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

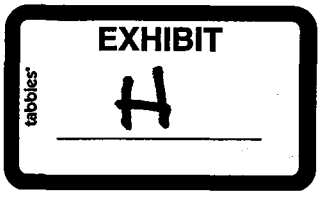
CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v. Case No. 2010-CA-001824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.



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Summary **Parties** **Events** **Dockets** **Disposition** **Costs**

37 2010 CA 001824 BROWN, CORRINE vs ROBERTS, DAWN K

Plaintiffs	Defendants
BROWN, CORRINE BALART, MARIO DIAZ	ROBERTS, DAWN K FAIRDISTRICTSFLORIDA ORG INC
Plaintiff Attorney(s)	**Defendant Attorney(s)**
CODY, STEPHEN	TANNER, MICHAEL G HINKLE, DONALD M
Case Comments	**Case Attributes**
SUMMONS SENT WITH PLAINTIFF HIGH PROFILE CASE	**Number:** 37 2010 CA 001824 **Action:** OTHER **Status:** CLOSED **Filed :** 5/24/2010 **Citation:**

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Summary Parties Events Dockets Disposition Costs

37 2010 CA 001824 BROWN, CORRINE vs ROBERTS, DAWN K

Docket Date	Docket Text	Amount	Amount Due	OR_Book	OR_Page
5/24/2010	COMPLAINT Receipt: 351986 Date: 05/24/2010	$400.00			
5/24/2010	CIVIL COVER SHEET				
5/24/2010	SUMMONS ISSUED DAWN K ROBERTS (DEFENDANT); Receipt: 351985 Date: 05/24/2010	$10.00			
5/25/2010	PLAINTIFF'S NOTICE OF PRIORITY STATUS				
5/25/2010	COPIES Receipt: 352617 Date: 05/25/2010	$22.00			
5/28/2010	MOTION FOR LEAVE TO INTERVENE AS AN INSTERESTED PARTY (THE FLORIDA SENATE)				
6/1/2010	PLAINTIFF'S RESPONSE TO MOTION INTERVENE BY FLORIDS SENATE				
6/2/2010	PLAINTIFFS' RESPONSE TO MOTION INTERVENE BY FLORIDA HOUSE OF REPRESENTATIVE				
6/3/2010	NOTICE OF HEARING Event: NOTICE OF HEARING ON FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE; AND FLORIDA SENATE'S MOTION TO INTERVENE Date: 06/09/2010 Time: 7:30 am Judge: FULFORD, JACKIE Location: CHAMBERS				
6/7/2010	NOTICE OF APPEARANCE OF CO-COUNSEL FLORIDA HOUSE OF REPRESENTATIVES (INTERVENOR);				
6/11/2010	SCHEDULING ORDER - SETTING TIME LINES FOR PLEADINGS TO BE FILED				
6/11/2010	ORDER GRANTING FLORIDA SENATE'S MOTION FOR LEAVE TO INTERVENE - ORDERED AND ADJUDGED THAT THE MOTION FOR TO LEAVE TO INTERVENE AS				

	AN INTERESTED PARTY FILED BY THE FLORIDA SENATE IS GRANTED
6/11/2010	ORDER GRANTING FLORIDA HOUSE OF REPRESENTATIVE'S MOTION FOR LEAVE TO INTERVENE
6/11/2010	MOTION OF BOB GRAHAM TO INTERVENE AS A DEFENDANT FILED BY LYNN C HEARN
6/11/2010	NON-JURY TRIAL Event: NON-JURY TRIAL Date: 07/26/2010 Time: 7:30 am Judge: FULFORD, JACKIE Location: CHAMBERS Result: CANCELLED
6/14/2010	INTERVENOR'S COMPLAINT OF THE FLORIDA SENATE
6/16/2010	NOTICE OF HEARING Event: MOTION OF BOB GRAHM TO INTERVENE AS A DEFENDANT Date: 06/23/2010 Time: 7:20 am Judge: FULFORD, JACKIE Location: CHAMBERS 365D
6/16/2010	FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO MOTION OF BOB GRAHAM TO INTERVENE AS DEFENDANT
6/17/2010	NOTICE OF APPEARANCE
6/17/2010	NOTICE OF APPEARANCE MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)
6/18/2010	THE FLORIDA SENATES RESPONSE IN OPPOSITION TO MOTION OF BON GRAHAM TO INTERVENE AS DEFENDANT
6/21/2010	REPLY BY BOB GRAHAM TO PLAINTIFFS' REPSONSES TO GRAHAM'S MOTION TO INTERVENE FILED BY LYNN C HEARN ON BEHALF OF BOB GRAHAM
6/22/2010	DEFENDANT'S MOTION FOR STAY OF DISCOVERY MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)
6/22/2010	DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO THE INTERVENOR'S COMPLAINT TO THE FLORIDA SENATE MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)

6/22/2010	DEFENDANT'S RESPONSE TO MOTION OF BOB GRAHAM TO INTERVENE MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)	
6/22/2010	DEFENDANT'S MOTION FOR EXPIDITED DISPOSITION MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)	
6/22/2010	GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS	
6/22/2010	DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO THE FLORIDA HOUSE OF REPRESENTATIVES' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)	
6/22/2010	GOVERNOR CHARLIE CRIST'S MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS	
6/22/2010	DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AND INTERVENING PLAINTIFFS' COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)	
6/22/2010	DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF MICHAEL G TANNER (Attorney) on behalf of DAWN K ROBERTS (DEFENDANT)	
6/23/2010	AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF	
6/23/2010	SUMMONS ISSUED FAIRDISTRICTSFLORIDA ORG INC (DEFENDANT); Receipt: 365043 Date: 06/23/2010	$10.00
6/24/2010	ORDER GRANTING FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO AMEND COMPLAINT	
6/24/2010	GRAHAM'S MOTION FOR STAY OF DISCOVERY	

6/24/2010	ORDER GRANTING MOTION OF BOB GRAHAM TO INTERVENE AS A DEFENDANT
6/24/2010	GRAHAM'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO EXPEDITE DISPOSITION
6/25/2010	FLORIDA HOUSE OF REPRESENTATIVES' AMENDED MOTION TO INTERVENE
6/25/2010	NOTICE OF TAKING VIDEOTAPED DEPOSITIONS DUCES TECUM OF BOB GRAHAM AND ELLEN FREIDIN ON 7/13/10
6/25/2010	FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO DEFENDANTS' MOTIONS FOR STAY OF DISCOVERY AND FOR EXPEDITED DISPOSITION
6/29/2010	AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
6/29/2010	FAIRDISTRICTSFLORIDA.ORG, INC.'S MOTION FOR STAY OF DISCOVERY
6/29/2010	FAIRDISTRICTSFLORIDA.ORG, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO EXPEDITE DISPOSITOIN
6/29/2010	NOTICE OF HEARING JUNE 30, 2010 @ 7:30AM
6/30/2010	CORRESPONDENCE - E-MAIL FROM JUDGE FULFORD TO PARTIES INVOLVED IN CASE
7/1/2010	ORDER GRANTING GOVERNOR CHARLIE CHRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
7/1/2010	NOTICE OF SERVICE OF INTERROGATORIES TO DEFENDANT FAIRDISTRICTSFLORIDA.ORG.INC.
7/2/2010	NOTICE OF REASSERTING ANSWER TO THE FLORIDA HOUSE OF REPRESENTATIVES' AMENDED MOTION TO INTERVENE
	ALERT ISSUED - THE 1ST DCA HAS AN INTEREST IN THIS CASE

7/2/2010	AND WANTS TO BE INFORMED OF THE FINAL DISPOSITION, PLEASE NOTIFY SHANNON RUSSELL WHEN ENTERED ADMIN ALERT - PLEASE READ DOCKET OR SEE SUPERVISOR issued on: 07/02/2010 For: FAIRDISTRICTSFLORIDA O RG INC Bond Amt: Bond Type:
7/2/2010	DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
7/6/2010	FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO THE SECRETARY'S MOTION TO DISMISS
7/6/2010	NOMAD A/V EQUIPMENT FEE // PAID BY MICHAEL TANNER - THE ATTY. FOR DEFT. Receipt: 369572 Date: 07/06/2010 Receipt 369572 reversed by 375674 on 07/19/2010.
7/6/2010	RESPONSE TO MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
7/6/2010	FLORIDA HOUSE OF REPRESENTATIVES' WITNESS LIST EXHIBIT LIST AND EXPERT WITNESS DISCLOSURES
7/6/2010	THE FLORIDA SENATE'S NOTICE OF ADOPTING ITS RESPONSE IN OPPOSITION TO DEFENDANT SECRETARY OF STATE'S MOTIONS TO DISMISS AS RESPONSE TO SAME MOTIONS TO DISMISS FILED BY DEFENDANTS GRAHAM AND FAIRDISTRICTSFLORIDA.ORG
7/6/2010	THE FLORIDA SENATE'S RESPONSE IN OPPOSITION TO SECRETARY OF STATE'S MOTIONS TO DISMISS PLAINTIFFS' COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION
7/6/2010	SUPPLEMENT TO MOTION TO DISMISS BY DEFENDANTS GRAHAM AND FAIRDISTRICTSFLORIDA.ORG,INC.
7/7/2010	FLORIDA HOSUE OF REPRESENTATIVES' RESPONSE TO SUPPLEMENT TO MOTION TO DISMISS
	THE FLORIDA SENATE'S WITNESS

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7/7/2010	THE FLORIDA SENATE'S EXHIBIT LIST
7/7/2010	NOTICE OF SUPPLEMENTAL AUTHORITY
7/8/2010	NOTICE OF APPEARANCE (STEPHEN S. DOBSON, III, OF DOBSON, DAVIS & SMITH, ON BEHALF OF THE INTERVENING DEFENDANT, BOB GRAHAM)
7/8/2010	NOTICE OF HEARING Event: NOTICE OF HEARING Date: 07/08/2010 Time: 2:00 pm Judge: FULFORD, JACKIE Location: CHAMBERS
7/9/2010	FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO BOB GRAHAM'S EMERGENCY MOTION TO QUASH SUBPOENA OR IN THE ALTERNATIVE MOTION FOR PROTECTIVE ORDER
7/9/2010	FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY DIRECTED TO FAIRDISTRICTS AND ELLEN FREIDIN
7/9/2010	NOTICE OF EMERGENCY HEARING (6:45 AM, MONDAY JULY 12, 2010, ONE HOUR HAS BEE SET ASIDE FOR SAID HEARING.)
7/9/2010	EMERGENCY MOTION TO QUASH SUBPOENA OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER
7/12/2010	ORDER ON MOTIONS TO DISMISS - ORDERED AND ADJUDGED: 1) THE DEFTS' MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION ARE DENIED. THIS COURT HAS JURISDICTION TO DETERMINE WHETHER THE BALLOT TITLES AND SUMMARIES FOR THE AMENDMENTS MEET THE REQU IREMENTS OF SECTION 101.161 FLORIDA STATUTES AND WHETHER THE AMENDMENTS ON THEIR FACE, BUT NOT APPLIED VIOLATE THE CONSTITUTION, FEDERAL LAW OR FLORIDA LAW. 2) THE DEFT'S MOTION TO DISMISS FAIRDISTICTS FLORIDA.ORG AS A PARTY TO

	THIS CASE IS GRANTED.
7/12/2010	MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY DIRECTED TO FAIRDISTRICTS AND ELLEN FREIDEN DONALD M HINKLE (Attorney) on behalf of FAIRDISTRICTSFLORIDA ORG INC (DEFENDANT)
7/12/2010	NOTICE OF APPEARANCE DONALD M HINKLE (Attorney) on behalf of FAIRDISTRICTSFLORIDA ORG INC (DEFENDANT)
7/12/2010	FLORIDA HOUSE OF REPRESENTATIVES' SUPPLEMENTAL RESPONSE TO MOTION TO STAY DISCOVERY AND RESPONSE TO THE COURT'S QUESTIONS AT JULY 12, 2010 HEARING
7/13/2010	BREF MOTION FOR EXTENSION OF TIME JAMES A SCOTT II (Attorney) on behalf of FLORIDA SENATE (INTERVENOR)
7/13/2010	BOB GRAHAM'S REPLY TO THE FLORIDA HOUSE OF REPRESENTATIVES' SUPPLEMENTAL RESPONSE TO MOTION TO STAY DISCOVERY AND RESPONSE TO THE COURT'S QUESTIONS AT JULY 12, 2010 HEARING JENNIFER SUZANNE BLOHM (Attorney) on behalf of BOB GRAHAM (INTERVENOR)
7/13/2010	HIGH PROFILE CASE
7/13/2010	ORDER GRANTING DEFENDANTS' AND INTERVENING DEFENDANT'S MOTIONS FOR STAY OF DISCOVERY AND DENYING DEFENDANT'S MOTION FOR STAY PENDING REVIEW
7/14/2010	ORDER TERMINATING DISCOVERY AND CANCELING TRIAL
7/14/2010	ORDER FROM SUPREME COURT PETITIONER HAS FILED A PETITION FOR WRIT OF ALL WRITS RESPONDENT IS HEREBY REQUESTED TO FILE A RESPONSE TO THE ABOVE-REFERENCED PETITION ON OR BEFORE JULY 19, 2010 BY 5:00PM THE PETITIONER MAY FILE A REPLY ON OR BEFORE JULY 22 2010 BY 5:00 PM

7/14/2010	ORDER FROM SUPREME COURT ACKNOWLEDGMENT OF NEW CASE SC10-1362
7/14/2010	ORDER FROM SUPREME COURT
7/14/2010	CANCELLED The following event: NON-JURY TRIAL scheduled for 07/26/2010 at 7:30 am has been resulted as follows: Result: CANCELLED Judge: FULFORD, JACKIE Location: CHAMBERS
7/14/2010	ORDER GRANTING FLORIDA SENATE'S BRIEF MOTION FOR EXTENSION OF TIME
7/15/2010	DEFENDANT DAWN K ROBERTS EXHIBIT LIST
7/15/2010	DEFENDANT DAWN K ROBERTS EXPERT WITNESS LIST
7/15/2010	DEFENDANT DAWN K ROBERTS WITNESS LIST
7/16/2010	FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO AMEND OPERATIVE PLEADING GEORGE N MEROS JR (Attorney) on behalf of FLORIDA HOUSE OF REPRESENTATIVES (INTERVENOR)
7/19/2010	SECOND AMENDED COMPLAINT FOR DECLARATORY INJUNCTIVE AND MANDAMUS RELIEF STEPHEN CODY (Attorney) on behalf of CORRINE BROWN, MARIO DIAZ BALART (PLAINTIFF)
7/19/2010	DEFENDANT DAWN K ROBERTS' RESPONSE TO PLAINTIFFS' MOTION TO FILE SECOND AMENDED COMPLAINT
7/21/2010	LETTER FROM SUPREME COURT OF FLORIDA
7/23/2010	LETTER FROM SUPREME COURT OF FLORIDA
7/26/2010	LETTER FROM SUPREME COURT OF FLORIDA (MOTION TO APPEAR PRO HAC VICE FILED-GRANTED)
7/28/2010	LETTER FROM SUPREME COURT (FLORIDA SENATE'S MOTION TO STRIKE-DENIED)
9/3/2010	LETTER FROM SUPREME COURT (DAWN ROBERTS FILED AN WRIT PETITION THAT INVOKES THIS COURT'S ALL WRITS JURISDICTION)

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

CORRIN BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Plaintiffs,

vs. CASE NO. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the
State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, INC., a
Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.

_____/

RE:	Hearing
BEFORE:	The Honorable Jackie Fulford
DATE:	July 12, 2010
TIME:	Commenced at 6:41 a.m. Concluded at 7:28 a.m.
LOCATION:	Leon County Courthouse Tallahassee, Florida
REPORTED BY:	DANIELLE FREEZE Certified Realtime Reporter

ACCURATE STENOTYPE REPORTERS, INC.
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P R O C E E D I N G S

* * *

THE COURT: Are we expecting anywhere else on the telephone?

MR. POZZUOLI: We sent out the number to everyone. I don't know. Is someone there from the House?

MR. WINSOR: I am Your Honor. Steve Cody is probably going to be dialing in.

THE COURT: Is Mr. Cody on the line yet?

MR. POZZUOLI: No, ma'am.

THE COURT: Okay. We're still a couple minutes early, so we'll give him a minute or two.

MS. ALEXANDER: Eddie, George is not here. We have Allen Winsor with Gray Robinson.

MR. POZZUOLI: Okay.

(Mr. Cody joined the conference line.)

THE COURT: I appreciate you-all coming this early. It's the only time I could accommodate you. My calendar is quite full.

I do have the written order on the motions to dismiss. If you want to come up, you are welcome to get a copy. I will tell you what it says.

I have found that the Court -- two things,

basically. I have found that the Court does have jurisdiction, and I have also ordered that Fair Districts be dismissed from the proceedings in light of the fact that no relief was sought against Fair Districts.

However, even though I find that the Court does have jurisdiction, I have spent the weekend researching the issue, and I do not see -- but I'm inviting you-all here, and I can see you again some other time today if you wish. I do not believe an evidentiary hearing is required. I don't find any case law that supports the challenges that I am to review requiring evidentiary hearing.

My understanding is my review of the ballot summary and title is limited to a review of a comparison between the title and summary and the proposed amendment. I think that's the review for the Court.

So the only argument that I think was made at the motions to dismiss was by Mr. Cody, and he argued that there were two issues that required the taking of evidence: One was the issue of incumbency; and the other was the issue of -- what was it? -- the issue with

respect to the census not obtaining language minority information. And I simply don't see that --

(Mr. Scott joined the conference line.)

THE COURT: I'm sorry. Did someone else join? Hello.

MR. SCOTT: Hello.

THE COURT: Who is this?

MR. SCOTT: This is Jim Scott.

THE COURT: Okay. We already started the hearing. Basically, the Court has ruled that it does have jurisdiction and that Fair Districts should be dismissed.

But what I was saying is I don't think that the Court should be taking evidence. I think it should simply be a review between the ballot -- the ballot title and summary and the proposed amendment to see if there's anything misleading, and I think there were eight counts in the complaints in addition to what the Senate has raised.

So I'd like to hear input from the parties with respect to whether they think an evidentiary hearing is really required and what authority there is for one, because I didn't

find anything. So I don't know if you are prepared to address that issue or if you would like some time and come back later today, perhaps on my lunch break, to address it, or what you want to do.

MR. WINSOR: This is Allen Winsor, Your Honor. I can address it in part now, but we may like to come back.

THE COURT: Okay.

MR. WINSOR: Let me tell you a couple things.

Do you prefer I stand here or at the podium or --

THE COURT: You can stand. Wherever you are comfortable.

MR. WINSOR: One of the things that the House has -- well, first the issue this court has to determine with respect to the ballot summary issues are whether the ballot summary gives the voters fair notice. It's not simply looking at the ballot summary and then looking at the amendment in this case because there are some factual issues that will impact whether or not what the summary -- what the amendment actually does is fully disclosed to the voter.

There are the eight alleged problems in

the original complaint that the House adopted, and there's an additional issue that the House added with respect to this 30-day situation. And the constitution requires that whatever districting plan with respect to state legislative districts is submitted to the Florida Supreme Court must be reviewed within 30 days.

What the House believes is that the evidence will show that adding these new provisions that Fair Districts seeks to add to the constitution would make that impossible. What the Florida Supreme Court has said with respect to VRA claims, which are fact-intensive like these are fact-intensive, or like these will be fact-intensive, is that it's impossible to do that within 30 days.

If that's true with respect to the new standards as the Florida Supreme Court has said it's true with respect to VRA standards, then the voter is entitled to know how this will impact the 30-day requirement.

So what the House is planning to do is put on evidence showing you how the process works, how these new amendments will affect the

process, all the things that go into the restricting process, and establish as a matter of fact that it is impossible to do that, as the Florida Supreme Courts has said with respect to the similar situation with VRA. I don't think you can do that by just looking at the summary and looking at the amendment.

And I don't think the Court can just assume that the Court will do the best it can or somehow work within the system. I mean, either it's going to repeal that 30-day requirement or it's going to work in harmony with it, and I don't think this court can rule on that without -- without evidence.

THE COURT: Is it really for this court to say what the supreme court can accomplish in 30 days?

MR. WINSOR: Well, it is at this stage, Your Honor, because it goes to the voters. The voters need to know that. And not that this court's -- well, if it can't be done, which is our position, then the voters are entitled to know that because there's clear precedent that, if an amendment is going to have a substantial impact on another provision of the constitution -- in this case the

30-day provision -- then the voters must know that. If that's the case, then the summary is invalid. And I don't think this court can say it's invalid or not with respect to that one issue without hearing the evidence.

THE COURT: Okay. Anybody else?

MR. CODY: Your Honor, this is Steve Cody. I do believe that taking evidence albeit appropriate required, I think that the court needs to hear how the census is taken, what material is gathered, what has been done in the past that's not being done now.

And then with regard to Section 5, the counts that deal with Section 5, I think Your Honor needs to hear the kind of information that the Justice Department requires, the kind of information that has to be submitted to the Justice Department in order to get a plan pre-cleared. And frankly, that's the same information you would have to submit to the District Court of Columbia if you wanted to go the judicial route. So in either case.

There is information, and because the Legislature is going to have to consider certain facts in crafting the districts, and by

doing it in a way that, for instance --

THE COURT: Just a second, Mr. Cody. If you could speak up a little bit louder, the court reporter is having a difficult time hearing you.

MR. CODY: Yes. How's this? Is this any better, Your Honor?

THE COURT: A little bit.

MR. CODY: In the instance of Ms. Freidin for suggesting that we draw the black and Hispanic majority district, looking at the portion of the population and trying to get to that figure first, by doing that, we invite a *Shaw v Reno* challenge that the Legislature draws up.

And so I believe that Your Honor needs to hear information like that, and that's not something that can be drawn simply from a facial examination of the title and the ballot summary and the text by itself.

THE COURT: But isn't that really an as-applied issue, and doesn't that come later?

MR. CODY: Well, certainly, Your Honor, taking them one by one as to the census, that is a facial issue because there's no way that the census is going to come back and supply that information.

The American Community Surveys, which we talked about in the complaint, only take information from communities that are 65,000 or more in population, leaving out in terms of geography the vast majority of the states in Florida in terms of population, I believe more than a majority of the population of the state of Florida.

Plus, it's only done on such a small sample basis that it may give you a clue as to what percentage of people statewide have certain demographic attributes, but it's not going to give you the information that will allow you to apply that information at the block level, which if you are the building block of a redistricting plan.

So that is not as applied because it's not going to be a case of, well, let's see what information -- what your section does use because it's not going to have the information, and the challenge is that the ballot summary is making a promise -- it's writing a check to the people of the state of Florida that the Legislature can never cash. And without evidence, I don't think Your Honor can review

that.

And the same goes with the Section 5 challenge, that it's not going to be a question of, you know, can the state of Florida provide certain information to the Legislature; it's this information is prohibited, and this consideration is prohibited to the Legislature. It's not a question of will they or won't they. This is an outright ban saying, no, you cannot.

But if you follow the dictates of that -- I mean, if you don't follow the dictates of the plan, potentially, it gets challenged in court and gets thrown out. If you do follow the dictates of it, you end up with a plan that will probably be rejected by the Department of Justice simply because they'll come back and they'll say, "Well, you didn't provide us the information on how this impacts minority voters in the five protected counties with regard to certain aspects of the ability of minorities to elect candidates of choice and whether this plan retrogresses on that ability."

And so I don't think that, without the expert input, Your Honor would be able to make a determination as to whether the Legislature

will be able to follow the dictates of this proposed amendment without running afoul of the law.

THE COURT: Okay. Ms. Alexander.

MS. ALEXANDER: Yes, Your Honor.

MR. POZZUOLI: Is that the Senate -- may I speak?

THE COURT: Ms. Alexander was going to speak. Could she go first?

MR. POZZUOLI: Then let her go.

THE COURT: Okay. Thank you.

MS. ALEXANDER: Thanks, Ed.

I think from the Florida Senate's perspective, we do believe that a trial is necessary. However, if you feel that a limitation of your jurisdiction is to facial review, we don't think that that precludes the offering of evidence.

For example, we have voting rights experts that will be able to, I believe, proffer testimony about the facial and validity of the amendments relative to the Voting Rights Act and how intricate a process that is.

And so I do believe that, even if you are limited to a facial review, we should be able

to offer evidence, perhaps through dispositive motion, related to how the two fatally conflict from a facial perspective. Although, we would prefer to lay out those intricacies because the Voting Rights Act process is fairly intricate in a trial format.

Eddie.

MR. POZZUOLI: I think you said it perfectly.

THE COURT: Go ahead.

MR. WINSOR: Before we get to -- I don't want to jump out of turn, Your Honor, but I think one of the issues we were here on this morning was the motions for protective order with respect to the depositions.

Before this court can determine whether the summary is accurate with respect to what this amendment is actually going to do, there needs to be some understanding of what the amendment is going to do. That's, obviously, a big part of this case.

We are concerned because Fair Districts has taken conflicting positions in the course of this. And we filed with our response to the motion to quash the Fair Districts subpoena a summary page that was produced by John Mills a

year-and-some-change ago that said what the racial provisions in this do are simply to make permanent the federal Voting Rights Act. They don't go beyond it; they just make it permanent. They've said in a newspaper article since then that, "Oh, no, these are much broader than that."

What the sponsors say with respect to what this will do is relevant, and we've cited in our responsive paper to the Freidin motion for protective order cases that say courts do look at the intent of the framers.

It's not the end-all, and we're not suggesting that it means whatever they say it means, but it is a factor that needs to be considered, and that's why we tried to depose the people who put this together, to understand: Why did you put this provision here? What was your intent with respect to that? Once we get an understanding of that, you can better evaluate whether the summary provides accurate notice to the voters.

What we don't want to do is have them avoid taking a position on this throughout this process and then after, if the thing does pass,

then be able to come back and say, "Okay. Well, we may have said this in the newspaper, but now we're saying something different."

So what is being presented to the voters is relevant in all of this, and that's why the court needs to hear evidence on it, and that's why we need to do this discovery as well.

I wanted to add that, and I apologize for jumping out of turn.

THE COURT: That's okay.

MR. TANNER: Your Honor, for the department, of course, it's our position that there's no subject matter jurisdiction.

Having said that, we don't believe any evidence should be taken for the reasons that we said in our papers. We do think that the pre-election review is limited to the single subject rule and the ballot summary and title compliance under the statute in the Supreme Court, but we do think that those are issues that are resolvable from the face of the summary, the title, and the amendment.

We think that taking evidence -- we think this proceeding being in this court turns the advisory process on its head. We think that is

exacerbated by the procedures that are being suggested here, that there's evidence that will be taken. We think all that would render Article 4 Section 10 really a pointless exercise.

So we would say, subject to our jurisdictional position, that there should be no evidence taken as has been described here.

THE COURT: Anybody else? Wait. Just one second. If you could just wait one second. Mr. Meyer is going to speak.

MR. MEYER: Your Honor, reserving our objection as we do to the subject matter jurisdiction issue, we believe, though, the Court is absolutely right in concluding that any challenge which can be brought at this juncture is limited to being a facial challenge.

By its very definition, Your Honor, a facial challenge is just that. You look at the language. You look at the constitution, you look at whatever federal authorities they want to raise, and you determine whether there's an inescapable collision. That's a matter of law, Your Honor. The Court has properly rejected these entreaties to turn this into some sort of

fact dispute, some sort of expert issues, when, in fact, what you have before you is a clean question of law.

Your Honor cites in her order the *Gray v Winthrop* case, and the line of cases that follow that all say just that, Your Honor: If there is a challenge that is entertained by the circuit court, we submit to you it should be after the election; but, in any event, in the limited circumstance where *Gray* says there might be a challenge, it's a facial challenge to determine whether the amendment in its entirety inescapably collides with some part of the federal constitution.

Your Honor, you don't need a trial. You don't need facts. In fact, it would be improper for this court to expand this proceeding into some proceeding like that. So, you know, we agree that no trial on this matter is warranted because there are no facts and, certainly, no expert issues in controversy.

THE COURT: Anyone else wish to be heard?

MR. POZZUOLI: Your Honor, Ed Pozzuoli. I believe the two counts that the Senate has added in addition to incorporating the House's claims

are, in fact, facial attacks and do require, at least, some context before the Court, and expert testimony should be allowed as to allow and better inform the Court as to why the existing proposed amendment collide with federal law.

And I agree with Mr. Meyer's statement up to a point, that that is what, I take it, Your Honor has ruled, and I think that is what the Senate has claimed. We do believe it would be helpful to the Court, either live or by affidavit, however the Court wants, to put in context why these proposed amendments conflict directly with both one person one vote as well as the federal Voter Rights Act and the 14th Amendment.

I think that's where we feel the expert testimony could assist the Court in determining both why the language is facially inappropriate and why we're so concerned with the proposals.

THE COURT: Now that I heard what you-all think, does anybody have any authority they can give me? Because in all of the research that I did in reviewing the cases that were provided to me, the only thing I found were summary judgments and dismissals. I don't find where a court is

taking evidence on these issues.

So does anybody have any authority they can cite to me? I mean, assume I'm ignorant on this issue because I am. The only thing I know is what you've given me or what I've been able to find. You know, I appreciate the fact that you-all still believe I have no jurisdiction, and there are certain courts that can review me and tell me that I'm wrong.

Mr. Meyer, you said that you think this is post-election, and I found that Laney Chiles case on the net band issue in the Second Circuit, Judge Padovano had the net ban case. The suit was brought post-adoption by the voters, and the circuit court said your ballot summary challenge is untimely. And the Supreme Court said you are right. So that was the Supreme Court's opportunity to say the circuit court didn't have jurisdiction anyway. They didn't -- you know, they didn't. They said it was untimely. The circuit court did, and they noted that they had issued an advisory opinion.

So, you know, I may be wrong and somebody may tell me I'm wrong here in the very near future, but I believe I do have jurisdiction.

But I just don't find any cases that say there was a trial.

Certainly, if you want the opportunity to proffer something, the Court will allow you to do that, but, you know, this is -- I know that it's unfair to you because you didn't know I was going ask you this question, so I'll certainly give you the opportunity to present some authority to me. But you-all have been doing this kind of litigation for a long time, so if you have some, tell me and I'll look at it.

MS. ALEXANDER: With respect to what you said, I think that -- even on summary judgment, can we make a distinction between evidence and a trial? Because on summary judgment, even if we have a dispositive motion in proceeding, we would be allowed, I believe, to attach supporting documentation in evidence to that. Correct?

THE COURT: Absolutely.

MS. ALEXANDER: Okay.

MR. WINSOR: Your Honor, we'll be happy to put a paper together.

I think, though, the simple answer is, once this court has determined, as it has, that

it has jurisdiction, then it proceeds in this case in the ordinary way that a case would proceed, and there will be an opportunity for summary judgment motions on both sides.

Then if the Court determines that there are no issues of fact that it needs to resolve, at that point then it will grant summary judgment. If there is a disputed issue of fact that the Court believes, based on the argument of the parties, needs to be resolved at a trial, then we go forward with the trial.

So, in that respect, Your Honor, I don't think it's any different than any other case. At the outset of this case, the parties put into place a schedule that included dispositive motions deadlines -- or a summary judgment deadline, which I believe is this Friday. To the extent there are claims that can be resolved without the need for this court to hear facts, then that would be appropriate motions.

But the ultimate issue with respect to many of the House's claims is whether this summary puts the voter on sufficient notice of what will actually happen. If, at the summary

judgment stage, this court believes it can resolve that issue without the need to address any issues of fact, then that's the decision of the Court. But I think that we'll be able to show that there will be evidence that needs to be taken for the reasons I described earlier, because there are facts that need to come into play here, including the interpretation of the sponsors of this, whatever that may be. It's something that needs to be in front of the Court. I don't think -- you know, I don't think we can decide that summary judgment until we have the discovery that we need.

With respect to the 30 days, I think there will be a dispute as to whether this is something that will be possible. I suspect that it is something that the parties won't agree on, and so I think the Court will need to hear evidence, including expert evidence, of how the process works, what goes into redistricting, how it has worked historically.

And in addition to that, one thing I didn't mention before are the impacts on racial minorities. There's going to be disputed facts about that. What will happen? Will this be

able to do what it is promoting itself as doing, which is to preserve the rights of minorities to be represented by people of their choice, and so -- candidates of their choice.

And so I think this case, once the Court makes its jurisdictional determination, just proceeds like any other case. There can be motions for judgment on the pleadings, motions for summary judgment, whatever; and if necessary, a trial. And those can be addressed as the Court goes forward.

THE COURT: Let me ask you a couple of questions based on what you said.

What will happen when the Legislature gets busy doing their work? I really see that as something in the future. I mean, if it won't work and if they run into problems, that's something that would be dealt with later on, not by this court. I mean, it would all be a guessing game to me, I believe, what could happen, what might happen, what will happen, and I'm not sure that's something we can determine until further down the road.

With respect to the issue of what was the intent of Fair Districts, what do you have now?

MR. WINSOR: I'm sorry?

THE COURT: What do you have now?

MR. WINSOR: What we have now are conflicting positions. We have a written statement that says that, with respect to the racial protections, this does nothing but put the federal VRA into state law. It makes it part of the Florida constitution so that, in the future, if Congress repeals or if the federal courts chip away at it, we'll still have that protection in Florida. We have that.

Which means that today it would have no practical impact because there already is a federal Voting Rights Act that Florida must comply with. So if all it does is adopt the federal Voting Rights Act, there's no practical change with respect to minority protections in Florida.

THE COURT: What is it that you actually have? You have a signed document?

MR. WINSOR: Yeah, we did. We filed a document with the Court that was a white paper, advertising by Fair Districts. This was attached to our response to the motion -- do you have that?

THE COURT: I do not.

MR. WINSOR: Okay. I have an extra copy here

and, unfortunately, just one. I'll just tear it off of this.

MR. MEYER: Your Honor, I believe I'm going to object to introducing political advertisements --

THE COURT: Well, what I'm trying to decide now, Mr. Meyer, whether there needs to be any discovery or not. So he's not going to introduce anything. I need to see if they really do need to take depositions.

MR. CODY: Your Honor, Stephen Cody. Getting back to the issue of whether there needs to be a trial, one of the things that I think that we are facing is that this cases takes us into new legal territory simply because the Court has not, in the past, said whether a trial needs to take place in a case like this.

Quite frankly, I don't think there's been a case like this where the challenge is being made to the proposed constitutional amendment due to -- upon factual differences that are raised by the language itself which cannot be shown to be misleading without taking evidence extraneous to the actual language of the amendment or the ballot summary.

That may be why neither the court nor the parties have been able to conclusively find a case that says, in a situation like this, yes, there is a trial or, no, there is not a trial. This may be, frankly, the case that makes that law.

But in order to have us fully establish a record, which I'm fairly confident that, regardless of how Your Honor rules, one of the parties is going to take this up, so this case is going to make that law. But I think that, in order to do so, and be more expeditious, given the time frames that the Secretary has set forth and told us we need to have a resolution on, it would be better to err on the side of making a complete record than having to come back and start over from the beginning and possibly not meet those deadlines.

If the amendment is to go on the ballot, I think it would do more than just -- if it goes on and later found not to have been proper, to take it off in terms of voter confidence in the process than to make sure that it's not voted on at this point if it, in fact, is illegal.

THE COURT: If you already have this paper,

that appears to be a representation by Fair Districts of what their intent was or what they believe would happen, why would you need to take their depositions?

MR. WINSOR: Well, because, number one, they have -- this is not all we have. What we have in addition to that are probably a dozen or more press statements or newspaper interviews and things where they have said, no, no, this does much more than the VRA. This is going to enhance minority protections beyond what's in the VRA, which is the direct opposite of what that paper says. And so -- and then Ms. Freidin testified at length in front of a joint legislative hearing and said something that I believe was sort of in between.

And so what we need to do for litigation --

THE COURT: And you have that, you have that transcribed testimony?

MR. WINSOR: We do have the transcribed testimony and newspaper articles. I can tell you her testimony was very -- I can file that with the court. We can do that today, in sort of bullet points. And same with the newspaper clippings

that I thought maybe had been filed, but I don't see them in my notebook here. But we can -- we can put together -- we could absolutely demonstrate by the end of the day that the Fair Districts and its representatives have taken the opposite position as articulated in that paper in front of you.

THE COURT: So why do they need to be deposed?

MR. WINSOR: They need to be deposed to have one official record. I mean, none of this is -- none of this -- they are bound by none of this. This is just a piece of paper that they put out. And what they said in the newspaper, they may -- may not even -- they may even dispute that they even said it. You know, it's just newspaper articles. There's not a whole lot we can do with that.

But what we need for litigation purposes is to have -- someone put this together, Your Honor. Someone wrote this and someone decided we're going to take this part of the VRA, this first part of the sentence, and put it with this thing over here. And somehow this all came together.

And it's a way that -- you know, the federal courts have been interpreting the Voting Rights Act for 40 years, and it's evolving and changing, so --

THE COURT: Someone will interpret this.

MR. WINSOR: I'm sorry?

THE COURT: And someone will interpret this if it makes it into law.

MR. WINSOR: And someone will interpret this, Your Honor, if it makes it into law, keeping in mind the intent of the framers, because that -- we've cited cases saying that is something that matters, and so whatever that intent is needs to be known upfront to determine whether the summary of -- three years from now, if they say, "Oh, no, this is -- this is what it meant, and we are the framers and we're saying that" --

THE COURT: But isn't it -- if it's something to be considered by the Court, it's supposed to be a small consideration.

MR. WINSOR: It is. Absolutely.

THE COURT: Isn't the intent when they drafted it? Not now, after they have made potentially different statements about it, and then you are going to take a deposition and they

take another position on it. It's when they drafted it that's important.

MR. WINSOR: Well, that's what -- I mean, that's what the deposition will get to, what the intent was when they drafted it.

You are absolutely right, Your Honor. I mean, if they change their mind later, that shouldn't matter. It should be the intent.

But at the same time, they're out there promoting this, and so what is being put forth to the voters also matters. The materials that are in front of the voters also --

THE COURT: But is that really something I'm supposed to be getting involved in? Because I don't think so. I mean, people in politics go out and say things and make representations all the time, and the courts don't get involved. I mean, if the voters make a decision, whether it be a good one or a bad one, that's up to the voters, and I don't think the Court gets involved in that.

MR. WINSOR: The voters have to make a decision. Whether it's a good one or a bad one, Your Honor, the law is clear that it must be an informed one.

The voters cannot make an informed

decision if they don't -- if the summary is inaccurate. This court can't determine whether the summary is inaccurate without knowing -- we believe you can, but there are certainly elements of misleading summary that can only be determined if you know what the meaning is, and their intent is relevant to that meeting.

MR. MEYER: Your Honor, the Supreme Court has had no trouble deciding whether the summary and ballot language is clear and unambiguous in this case and in approximately 70 other cases that we have found in our research without going through a trial.

Your Honor is absolutely right. You know, we shouldn't have a trial over what the political rhetoric surrounding the adoption of a ballot initiative is, and that's what the House wants to lead us into.

Your Honor, whether John Mills -- who, I might parenthetically note, is not Fair Districts Florida. They distributed it as a political advertisement -- apparently, his paper thinks this or whether I think that is really irrelevant. It's part of the political debate, Your Honor.

THE COURT: Did you participate in the presentation to the Supreme Court and the advisory opinion?

MR. MEYER: I did not, Your Honor.

THE COURT: Did anybody here participate in that?

MR. MEYER: Mark Herron did.

THE COURT: Mr. Herron, did Fair Districts participate in the presentation to the Supreme Court in the advisory --

MR. HERRON: Your Honor, they did.

THE COURT: At that argument, or whatever it was, did they tell what their intent was? Did they testify what they did?

MR. HERRON: Again, the only issues that were before the Court is whether the language was clear and unambiguous. The papers that we submitted to the Court argued that it was. Intent was not an issue. Again, it's whether the language of the amendment or the ballot summary and title vis-à-vis the amendment is clear and unambiguous, and the Court held that it was.

THE COURT: Thank you.

Well, how much time would you like to provide me with some authority? Because my

belief at this point is I'm going to stay discovery. I don't believe that taking of the depositions to show -- when you have a whole notebook there, for the record, if that's all evidence of what their intent was, I don't know that taking of depositions is really going to provide the Court with anything else that it would need to make its decision. So how much time would you like --

MR. WINSOR: This is not what that is, Your Honor.

THE COURT: Sorry.

MR. WINSOR: We can do that -- would tomorrow morning be too late? We could do it late today if that's better.

But I will tell you this. The depositions we seek will be very short. They would not be -- you know, and we've seen these motions about how we have scheduled them on short notice, and that's just not the case. We tried to be as accommodating as we can. 90 minutes for either one of them or any one of them would be plenty. We just want to say, you know, is John Mills right? is he wrong? This kind of thing. To understand what their official

position is going to be. So 90 minutes would be plenty, Your Honor. We're not talking about taking extensive discovery or dozens of depositions.

But with respect to when we could get you additional authority about this, end of the day or first thing tomorrow morning is --

THE COURT: Don't you-all intend to take depositions tomorrow?

MR. WINSOR: We have them noticed tomorrow, but, I mean, we can -- and both Senator Graham has said he's not available tomorrow, and I believe Fair Districts has taken the position they're not available tomorrow. So we are happy to reschedule. We have made that -- from the day we scheduled, we said we'd be happy to accommodate rescheduling, depending upon people's schedules and things like that, so . . .

THE COURT: I've seen a motion on behalf of Mr. Graham that he's not available, so --

MR. WINSOR: Yes, Your Honor.

THE COURT: In light of the fact that they represented they are willing to reschedule it independent of what I may decide. His deposition definitely needs to be rescheduled.

MR. DOBSON: Your Honor, Stephen Dobson on behalf of Senator Bob Graham.

Your Honor, we have filed a motion to quash the subpoena or, in the alternative, a protective order to prohibit it from being taken tomorrow. I will tell the Court Senator Graham is scheduled, as indicated in our motion, to conduct hearings on the Deepwater Horizon -- for the Deepwater Horizon Oil Inquiry Commission in New Orleans.

One of the alternatives that had been mentioned in the plaintiff's response was that they could do it after 4:00. I will represent to the Court Senator Graham has a flight at 6:00 p.m., immediately after the conclusion of the hearings tomorrow at 4:00 p.m., making tomorrow an impossible day.

I do want to advise the court that Senator Graham is scheduled for another commission for which he's been appointed to leave for Europe on the 15th and will be in Europe for approximately two weeks, Your Honor.

MR. WINSOR: We'll be happy to work within that schedule, and he can do it by telephone, and we can limit it to 90 minutes. And we're going to

do whatever we can to . . .

MR. DOBSON: Your Honor, Senator Graham would also, for purposes of this hearing, adopt the arguments that have been made by Mr. Meyer and others on behalf of the defendants. I look at this, frankly, as the Court did, that four corners of the document, now that it is there, it stands.

In another world in which I participate a lot in, I think it's like a search warrant. Once the search warrant is drafted, we live and die by the four corners of that agreement.

This agreement has been drafted. If you go to everybody involved in it in trying to determine what their intent was, if there were 20 people, you might hear 20 different reasons and then a compromise on something, and some of them may not even agree with what the compromise was.

I think what is important for this court to consider is the four corners of the document, what has been drafted, and from that, just as the Supreme Court can determine whether the language is clear and unambiguous, this court can then determine any other issues that relate to this document from the document

itself, not from trying to divine what many people meant.

And, for example, by former Speaker of the House John Mills, who is not part of Fair Districts, who is not part of this, and trying to submit something that he says, it's like submitting something, you know, that Al Lawson says or Charlie Crist says or anybody else in the political arena.

Everybody may have different values, but what's important are the four corners of the document, and I think you have very wisely decided, or, at least, are leaning, it seems from your comments, into ruling that way, and just as the other courts have done. Other than that, I have nothing else, Your Honor.

MR. POZZUOLI: Ed Pozzuoli on behalf of the Senate. In light of Your Honor's ruling, and in light of Senator Graham's unavailability, is it appropriate that Senator Graham remain in the matter? I mean, I don't know what exactly Senator Graham can actually add based upon Your Honor's ruling limiting jurisdiction to, essentially, a facial review.

THE COURT: I don't know.

MR. POZZUOLI: I mean, it's one man's opinion as, you know, opposed to 8 million citizens who would have -- I would use the same argument they made with respect to discovery and suggest to the Court that the relevancy of a position taken by Bob Graham in this matter is just a matter of his opinion versus 8 million other Floridians. Especially in light of the limiting nature of the matter pursuant to Your Honor's order this morning.

THE COURT: Well, Mr. Graham may decide he doesn't want to participate anymore after my order, as many of you may decide, but I guess that's for somebody higher than me to decide.

I don't want everybody to take positions off-the-cuff just because I entered an order and you were presented with it this morning. So you-all can speak to your clients and decide how you want to proceed. That's for you-all to decide.

I am going to temporarily stay discovery. I am going to -- I mean, I'll just tell you, frankly. Apparently, Mr. Graham is going to be unavailable after the 15th. Today is already the 12th. What is it, the 15th is Thursday?

After tomorrow afternoon, the Court is going to be unavailable until next Tuesday, whatever date that is.

So the sooner that you can get me the authority, the better. If anybody wants to give me a response, the sooner you do that. And you may not want to wait to respond. You may just want to give me what you have.

MR. TANNER: Well, I wanted to take up one final issue with you, Your Honor, that is related to what you have just been discussing, but -- and that is, we're certainly not going to quibble with your order.

It should come as no surprise to you that we would seek guidance from the Supreme Court on this issue, and so we do intend to seek review in the Supreme Court on this.

So we would respectfully ask you to stay the entire case while we go to the Supreme Court later today to seek review of the order. That, I think, would obviate much of what we are debating here today. But we would respectfully ask you to stay the case while we seek review in the Supreme Court of your order.

THE COURT: I'm going to respectfully deny

your request, but they certainly can tell me otherwise. Probably pretty promptly.

MR. TANNER: Thank you, Your Honor.

MR. POZZUOLI: Your Honor, with respect to scheduling now, given -- would you give the parties a little bit of time to review your order and then either amend its complaint and then suggest an amended schedule?

THE COURT: You want to amend your complaint?

MR. POZZUOLI: Well, in light of your order, I want to point -- I want to -- one, is the Court going to change the schedule of -- obviously, if we're not going to try a case, are we going to re -- are we going to rerack the schedule to allow for dispositive motions, or however Your Honor is going to handle that?

THE COURT: I believe the schedule already included a time frame for dispositive motions. It would not be my intent to change the schedule in any way unless you-all request that. I mean, we already have the days set and the days set aside, and my intention would be to leave it.

If we end up without a trial, and we end up hearing the dispositive motions during the time period that we set for the trial, it will

just give the Court, assuming I still have jurisdiction, to address it, I could do it during that time period, and we could use those days to accomplish whatever we need to accomplish so that it can be reviewed by whoever needs to review it. So my intention would be to keep the same schedule unless something happens.

MS. ALEXANDER: With respect to the leave to amend, I think what we would like to do, in light of the restriction of a facial review, clarify our complaint to make it more pointed towards that kind of review. We're not talking about adding any more claims; just perhaps making it a little bit clearer, adding in a few more paragraphs to tailor what we already have to the nature of the proceeding as its proceeds, and so -- but I think we could probably do that by Wednesday. Like I said, I don't think we plan on adding any claim. I'm sure we don't. But I think we do need, in light of the ruling, to revise our allegations.

THE COURT: Okay. Why don't you-all discuss that after you have a chance to look at the order and talk to your co-counsel and clients. If you want to file a motion for leave to amend, then you

can do that.

MS. ALEXANDER: Thank you, Your Honor.

THE COURT: You're welcome.

Anything else?

MR. MEYER: Your Honor, will you be entering a written order staying the discovery of --

THE COURT: If somebody will give me one -- I'm going to be on the bench all day. I'll be in Courtroom 3D. If someone wants to bring it in there, I'll sign it. It's just staying until further order of the court.

And then, likewise, if you are going to file something today, that's where I'll be. If you bring it to me and it goes to my office, I'll never see it today.

MR. WINSOR: As a bit of a preview, Your Honor, I'll tell you I don't have any magic bullet case that says, in this particular type of proceeding, you are to hold a trial. But it's the ordinary, you know, this is a trial court and this is case in which the Court has found it has jurisdiction, so . . .

THE COURT: I get the summary judgment thing --

MR. WINSOR: Yeah, okay.

THE COURT: -- the affidavits, the documents, and all that, and that they may dispute them, and then, if they do that, we may end up with a trial. I understand all that.

MR. WINSOR: Thank you.

THE COURT: I'm going to give you your exhibit back too.

MR. WINSOR: Oh, okay.

THE COURT: And whoever is on the telephone, if you want to provide me with your fax numbers, I'll have my judicial assistant fax you a copy of the order.

MR. POZZUOLI: Your Honor, we'll just get it from my partner, who is there.

THE COURT: Anything else?

MR. TANNER: No, Your Honor.

MR. MEYER: No.

MR. CODY: I'll get a copy, if I can, from Mr. Pozzuoli's office.

THE COURT: Thank you all very much.

(The proceedings concluded at 7:28 AM)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, LISA D. FREEZE, Notary Public, certify that I was authorized to and did stenographically report the proceedings herein, and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS my hand and official seal this 12th day of July, 2010.

_____

LISA D. FREEZE, CRR, NOTARY PUBLIC
2894 REMINGTON GREEN LANE
TALLAHASSEE, FL 32308
850-878-2221

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

FILED
10 MAY 24 PM 2:33
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA
C-05
COPY "not verified against"

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v.

Case No.: 2010CA1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Corrine Brown and Mario Diaz-Balart, sue Defendant, Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida, and allege:

1. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition has since obtained the necessary number of signatures and has been certified for placement on the November 2010 general election ballot.

2. The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their

ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

(Exhibit A.)

3. The ballot title and summary for the proposed Congressional Amendment is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

(*Id.*)

4. Pursuant to Article IV, section 10, Florida Constitution, the Florida Supreme Court reviewed the Congressional Amendment and rendered an advisory opinion that its summary is clear and unambiguous and that it is limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

5. The Congressional Amendment's ballot summary violates the strict standard for ballot clarity. Because the ballot summary misrepresents the legal effect and major ramifications of the Congressional Amendment, the Congressional Amendment must be withheld from the 2010 General Election Ballot.

6. The ballot summary overstates the protections afforded to minorities. The summary states that districts shall not be drawn to deny minorities the equal opportunity to elect representatives of their choice. In fact, the Congressional Amendment states only that minorities' ability to elect representatives of their choice — whether equal or unequal — will not be diminished.

7. The ballot summary also misleads by omission. It gives no hint that the Congressional Amendment's compactness and political and geographical boundary requirements will constrain the Legislature's ability to promote minority rights.

8. The ballot summary also purports to require that districts be as nearly equal in population as practicable. But the United States Constitution already imposes this requirement, and all of Florida's congressional districts comply with it. The negative implication that this requirement does not exist, or that Florida's Congressional districts are not as nearly equal in population as practicable, is false and misrepresents the legal impact of the Congressional Amendment.

9. The ballot summary is loaded with vague and ambiguous terms which even the sponsor of the Congressional Amendment is unable or unwilling to define. As a result, the courts ultimately will be forced to draw the districts, and voters will have no say.

The Parties

10. Plaintiff, Corrine Brown, is a citizen of the State of Florida and is registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3.

11. Plaintiff, Mario Diaz-Balart, is a citizen of the State of Florida and is registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than 60 percent of the voting-age population in Congressional District 25.

12. Defendant, Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida (the "Secretary"), is the chief elections officer of the State. It is her duty under Florida law to certify the items, including proposed constitutional amendments, that will be included on the statewide, general election ballot.

Jurisdiction and Venue

13. This Court has jurisdiction pursuant to Sections 26.012(2), Florida Statutes.

14. Venue is proper in this Court because the Secretary is headquartered in Leon County, Florida.

15. This Court has authority to grant declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes.

16. Under *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of the Congressional Amendment, *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009), is no impediment this challenge.

General Allegations

17. All petitions to amend the Florida Constitution must be accompanied by a clear and unambiguous summary of the proposed amendment. § 101.161(1), Fla. Stat. (2009). The summary may not exceed 75 words. *Id.* The text of a proposed amendment will not appear on

the ballot — only the title and summary of the amendment are placed on the ballot. *Id.* It is the responsibility of the sponsor to prepare a clear and unambiguous summary. *Id.* § 101.161(2).

18. An initiative petition can only be submitted to the voters if the proposed amendment concerns a single subject and matter directly connected therewith, *see* Art. XI, § 3, Fla. Const., and the ballot summary is clear and unambiguous, *see* Art. XI, § 5(a), Fla. Const.; § 101.161(1), Fla. Stat. (2009). A proposed amendment involves multiple subjects if, without disclosure to the voters, it substantially affects preexisting constitutional provisions or multiple branches of government. A ballot summary is not clear and unambiguous if it is misleading.

19. A ballot summary that omits material information and thus precludes the voters from casting their ballots intelligently violates the accuracy requirement. *In re Adv. Op. to Att'y Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

COUNT I – MISLEADING BALLOT SUMMARY

20. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

21. The Congressional Amendment contains two, distinct requirements that relate to the voting rights of racial and language minorities:

- Districts shall not be drawn with the intent or result of denying or abridging the **equal opportunity** of minorities **to participate in the political process**; and
- Districts shall not be drawn to **diminish the ability** of minorities **to elect representatives of their choice**.

The guarantee of an "equal opportunity" applies only to minorities' participation in the political process—not to the ability of minorities to elect representatives of their choice. The Florida Supreme Court has made clear that these are two separate and distinct requirements. *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d at 188-89.

22. The ballot summary mischaracterizes the second of these requirements (the "Non-Diminishment Provision"). The actual text of the Congressional Amendment provides:

> Districts shall not be drawn . . . to **diminish [the] ability** [of racial and language minorities] to elect representatives of their choice.

But the ballot summary describes the Non-Diminishment Provision as follows:

> Districts shall not be drawn to **deny racial or language minorities the equal opportunity** to . . . elect representatives of their choice.

23. The summary is misleading. The Congressional Amendment does not guarantee minorities an equal opportunity to elect representatives of their choice. It provides in this respect only that minorities' ability to elect representatives of their choice — equal or unequal — will not be diminished.

24. There is a material difference between a guarantee of equality and a mere protection against diminishment. A guarantee of equality would require the practical attainment of an objective ideal. A protection against diminishment only guards against a worsening in the existing ability of minorities to elect representatives of their choice. In its promise of equality, the summary grandly overstates the actual—and less protective—effect of the Congressional Amendment.

25. In a series of statements made to a committee of the Florida House of Representatives, the Sponsor repeatedly asserted that the Non-Diminishment Provision merely prevents future "harm" to the present ability of minorities to elect representatives of their choice:

> That last phrase prohibits the drawing of any district or plan that will ***reduce*** the ability of minorities to elect minority representatives. Plain and simple.
>
> Minorities' ability, the ability of minority voters to elect representatives of their choice is not going to be ***diminished*** with this amendment.

> What I do know is that these amendments will very clearly by their language forbid any legislator or any Legislature I should say, to adopt any plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.
>
> The . . . language says that districts cannot be drawn or plans cannot be drawn to ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> However, given that and given the language that is in our amendment, you cannot ***diminish*** the ability of . . . minority voters to elect representatives of their choice. So that is a protection that will be in the Florida Constitution. You will be violating the Constitution if you ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> What our language says is that you cannot . . . make districts or create a plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.
>
> What our amendments say is that . . . with regard to ability to elect representatives of choice, the Legislature cannot do anything to ***diminish*** that ability.
>
> And we want to make sure that in doing all that there is ***no harm done*** and ***no diminution*** of . . . the rights of minority voters.
>
> The language of the amendment says that you can't draw districts to ***diminish*** the ability to elect representatives of choice and that is—***that is the prohibition.***
>
> In fact, that is the reason that the language is in there to ensure that . . . the ability of minority voters to elect representatives of their choice will not be ***diminished.***

(Emphasis added.)

26. Conceptually and practically, non-diminishment is different from equality. Contrary to the promise of the ballot summary, the Congressional Amendment does not require that the ability of minorities to elect representatives of their choice be affirmatively enhanced until equality is achieved. They merely prevent backsliding in relation to the status quo—equal or unequal.

27. The Congressional Amendment's sentence construction makes clear that minorities are not ensured an equal opportunity to elect representatives of their choice. The Congressional Amendment does ensure an "equal opportunity . . . to participate in the political process," and the drafter might have completed the sentence: "and to elect representatives of their choice." "Equal opportunity" would then have applied to the ability to elect the representatives of choice. This was not done.

28. As the Florida Supreme Court explained, "the negative verb 'shall not be drawn' in the proposed amendment[] modifies both clauses 'with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process' and 'to diminish their ability to elect representatives of their choice.'" *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d at 189. The phrase "equal opportunity" does not modify both clauses—except in the erroneous ballot summary.

29. The Sponsor has stated that the Non-Diminishment Provision is "somewhat similar to what is in Section 5" of the VRA. Where it applies, Section 5 ensures that no voting change "has the purpose or will have the effect of diminishing the ability of any citizen of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section 5 does not guarantee equality, but merely prevents backsliding, or "retrogression." The benchmark for comparison is the status quo, and not the ideal of equality.

30. Like Section 5 of the VRA, the Congressional Amendment's Non-Diminishment Provision prohibits backward steps. It prohibits the undoing or reversal of gains already achieved by minorities. It does not, however, ensure an "equal opportunity . . . to elect representatives of their choice." Thus, a redistricting plan that neither diminishes the ability

of minorities to elect representatives of their choice, nor accords minorities an equal opportunity to elect representatives of their choice, would not violate the Non-Diminishment Provision.

31. In stating that the Congressional Amendment guarantees minorities the "equal opportunity to . . . elect representatives of their choice," the ballot summary misrepresents the legal impact of the Congressional Amendment and gives voters a wrong and materially misleading impression.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT II – MISLEADING BALLOT SUMMARY

32. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

33. The ballot summary is deceptive and misleading because it does not tell voters that the Congressional Amendment, through its compactness and political and geographical boundaries requirements, restrains the Legislature's ability to draw districts in which minority voters will have the ability to elect representatives of their choice.

34. Currently, the Equal Protection Clauses of the United States and Florida Constitutions are the only legal constraints that act as a ceiling on the Legislature's discretion to draw districts in which minority voters will have the ability to elect candidates of their choice.

35. If the Congressional Amendment is enacted, the Legislature will be subject to two new legal constraints on drawing districts: the requirements that districts be compact and that districts, where feasible, utilize existing political and geographical boundaries.

36. To avoid these new requirements, the Legislature would have to show that they conflict with the following, superior standard, which is also contained in the Congressional Amendment: "Districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

37. Except to the extent necessary to comply with this requirement and the federal Voting Rights Act (the "VRA"), the Legislature's discretion to create districts that promote minority representation will be subject to the limitation that districts be compact and follow political and geographical boundaries..

38. The ballot summary does nothing to inform voters of the Congressional Amendment's significant effect on the Legislature's discretion under current law to promote minority representation.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT III – MISLEADING BALLOT SUMMARY

39. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

40. The ballot summary states that, under the Congressional Amendment, districts must be "as equal in population as feasible." Thus, the summary suggests that current law does not already require districts to consist of populations as nearly equal as practicable, or that districts in Florida in fact consist of unequal populations. Both of the inferences that flow from the summary are false.

41. Federal law already requires that congressional districts be as nearly equal in population as practicable. *Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

42. Florida's current congressional plan, adopted in 2002, has a total deviation of one person. Twenty-two of the State's twenty-five congressional districts have zero deviation and the other three districts only deviate by a single resident.

43. The ballot summary, therefore, misleads voters about the existing requirements applicable to the redistricting process and the legal effect of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT IV – MISLEADING BALLOT SUMMARY

44. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

45. The ballot summary confuses and misleads voters because the summary uses the same phrase—"*drawn to*" —inconsistently to mean no fewer than three different things.

46. **First**, the ballot summary provides that districts may not be "drawn to" favor or disfavor an incumbent or political party. In this case, the phrase "drawn to" means that districts may not be drawn with the *intent* to favor or disfavor an incumbent of political party.

47. **Second**, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to participate in the political process. In this case, the phrase "drawn to" means that districts may not be drawn with either the *intent* or *result* of denying the equal opportunity of minorities to participate in the political process.

48. **Third**, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to elect representatives of their choice. In this case, the phrase "drawn to" means that districts may not be drawn with the *result* of diminishing the ability of racial or language minorities to elect representatives of their choice.

49. Thus, the phrase "drawn to" has three different meanings in the summary: (i) *intent*, as applied to the prohibition against favoring or disfavoring incumbents or political parties; (ii) *intent* or *result*, as applied to the prohibition against denying minorities an equal opportunity to participate in the political process; and (iii) *result*, as applied to the prohibition against diminishing the ability of minorities to elect representatives of their choice.

50. The inconsistent use of terminology within the ballot summary is misleading. The summary fails to inform the voters, clearly and unambiguously, whether the Congressional Amendment prohibits an intent, a result, or both, in the three instances to which the phrase "drawn to" applies. In using the identical phrase to denote three different and clearly distinguishable legal standards, the ballot summary confuses and dissembles the true legal impact of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT V – MISLEADING BALLOT SUMMARY

51. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

52. The ballot summary suggests that the Legislature will be required to ignore incumbency. Under the VRA, it cannot do so. The Legislature must consider incumbency — and may favor an incumbent — to protect minority rights. By suggesting that the Congressional Amendment prohibits an intent to favor incumbents, the summary promises more than can be delivered.

53. Section 5 of the VRA, which applies to changes in electoral practices and procedures in five Florida counties (Collier, Hardy, Hendry, Hillsborough, and Monroe), prohibits changes that "lead to retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Whether a change will result in retrogression "depends on an examination of all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479.

54. One component of the opportunity to participate in the political process is the preservation of minority incumbents in positions of legislative influence and leadership. *Id.* at

483. Thus, the VRA requires the Legislature to weigh incumbency when it assesses compliance with Section 5, and permits it to favor minority incumbents as one means of compliance.

55. The Congressional Amendment, however, purports to deprive the Legislature of this important mechanism to ensure compliance with the VRA. Because it is foreseeable that the Legislature will intend to favor minority incumbents to ensure compliance with the VRA, the summaries' unqualified representation that an intent to favor incumbents is prohibited is inaccurate.

56. For the same reason, the Congressional Amendment itself contains an internal contradiction. The Congressional Amendment requires that districts not be drawn to deny or abridge "the equal opportunity of racial or language minorities to participate in the political process." The preservation of minority incumbents in positions of power is relevant to the requirement that districts maintain the equal opportunity of racial minorities to participate in the political process. This requirement thus conflicts with the prohibition against favoring incumbents.

57. The Legislature cannot fully assess and protect racial minorities' opportunity to participate in the political process unless it assesses and protects the achievements of minority incumbents. Because the conflicting requirements in Subsection (1) claim equal dignity in the hierarchy of requirements, the Congressional Amendment creates an irreconcilable contradiction. This internal conflict will prevent full compliance with all requirements contained in the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on

the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VI – MISLEADING BALLOT SUMMARY

58. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

59. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, and predictably. The Congressional Amendment expresses broad and subjective concepts in undefined terms — terms which voters can reasonably construe in an endless number of differing, conflicting ways.

60. The Congressional Amendment does not define "compact" or enable voters to distinguish between compact and non-compact districts. The Congressional Amendment does not define "political and geographical boundaries" or explain when it is "feasible" and when it is not "feasible" to utilize them. The Congressional Amendment prescribes no standard by which courts can determine the "intent" of a legislative body and of the Governor.

61. The Sponsor's own public statements about the Amendment underscore that the ballot summary is misleading and that the Amendment therefore flies under false colors.

62. Notwithstanding differences in wording between the Congressional Amendment and the VRA, the Sponsor initially informed the public that the Congressional Amendment's

voting-rights provisions are "identical" to and would "enshrine" in the Florida Constitution the protections in the VRA. *See How Will the FairDistrictsFlorida.org Amendments Work?*, Sponsor's Advertisement (Mar. 5, 2009); *Stop Protecting Politicians*, TCPalm (Nov. 26, 2008); *Leaning Republican, Again*, Florida Trend (Sep. 1, 2008).

63. But after the Supreme Court's decision in *Bartlett v. Strickland*, ___ U.S. ___, 129 S. Ct. 1231 (2009), the Sponsor stated (in an apparent acknowledgement of the different wording of the Amendment and the VRA) that the Amendment affords minorities "enhanced" rights and "greater protection than exists today in federal law." *See Plan to Redraw State Districts Called Unfair*, Tampa Tribune (Jan. 12, 2010); *Race Enters Debate Over Redrawing Florida Political Districts*, Florida Times-Union (Dec. 14, 2009); *Two Ballot Proposals Stir Fears*, Sarasota Herald-Tribune (Nov. 27, 2009); *Initiative Prompts Questions of Racial Fairness*, Daytona Times (Nov. 19, 2009).

64. At the committee meeting on February 11, 2010, Ellen Freidin, the Chairwoman of Fair Districts Florida also noted that the language of the Amendment and the VRA is not identical. She further stated that, under the Amendment, the Legislature must use all possible means at its disposal to ensure that the ability of minorities to elect representatives of their choice is not diminished. But Ms. Freidin refused to identify any measure of the "ability" of groups to elect their preferred representatives. Nor did she explain how the Legislature should measure the "opportunity of racial or language minorities to participate in the political process."

65. The recent public statements of the Chairwoman of the Congressional Amendment's sponsor have only increased voter confusion and further clouded the meaning of the ballot summary.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VII – MISLEADING BALLOT SUMMARY

66. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

67. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, predictably, and systematically.

68. The Congressional Amendment expresses broad and subjective concepts in undefined terms—terms which the voters can reasonably construe in an endless number of differing and conflicting ways. The Congressional Amendment does not define "language minorities," or state how large a group would have to be in order to qualify as a language minority, and thus does not identify the groups that will benefit from the new voting rights created by the Congressional Amendment.

69. On February 11, 2010, at a joint meeting of the Senate Committee on Reapportionment and the House Select Policy Council on Strategic and Economic Planning,

FDF refused to provide guidance. And, asked to define "language minorities," FDF referenced the VRA, which defines "language minorities" to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 42 U.S.C. § 1973*l*(c)(3), but then stated that "language minorities" only means "Hispanics," contrary both to the VRA and to the definition espoused by three Justices of the Florida Supreme Court. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

70. The ballot summary's use of the phrase "language minorities" in the plural will cause voters to believe that more than a single language minority group is intended to be protected by the Congressional Amendment.

71. If the intent of the Congressional Amendment was to merely protect those persons who are Spanish speakers, then the ballot summary could have been written to state that directly.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VIII – MISLEADING BALLOT SUMMARY

72. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

73. The ballot language also leads voters to believe that Legislature will be able to determine with certainty where members of language minorities reside and to take that into consideration when crafting districts.

74. The questionnaire sent out during the 2010 Census to every Florida household only asks 10 questions: (1) the number of people living in the dwelling; (2) additional people staying in the dwelling as of April 1, 2010 who were not counted in answer to question (1); (3) whether the dwelling is owned, rented, or occupied without paying rent; (4) the dwelling's telephone number; (5) the names of persons who occupy the dwelling; (6) the sex of persons occupying the dwelling; (7) the age and date of birth of persons occupying the dwelling; (8) whether any person occupying the dwelling is of "Hispanic, Latino, or Spanish origin" and, if so, whether they are "Mexican, Puerto Rican, Cuban, or other Hispanic origin"; (9) the race of the persons occupying the dwelling; and (10) whether any occupant occasionally stays elsewhere. There are no questions on the form about language, nor is any required by United States Public Law 94-171, the enactment that directs the Census Bureau to make Census data available to the states for purpose of redistricting and reapportionment.

75. Accordingly, there will be no bloc-level count of language use available at the time the Legislature draws the legislative and congressional districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that language minorities will have an "equal opportunity to participate in the political process and elect representatives of their choice."

76. The Census Bureau will no longer send a long-form to 1 out of 6 households asking about languages. See "2010 Census Constituent FAQs", Census Bureau, http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf. Accordingly, there will be no Census block level count containing data on language available at the time the Legislature draws the Congressional Districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that they will have "the equal

opportunity to participate in the political process and elect representatives of their choice" as stated in the proposed Congressional Amendment.

77. In lieu of the long Census form, the Census Bureau will be using its American Community Survey ("ACS"). Like a political poll, the ACS will use a random sample of U.S. residents. The annual results of the ACS will be available for all areas with populations of 65,000 or more. Areas with populations less than 65,000 require the use of multiyear estimates to reach an appropriate sample size for data publication.

78. However, the sample size will not permit disaggregating the Census data down to the level of a Census block, the lowest geographic level used in redistricting. For instance, the 2006 ACS only surveyed 152,155 of Florida's estimated population of 18,328,340. With such a small sample size it will be impossible for the Legislature to precisely determine how many minority language speakers are spread throughout the hundreds of thousands of Census blocks, block groups, and tracts in the State of Florida.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

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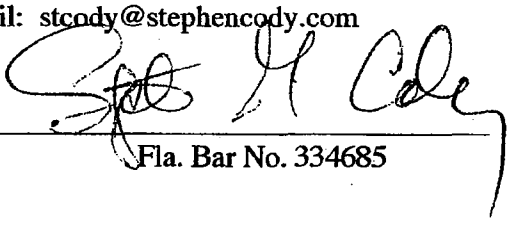

Fla. Bar No. 334685

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS:

_____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: ____ / ____ / ____ **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

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FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

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RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-15

CIVIL COVER SHEET

I. CASE STYLE

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida.,

Defendants.

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

CIRCUIT CIVIL DIVISION

CASE NO.

JUDGE:

FILED
10 MAY 24 PM 2:32
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

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II. TYPE OF CASE: (Place an x in one box only. If the case fits more than one type, pick the most definitive.)

Domestic Relations		Torts		Other Civil	
				☐	Contracts
☐	Simplified dissolution	☐	Professional Liability	☐	Condominium
☐	Dissolution	☐	Products Liability	☐	Real Property/Mortgage Foreclosure
☐	Support - IV -D	☐	Auto Negligence		
☐	Support -Non IV -D	☐	Other Negligence	☐	Eminent Domain
☐	URESA - IV - D			☒	Other
☐	URESA -Non IV - D				
☐	Domestic violence				
☐	Other domestic relations				

III. Is Jury Trial Demanded in Complaint?

☐ Yes

☒ No

DATE: May 24, , 2010.

STEPHEN M. CODY, ESQ.
Attorney for Plaintiffs

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

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ORIGINAL FILED

PLAINTIFFS' NOTICE OF PRIORITY STATUS

Pursuant to Florida Rule of Judicial Administration 2.545(c)(1), Plaintiffs, Corrine Brown and Mario Diaz-Balart, request priority status and an expedited disposition schedule.

1. This case challenges the validity of a proposed amendment to the Florida Constitution. The Florida Department of State has certified the amendment for placement on the general election ballot. The general election is scheduled to be held on November 2, 2010.

2. Florida's sixty-seven Supervisors of Elections will begin printing millions of general election ballots shortly after the results of the August 24, 2010, primary election are certified, on or about September 1, 2010. *See* §§ 102.111(1), 102.112(2), Fla. Stat. (2009). Millions of ballots will be printed between the date of certification and September 18, 2010, the date by which the Supervisors must mail absentee ballots to overseas voters. *Id.* § 101.62(4)(a).

3. Here, Plaintiffs ask the Court to withhold the challenged amendment from the general election ballot. To provide the requested relief, the Court must resolve the issues raised in Plaintiffs' Complaint for Declaratory and Injunctive Relief no later than September 1, 2010.

4. Florida Rule of Judicial Administration 2.215(g) directs the Court to "expedite priority cases to the extent reasonably possible." Priority cases are cases that have been assigned priority status or an expedited disposition schedule. Fla. R. Jud. Admin. 2.215(g). "Particular attention shall be given to . . challenges involving . . . proposed constitutional amendments." *Id.*; *accord Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 558-59 (Fla. 1st DCA 2006) (holding that refusal to expedite challenge to proposed constitutional amendment was error); *Crawford v. Gilchrist*, 59 So. 963, 966 (Fla. 1912) ("[T]he public welfare demands that the questions here raised as to the validity of . . . such amendments should be determined as speedily as the law will permit so as to avoid unnecessary expense, confusion, and litigation in governmental matters that vitally affect all the people of the state.").

5. Impending election deadlines require expedited consideration of this challenge to a proposed constitutional amendment. Time should be afforded, moreover, for appellate review. The vital interests of the people of this state warrant priority status and expedited treatment.

WHEREFORE, Plaintiffs, Corrine Brown and Mario Diaz-Balart, respectfully request that this case be assigned priority status and an expedited disposition schedule.

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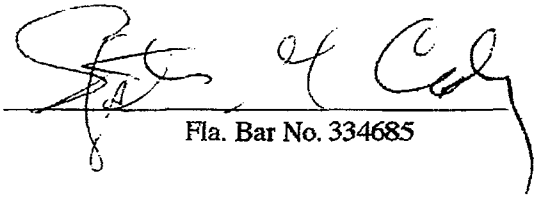

Fla. Bar No. 334685

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

CASE NO: 10-CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

MOTION FOR LEAVE TO INTERVENE AS AN INTERESTED PARTY

COMES NOW, THE FLORIDA SENATE, by and through its President Jeff Atwater (the "Florida Senate"), and hereby moves this Court for an order permitting it to intervene in the above-captioned litigation as an interested party pursuant to Florida Rule of Civil Procedure 1.230. In support of the instant Motion for Leave to Intervene as an Interested Party, the Florida Senate asserts the following:

I. Background

1. The Florida Senate is a legislative body created by Article III of the Constitution of the State of Florida vested, along with the Florida House of Representatives, with the legislative power of the State.

2. This lawsuit, filed by United States Congressman Mario Diaz-Balart and United States Senator Corrine Brown, challenges the validity of proposed constitutional amendments to Florida's constitutional apportionment processes that seek to impose a new set of contradictory and unworkable standards thereon.

II. Standing of Florida Senate to Intervene as an Interested Party

3. Pursuant to Article III, section 16 of the Constitution of the State of Florida, the Florida Senate (along with the House of Representatives) is vested with the duty to apportion the State and Congressional voting districts in accordance with the United States Constitution, the Constitution of the State of Florida and all applicable state and federal law in the second year following each decennial census (2010). Specifically, Article III, Section 16(a) of the Florida Constitution mandates that the "legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state..."

4. The redistricting process for the 2012 cycle has already begun. Committees of the Florida Legislature have met on numerous occasions to plan for the reapportionment process and to discuss the proposed constitutional amendments at issue in this litigation and their impact upon the redistricting process. In early 2011, the United States Census Bureau will release state-by-state data, and the Florida Legislature will hold dozens of public hearings across the state to listen to the voters and gather essential information.

5. The criteria mandated by the proposed constitutional amendments at issue in this litigation are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rules by which their effects can be divined and their purposes accomplished. Moreover, they lack judicially discoverable or manageable standards that would enable the courts to construe and enforce their requirements coherently, objectively, predictably, and systematically. The proposed constitutional amendments

also patently violate paramount federal law relative to the voting rights of minorities and will therefore ultimately be futile and inoperable.

6. Pursuant to Rule 1.230. Florida Rules of Civil Procedure, "Anyone claiming an interest in pending litigation may at any time be able to assert a right by intervention." Intervention should be liberally allowed. *National Wildlife Federation, Inc. v. J.T. Glisson*, 531 So.2d 996, 98 (Fla. 1st DCA 1988).

7. The Florida Senate respectfully submits that the proposed constitutional amendments being challenged in the instant case will have a direct impact upon the Senate's reapportionment duties and responsibilities as delineated by Article III, § 16(a) of the Constitution of the State of Florida. Moreover, the Florida Senate, if permitted to intervene in the case at bar, will demonstrate to this Court not only the statutory and procedural invalidity of the proposed constitutional amendments and their ballot summaries, but will also establish how application of the proposed reapportionment criteria contained within patently violates paramount federal law and, should, therefore, render the proposed constitutional amendments ineligible for placement upon the ballot. *See Gray v. Winthrop*, 115 Fla. 721 (Fla. 1934).

8. For example, the language and application of the proposed constitutional amendments at issue will patently conflict with paramount federal law, namely the Voting Rights Act of 1965 (42 U.S.C. § 1971) and the supremacy clause to the United States Constitution.

9. A reapportionment plan is violative of section 5 of the Voting Rights Act if the plan would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Georgia v. Ashcroft*, 539 U.S. 461, 480

(2003). Five Florida counties are currently covered jurisdictions under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973. Loss of minority districts from a statewide plan is sufficient to show a violation of section 5 of the Voting Rights Act. *Georgia v. Ashcroft*, 539 U.S. at 479. In addition, section 2 of the Voting Rights Act protects minorities from electoral laws or procedures that cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

10. To comply with the non-retrogression standard of Section 5 and the non-vote dilution provision of Section 2, federal courts have expressly authorized and affirmed a legislature's use of incumbency and political party affiliation data in the redistricting process. As recently as 2002 in Florida, the federal appellate court expressly held that certain challenged districts from the 2002 Florida Reapportionment plan were in compliance with the Voting Rights Act because they relied upon political party and incumbency data in the same manner as the Florida Legislature did during the redistricting process. *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D. Fla. 2002).

11. The proposed constitutional amendments at issue, however, expressly prohibit the Florida Legislature from having an intent to favor or disfavor a political party or an incumbent. Under this mandate, the Florida Legislature would be legally prohibited from utilizing political party or incumbency data in the redistricting process to protect minority rights (which has been expressly authorized to use by the Voting Rights Act, vis-a-vis the *Martinez* Court to ensure that the crafted apportionment plan is in compliance with the Voting Rights Act).

12. Hence, the proposed constitutional amendments, on their face, patently contravene both the *Martinez* Court's express approval of the Florida Legislature's use of political party and incumbency data and the *Martinez* Court's own utilization of such data in finding that challenged minority districts were in compliance with the Voting Rights Act. If the Florida Legislature is prohibited from utilizing political party or incumbency data in the redistricting process to ensure that retrogression does not occur, minority seats will be lost as the likelihood of a district's performance for a minority candidate has been determined based upon data such as political party affiliation and incumbency. *See Martinez v. Bush, supra.*

13. The proposed constitutional amendments will interfere with and obstruct the opportunity of minority voters to participate in the political process and to elect candidates of their choice. The proposed constitutional amendments will also cause the loss of minority seats as political party and incumbency data will be precluded from consideration in the redistricting process. When a plan crafted under the proposed constitutional amendments causes the loss of minority seats, the criteria mandated by the proposed constitutional amendments and the resulting apportionment plan itself will be inexorably in violation of the non-retrogression and non-vote dilution mandates of the Voting Rights Act and, therefore, fully illegal.

14. The Florida Senate's intervention into the instant case would not cause prejudice to any existing party, and would not delay the proceedings. This Motion is filed a mere days after the underlying suit was filed and the Florida House of Representatives has already filed its own request to intervene in this case as well as its own additional claims (which the Florida Senate supports). Given the importance of this case and of

legislative reapportionment to the citizens of Florida and to their Florida Legislature, it is imperative that both houses of the Florida Legislature be fully represented in this proceeding.

WHEREFORE, the Florida Senate respectfully requests that this Court enter an Order: 1) granting it leave to intervene in the instant case and affording it full party status herein as an intervening Plaintiff, 2) providing it leave to assert additional claims relative to the invalidity of the proposed constitutional amendments, as necessary, and 3) granting any further relief that this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished via electronic means and U.S. mail: to Stephen M. Cody, Esq., Attorney for Plaintiffs, 16610 S.W. 82 Court, Palmetto Bay, FL 33157, and Dawn K. Roberts, Interim Secretary of State, Florida Dept. of State, 500 South Bronough Street, Tallahassee, FL 32399 this 28 day of May, 2010.

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IN THE CIRCUIT COURT OF THE 2nd JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.

PLAINTIFFS' RESPONSE TO MOTION INTERVENE BY FLORIDA SENATE

Plaintiffs, Corrine Brown and Mario Diaz-Balart, by and through their undersigned counsel, respond to the motion to intervene filed by the Florida Senate and say that they have no objection to the relief sought therein.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Dawn K. Roberts, Interim Secretary of State, Florida Department of State, 500 South Bronough Street, Tallahassee, Florida 32399 and mailed and emailed to George N. Meros, Jr., GrayRobinson, P .A., Post Office Box 11189, Tallahassee, Florida 32302-3189, gmeros@gray-robinson.com and James A. Scott, Esq., Tripp Scott, P.A,, 110 Southeast Sixth Street, 15th Floor Fort Lauderdale, Florida 33301, jas@trippscott.com this May 28, 2010.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening Plaintiff,

v. Case No.: 2010 CA 001824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

Pursuant to Florida Rule of Civil Procedure 1.230, the Florida House of Representatives, through its Speaker, Larry Cretul, moves the Court for an order permitting it to intervene as a Plaintiff in this action.

1. The Florida Department of State has certified two proposed constitutional amendments for placement on the November ballot.[1] Both proposals would inject ambiguous, contradictory, and misleading requirements into the redistricting process. If implemented, they would dramatically and detrimentally impact the Legislature's ability to carry out its constitutional duty to create districting plans openly, fairly, and accountably. And they would substantially curtail the Legislature's ability to protect the interests of racial minorities, whose ability to elect members of their choice has significantly improved over the past two decades.

[1] Copies of the proposed amendments and their ballot summaries are attached to this Motion.

Worse still, the amendments' impacts are deliberately hidden from the electorate asked to approve them. The Florida House of Representatives has a duty to protect the interests of voters, who are entitled to "receive[] fair and actual notice of the proposal's purpose and effect." *Harris v. Moore*, 752 So. 2d 1241, 1242 (Fla. 4th DCA 2000). The Florida House of Representatives likewise has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980).

2. The two proposals are substantially identical, except one (Amendment 5) applies exclusively to state legislative districts and the other (Amendment 6) applies exclusively to congressional districts. The amendments say some things but would do others. The proposals mislead, obfuscate, hide the ball, and fly under false colors. They do so by design. Their proponents carefully crafted the amendments and their ballot summaries to secure passage by confusing and misleading the public. Absent judicial intervention, Amendments 5 and 6 will appear on the ballot accompanied by summaries as deliberately false and misleading as the name of their political sponsor: "FairDistrictsFlorida."

3. The proponents of Amendments 5 and 6 suggest that the amendments will improve the redistricting process, making it more "fair" by removing legislative discretion and political considerations. Their website boasts an intent to "restore true democracy to Florida." *See* http://www.fairdistrictsflorida.org/home.php (last visited May 26, 2010). But what they truly seek is to remove democracy from the redistricting process, putting inherently political decisions in the hands of the Florida Supreme Court rather than the hands of politically accountable elected officials.

4. Redistricting is, and always has been, a "highly political task." *Growe v. Emison*, 507 U.S. 25, 33 (1993). As the United States Supreme Court has recognized, "extirpating politics from what are the essentially political processes of the sovereign States" constitutes "an impossible task." *Gaffney v. Cummings,* 412 U.S. 735, 754 (1973); *see also Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (finding nothing invidious in politically drawn district lines). The Florida Constitution commits the critical task of redistricting to the Legislature because courts "are inherently ill-equipped" to "make decisions based on highly political judgments" relating to redistricting issues, *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244 (2009) (plurality opinion) (marks omitted).

5. As the amendments' proponents are well aware, Amendments 5 and 6 will ultimately remove this process from the Legislature and deliver it to the Florida Supreme Court. This is their true effect and purpose. Rather than explicitly so stating, "FairDistrictsFlorida" hopes to implement ambiguous, contradictory, and misleading "standards," which the Legislature must follow in redistricting. Satisfying all the "standards"—many of which lie in the eye of the beholder—is impossible. As a result, each legislatively enacted plan would be subject to endless challenge, and the courts will ultimately be called upon to handle the highly political and time-sensitive task of redistricting:

- Districts that neatly follow non-compact municipal boundaries would be challenged as not being "compact."
- Compact districts crossing municipal boundaries would be challenged for not following municipal boundaries.
- A district that traditionally elects Democrats would be challenged as favoring a Democratic incumbent.
- The same district if redrawn as a Republican district would be challenged as disfavoring the Democratic incumbent.

- And any number of districts would be challenged for "denying or abridging the equal opportunity of racial or language minorities to participate in the political process or [] diminish[ing] their ability to elect representatives of their choice," however that language is ultimately interpreted by an empowered, reviewing court.[2]

6. Rather than guide the Legislature, the amendments do little more than provide endless avenues for judicial attacks on redistricting plans. No plan would be immune from challenge. And no plan could possibly satisfy all interested groups. Litigation—and the public expense of defending the Legislature's work product—would be endless. "Inviting attack on minor departures from some supposed norm [in redistricting review] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely *unless the express or tacit goal is to effect its removal from legislative halls*." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (emphasis added). The amendments' tacit goal and certain effect *is* to transfer redistricting from the Legislature to the courts.[3]

7. By design, the amendments' tacit goal is not disclosed to the voters. Instead, the amendments hide their true purpose and fly under false colors. They thus violate the accuracy requirement, which "functions as a kind of 'truth in packaging' law for the ballot." *Adv. Opinion*

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[2] The amendments' only requirements not vulnerable to countless subjective challenges mandate that districts be contiguous and consist of populations as nearly equal as possible. But these requirements do not change existing law and practice. *See Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

[3] The proponents' earlier attempt to remove political accountability from the redistricting process was overt. In 2006, a proposed amendment would have expressly removed redistricting from the Legislature and delivered it to a "nonpartisan commission." *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1221 (Fla. 2006). The Florida Supreme Court struck that attempt from the ballot because, despite the proponents' marketing the commission as "nonpartisan," "the method of selecting the commission members is decidedly partisan." *Id.* at 1228-29. The Court therefore found the ballot summary misleading. *Id.* (It also found single-subject violations.) That amendment never appeared on the ballot, in part because its proponents settled on this deceptive alternative.

to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature, 926 So. 2d 1218, 1227 (Fla. 2006); *accord Adv. Op. to Att'y Gen. re Add'l Homestead Tax Exemption*, 880 So. 2d 646, 653-54 (Fla. 2004) ("The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based only on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution.") (citation omitted).

8. Because they lack accurate ballot summaries, the amendments are invalid. Amendment 5 suffers an additional infirmity: it violates the single-subject rule. Neither amendment should appear on the ballot this November. The Florida House of Representatives seeks to intervene in this case, to join in Plaintiffs' challenge, and to ensure that Florida voters are not presented with amendments flying under false colors.

THE EXISTING CLAIMS

9. Plaintiffs Corrine Brown and Mario Diaz-Balart, both members of Congress, initiated this action on May 24, 2010. Their Complaint comprises eight counts, each of which alleges that the ballot summary for Amendment 6 is misleading. They sue the interim Secretary of State, whose duty it is to certify proposed constitutional amendments for ballot placement. (Compl. ¶ 12.)

10. The Congresspersons' Complaint challenges only Amendment 6, which relates to congressional districts. Amendment 5, which is substantially identical to Amendment 6 but applies only to state legislative districts, is not implicated in the Complaint.

INTERVENTION OF THE FLORIDA HOUSE OF REPRESENTATIVES IS PROPER

11. Under Florida House of Representatives Rule 2.6, "[t]he Speaker may initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House . . . when the Speaker determines that such suit is of significant interest to the House."

12. Intervention is governed by Florida Rule of Civil Procedure 1.230, which provides: "Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." "Consistent with the policies which the Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County,* 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992); *accord Nat'l Wildlife Fed. Inc. v. Glisson*, 531 So. 2d 996, 998 (Fla. 1st DCA 1988) ("Intervention should be liberally allowed.").

13. Whether to allow intervention is committed to the discretion of the Court, but intervention should be permitted when a proposed intervenor's interest is already at issue in the litigation and is "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Union Cent. Life Ins. Co. v. Carlisle,* 593 So. 2d 505, 507 (Fla. 1992) (quoting *Morgareidge v. Howey*, 78 So. 14, 15 (1918)). The Florida House of Representatives satisfies these criteria. Its interest is in protecting the electorate by keeping misleading Amendments 5 and 6 off the ballot. And to that end, it would plainly gain if this Court were to enter a judgment granting that requested relief.

14. The existing Plaintiffs represent their own unique interests. Both represent congressional districts with a majority (or near-majority) of minority voters. (Compl. ¶¶ 10, 11.) Amendment 6 will have a negative impact on the ability of minorities to elect representatives of

their choice, so the amendment will necessarily impact the Plaintiffs and their congressional constituents. The Florida House of Representatives shares an interest in protecting minority communities. And it also has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980). Thus, the Florida House of Representatives has interests related to—but broader than—the interests of the existing Plaintiffs.

15. The Florida House of Representatives seeks to join in the Plaintiffs' existing challenge to Amendment 6. Although the Plaintiffs do not challenge Amendment 5, their challenges are equally applicable to both amendments, which have substantially identical language. The Florida House of Representatives seeks to present most of those same challenges with respect to Amendment 5, as well as Amendment 6. In addition, the Florida House of Representatives seeks to present one further challenge to Amendment 5.

The Florida House of Representatives' Proposed Claims

16. If permitted to intervene as a Plaintiff, the Florida House of Representatives would assert most of the claims already presented by the Plaintiffs. Specifically, as alleged in Counts I though VI of the Complaint, the ballot summaries are misleading for numerous reasons. The Florida House of Representatives therefore seeks to adopt the claims presented in Counts I through VI in full.

17. In addition, each of those Counts is equally applicable to Amendment 5. The Florida House of Representatives, therefore, seeks to apply each of those claims to both amendments.

18. Furthermore, the Florida House of Representatives asserts that the ballot summaries for both amendments are false, deceptive, and misleading because the true purpose of

the amendments is to remove the redistricting process from the Legislature and deliver it to the Florida Supreme Court, as discussed in paragraphs 1 through 8, above. The amendments therefore fly under false colors and should be removed from the ballot.

19. Finally, the Florida House of Representatives seeks to present one additional claim that is applicable to Amendment 5 only:

20. Amendment 5 would create Article III, Section 21 of the Florida Constitution, imposing complex, intensely fact-specific criteria on state legislative redistricting. But its summary never informs voters of its inevitable and dramatic effect on the Florida Supreme Court's mandatory review of state legislative redistricting plans under Article III, Section 16(c), Florida Constitution.

21. The Florida Constitution establishes a carefully constructed, time-sensitive process for the decennial reapportionment of state legislative districts. Art. III, § 16, Fla. Const. The constitutional framework is designed to ensure that a redistricting plan is adopted by the Legislature and approved by the Florida Supreme Court in sufficient time to allow candidates to qualify and voters to elect their representatives at the next election. Under this process, the Legislature must redraw state legislative districts at its 2012 regular session. Art. III, § 16(a), Fla. Const. Within fifteen days after adoption of a redistricting plan, the Attorney General must petition the Florida Supreme Court to determine the validity of the plan. Art. III, § 16(c), Fla. Const. Historically, the Attorney General has petitioned the Court in early to mid-April, during or after the session in which the Legislature takes up redistricting.

22. The Supreme Court must review any redistricting plan, permit opposing parties to present their views, and determine the validity of the plan—all within thirty days. *Id.* The Court's judgment is "binding upon all the citizens of the state." Art. III, § 16(d), Fla. Const. As

a result of the 30-Day Rule and existing constitutional standards, the scope of review has historically been extremely limited. The framework established by the Florida Constitution does not "allow for a fact-intensive review within [the] thirty-day window." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002).

23. Under the 30-Day Rule, the Court has traditionally rendered a decision by mid-May, only weeks before candidates began to qualify for office in the newly drawn districts. In 2012, candidate qualifying is scheduled to commence on June 18th. §§ 99.061(1), (9), 100.031, 100.061, Fla. Stat. (2009). The primary and general elections are scheduled to follow in short order, on August 28th and November 6th, respectively. *Id.* §§ 100.061, 100.031.

24. The constitutional framework affords little time to remedy any invalidity in a redistricting plan. If the Court invalidates a plan, the Governor must convene the Legislature for an extraordinary session of no more than fifteen days. Art. III, § 16(d), Fla. Const. Again, the Attorney General must petition for review or, if no plan is adopted, must report that fact to the Court. Art. III, § 16(e), Fla. Const. If the Court strikes the new plan, or if none was adopted, the Court, in the last resort, makes an emergency apportionment. Art. III, § 16(f), Fla. Const.

25. The 30-Day Rule has never impeded the Court's review of a plan's compliance with the Florida Constitution, because the criteria presently imposed by the Constitution are few and simple. State House districts must be between 80 and 120 in number, while State Senate districts must be between 30 and 40 in number. Art. III, § 16(a), Fla. Const. Districts must be numbered consecutively and consist of contiguous, overlapping, or identical territory. *Id.* Compliance with these criteria can readily be determined from the face of any redistricting plan. Thus, the Court has never found it difficult to reconcile the 30-Day Rule with its obligation to assess the validity of a plan under criteria contained in the Florida Constitution.

26. Amendment 5 would substantially affect the Florida Supreme Court's automatic, binding review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It would create new, fact-intensive criteria that would inevitably spawn a range of legal challenges to individual districts and the plan as a whole—challenges the Court cannot review within the limited time allotted by the Constitution. The amendment would generate fact-intensive inquiries about every district. The Florida Supreme Court would have to determine whether legislators subjectively intended to favor or disfavor political parties or incumbents. It would have to engage in a circumstantial analysis of the opportunity of racial and language minorities to participate in the political process—and the Legislature's intent in this regard—and the ability of minority voters to elect representatives of their choice. It would have to scrutinize the compactness or non-compactness of every district, and the feasibility of utilizing local political and geographical boundaries.

27. The Florida Supreme Court itself has deemed it impossible to conduct a fact-specific review in thirty days. The Court has refused to adjudicate VRA claims—claims that are less complex than those which the amendment's criteria would engender—explaining that "article III, section 16(c) did not envision the development of the highly complex federal claims. The juxtaposition of these claims on this Court's article III, section 16(c) review is highly problematic." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 829 n.13.

28. If the Florida Supreme Court attempts the impossible, it must perform an inadequate review that deprives parties of any opportunity to conduct discovery and present evidence, and therefore denies their due process rights. The Court's decision, though unsupported by record evidence, would bind all citizens of the state and extinguish their right to raise future challenges. Any such review of fact-intensive criteria will fundamentally reshape the

Court's review process, which, by the Court's own precedents, has hitherto been limited to simple, facial challenges. On the other hand, if the Court declined to review the plan's compliance with the criteria ordained by Amendment 5, it would violate its constitutional responsibility to determine the validity of redistricting plans under the Florida Constitution. The Court has never declined to assess the validity of a state legislative redistricting plan under any criteria set forth in the Florida Constitution. To do so in this instance would thus substantially alter the Court's review process.

29. If the Court ignores the 30-Day Rule and engages in a more lengthy review, it will frustrate the timely completion of the redistricting process and subvert the right to vote of all Florida citizens. A thoughtful and deliberate evaluation of complex criteria cannot be completed prior to candidate qualifying, or even before the first general election after reapportionment.

30. In Alaska, the state constitution contains detailed redistricting criteria. In 2001, redistricting spawned nine lawsuits. The parties engaged in extensive discovery, and about 160 witnesses were deposed. The court conducted a three-week trial and issued a 121-page opinion seven months after the cases were filed. The Alaska Supreme Court commended the trial court for its thorough review under "extreme time pressures." *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 n.1 (Alaska 2002).

31. The imposition of multiple, complex, fact-intensive criteria on the existing timelines in Article III, Section 16(c) would force the Florida Supreme Court either to ignore its constitutional duty to promptly determine the validity of redistricting plans, or, contrary to the restraint observed in its own precedents, to perform a desperate, slapdash review of fact-intensive claims which, under constitutional time pressures, will amount to mere guesswork and deny adversary interests due process and meaningful access to the courts. Amendment 5 not

only imposes a collection of fact-intensive standards, but it also fundamentally alters the Florida Supreme Court's review of state legislative plans. Because it radically alters—but does not explain—its effect upon existing provisions of the Florida Constitution, Amendment 5 embraces multiple subjects.

32. The ballot summary does not inform voters of Amendment 5's inevitable and substantial effect on the Court's review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It hides the ball as to the amendment's true effect, and fails to inform voters of the monumental change it makes to existing constitutional processes. A proposed amendment that works substantial changes to established constitutional processes, and does so without informing the voters, is inaccurate and misleading by omission. Amendment 5 is therefore invalid.

This Court Should Permit the Addition of the New Claims

33. Although intervening parties typically must "take cases as they find them," the court may order otherwise in its discretion. *Litvak v. Scylla Props., LLC*, 946 So. 2d 1165, 1175 (Fla. 1st DCA 2006) (citing Fla. R. Civ. P. 1.230); *accord Smith v. Atl. Boat Builder Co.*, 356 So. 2d 359, 362 (Fla. 1st DCA 1978) ("We note, however, that Fla. R. Civ. P. 1.230 while providing that intervention 'shall be in subordination to, and in recognition of, the propriety of the main proceeding' concludes with the qualifying clause 'unless otherwise ordered by the court in its discretion.'"). Moreover, while "the intervenor may not assert matters extraneous to his own interests . . . he may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties." *Williams v. Nussbaum*, 419 So. 2d 715, 717 n.1 (Fla. 1st DCA 1982).

34. In this case, the Florida House of Representatives could file its own complaint to assert its interests. But it would benefit all parties—and serve judicial efficiency—to have the existing claims and the Florida House of Representatives' claims presented in the same case. Intervention promotes judicial efficiency, and "[c]onsistent with the policies which the [intervention] Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County,* 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992).

35. The Florida House of Representatives seeks to join in Counts I through VI of the Plaintiffs' Complaint, and to extend them to Amendment 5. These challenges are equally applicable to both substantively identical amendments, as will be any defenses. And the additional challenge presented to Amendment 5 is closely related. These challenges are appropriately considered together. The alternative to intervention would be the Florida House of Representatives' filing its own action, asserting overlapping claims, and potentially burdening two judges with similar or identical issues. This inefficient alternative would offer no benefits to offset its many burdens, including duplicative proceedings and the potential for inconsistent judgments.

36. The proposed intervention would not prejudice any party. This Motion is filed immediately after the case was initiated, and the intervention will not delay or prolong the case.

37. Upon intervention, the Florida House of Representatives will assert the claims presented in this Motion.[4]

---

[4] The entirety of the Florida House of Representatives' claims is presented in this Motion as if presented in an independent complaint. Should the Court order it, the Florida House of Representatives will present its claims in a separately filed complaint. Given the need for expedited relief, the relative positions of the parties, and the nature of the case, the House respectfully suggests such additional pleading is unnecessary, and that this Motion should be accepted as the pleading of the House. *Cf. Wogisch v. Tiger*, 193 So. 2d 187, 188 (Fla. 4th DCA

WHEREFORE, the Florida House of Representatives respectfully seeks entry of an order (i) granting this Motion, (ii) designating the Florida House of Representatives as an intervening Plaintiff, (iii) accepting this Motion as the Florida House of Representatives' pleading, and (iv) granting such further relief as the Court finds appropriate.

Respectfully submitted,

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Attorneys for Proposed Intervening Defendant, Florida House of Representatives

1966) ("When intervention is permitted upon sufficient showing of interest . . . , the intervenor may, by proper pleading, make his petition for leave to intervene suffice as his complaint.").

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail this twenty-sixth day of May 2010, to the following:

Stephen M. Cody
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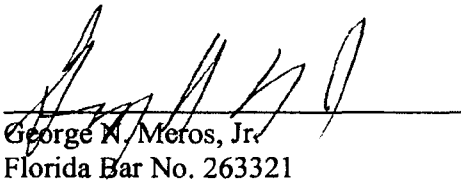
Palmetto Bay, Florida 33157
Attorneys for Plaintiffs

Dawn K. Roberts
Interim Secretary of State
Florida Department of State
500 South Bronough Street
Tallahassee, Florida 32399
Defendant



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Attorneys for Proposed Intervening Defendant, Florida House of Representatives

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____
(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS:

_____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: ___/___/___ **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new Section 21 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

BALLOT SUMMARY: Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new Section 21 to Article III

Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:
(1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____
SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-16

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS:

_____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: ___/___/___ **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-15

IN THE CIRCUIT COURT OF THE 2nd JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

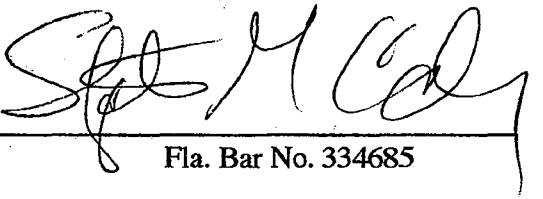
Defendant.

PLAINTIFFS' RESPONSE TO MOTION INTERVENE BY FLORIDA HOUSE OF REPRESENTATIVE

Plaintiffs, Corrine Brown and Mario Diaz-Balart, by and through their undersigned counsel, respond to the motion to intervene filed by the Florida House of Representatives and say that they have no objection to the relief sought therein.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Dawn K. Roberts, Interim Secretary of State, Florida Department of State, 500 South Bronough Street, Tallahassee, Florida 32399 and mailed and emailed to George N. Meris, Jr., GrayRobinson, P .A., Post Office Box 11189, Tallahassee, Florida 32302-3189, gmeros@gray-robinson.com this May 27, 2010.

STEPHEN M. CODY, ESQ.
16610 SW 82 Court
Palmetto Bay, FL 33157
Telephone: (305) 753-2250
Fax: (305) 468-6421
Email: stcody@stephencody.com



Fla. Bar No. 334685

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening Plaintiff,

v. Case No.: 2010 CA 001824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

NOTICE OF HEARING

YOU WILL PLEASE TAKE NOTICE that Proposed Intervening Plaintiff, Florida House of Representatives, will call up for hearing before the Honorable Jackie L. Fulford, Circuit Judge, Leon County Courthouse, Suite 365-D, 301 South Monroe Street, Tallahassee, Florida, on Wednesday, **June 9, 2010 at 7:30 a.m.**, or as soon thereafter as possible, the following:

1. **Florida House of Representatives' Motion to Intervene; and**
2. **Florida Senate's Motion to Intervene**

(30 minutes are reserved)

Out-of-town attorneys who wish to appear by telephone should use conference call number 866-750-7335, Passcode 850-577-2806.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Doug Smith, Office of Court Administration, Leon County Courthouse, 301 South Monroe Street,

Tallahassee, Florida 32301, Telephone (850) 577-4401, Facsimile (850) 487-7947, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished as indicated below this 3rd day of June, 2010, to the following:

By E-Mail and U.S. Mail:
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By Hand Delivery:
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Interim Secretary of State
Florida Department of State
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By E-Mail and U.S. Mail:
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Attorneys for Florida Senate

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abardos@gray-robinson.com
Attorneys for Proposed Intervening Plaintiff, Florida House of Representatives

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening Plaintiff,

v. Case No.: 2010 CA 001824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

NOTICE OF APPEARANCE OF CO-COUNSEL

NOTICE IS HEREBY GIVEN that Miguel De Grandy enters his appearance as co-counsel for the Proposed Intervening Plaintiff, Florida House of Representatives.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished as indicated below this 7th day of June, 2010, to the following:

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abardos@gray-robinson.com

Attorneys for Proposed Intervening Plaintiff, Florida House of Representatives

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

SCHEDULING ORDER

This cause came before the Court for hearing on June 9, 2010. Counsel for all parties, including the intervenors (collectively, the "Parties"), were present personally or telephonically.

Consistent with Florida Rule of Judicial Administration 2.215(g) and the agreement of counsel, and being otherwise fully advised, the Court finds and orders as follows:

1. Intervening Plaintiff, Florida Senate, shall serve its complaint on or before June 14, 2010. Defendant shall file responses to the pleadings of Plaintiffs and Intervening Plaintiffs on or before June 28, 2010.

2. Plaintiffs and Intervening Plaintiffs shall serve witness and exhibit lists and expert witness disclosures on or before July 6, 2010. Defendant shall serve witness and exhibit lists and expert witness disclosures on or before July 12, 2010. The expert witness disclosures shall

identify all expert witness intended to be called at trial and briefly summarize the expert witness' expected testimony.

3. The Parties shall serve any dispositive motions on or before July 16, 2010, and any responses to such dispositive motions on or before July 21, 2010.

4. The discovery period shall close on July 21, 2010.

5. All papers which, under the Florida Rules of Civil Procedure or this Scheduling Order, are required to be served on the Parties, shall additionally be furnished to the Parties by electronic mail no later than the date of service. All responses by the Parties to requests for written discovery shall be due within 20 days after the date of service by electronic mail, without regard to Florida Rule of Civil Procedure 1.090(e).

6. The Court shall conduct a non-jury trial at the Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida, beginning on July 26, 2010. Counsel shall be present and prepared to begin proceedings at 7:30 a.m. The Court may hear argument on any dispositive motions before trial at a time to be determined.

DONE and **ORDERED** this 11th day of June 2010, Leon County, Florida.

JACKIE L. FULFORD
CIRCUIT JUDGE

Copies to Counsel of Record

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

CASE NO: 2C10 CA 001824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING FLORIDA SENATE'S MOTION FOR LEAVE TO INTERVENE

THIS CAUSE having come before the Court and the Court, being otherwise fully apprised in the premises, it is, hereby,

ORDERED AND ADJUDGED that the Motion For Leave To Intervene As An Interested Party filed by the Florida Senate is GRANTED.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida on this 9th day of June, 2010.

CIRCUIT JUDGE

Copies Furnished:

James A. Scott, Esq.
Stephen M. Cody, Esq.
Attorney for Sec. of State
George Meros, Esq.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

This cause came before the Court on June 9, 2010, upon the respective Motions to Intervene filed by the Florida House of Representatives on May 26, 2010. The Court, having reviewed the Motion and being otherwise fully advised, finds that the intervention of the Florida House of Representatives is appropriate. Accordingly, the Florida House of Representatives' Motion to Intervene is **GRANTED**. The Court accepts the allegations in the Motion to Intervene as the operative pleading of the Florida House of Representatives.

DONE and **ORDERED** this 11th day of June 2010, Leon County, Florida.

JACKIE L. FULFORD
CIRCUIT JUDGE

Copies to Counsel of Record

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

CIVIL DIVISION
Case No.: 2010 CA 1824
Judge: Jackie Fulford

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of the State of Florida,

Defendant.

MOTION OF BOB GRAHAM TO INTERVENE AS A DEFENDANT

Intervenor, BOB GRAHAM, moves to intervene as a defendant in this action, with the right to litigate all matters arising therein. In support of this motion, Intervenor states:

Facts Supporting Intervention

1. Plaintiffs, CORRINE BROWN and MARIO DIAZ-BALART, have initiated this action seeking a declaration by this Court that the ballot summary of Amendment 6 – designated in their complaint as the "Congressional Amendment" – is misleading and violates Section 101.161(1), Florida Statutes, and an injunction prohibiting the Defendant from directing that Amendment 6 be placed on the 2010 general election ballot.

2. The "Congressional Amendment" is the product of a citizen initiative, which was placed on the ballot following review of the ballot summary and ballot title by the Florida Supreme Court and the submission of in excess of 681,000 signatures of Florida electors.

3. On January 29, 2009, the Florida Supreme Court held that the "Congressional Amendment" met the legal requirements of Article XI, Section 3, Florida Constitution, and that its ballot title and summary complied with Section 101.161, Florida Statutes. *Advisory Opinion to the Attorney General Re: Standards for Establishing Legislative District Boundaries,* 2 So. 3d 175 (Fla. 2009).

4. Defendant DAWN K. ROBERTS is the Interim Secretary of State of the State of Florida. She is the chief election officer of the state and the head of the DEPARTMENT OF STATE. Pursuant to Section 100.371(4), Florida Statutes, it was determined that the "Congressional Amendment" had received the requisite number of signatures for placement on the ballot and Secretary of State Kurt Browning, the predecessor in office of Defendant DAWN K. ROBERTS issued a certificate of ballot position and designated the "Congressional Amendment" as Amendment 6.

5. Intervenor, BOB GRAHAM, is a resident of Miami-Dade County, Florida, and a registered voter and taxpayer. He has regularly voted in Florida general elections and on ballot proposals and intends to vote in the November 2010 general election. He has supported and continues to support Amendment 6

which establishes standards for the Florida Legislature in establishing congressional districts following the decennial census.

6. Plaintiffs, CORRINE BROWN and MARIO DIAZ-BALART, seek to nullify BOB GRAHAM's constitutional right to seek to amend the State Constitution through the initiative process set forth in Article XI, Section 3, Florida Constitution.

7. Accordingly, Intervenor, BOB GRAHAM, has an interest in this pending action and should be permitted to intervene as a matter of right.

Standards for Granting the Motion to Intervene

8. Rule 1.230, Florida Rules of Civil Procedure, provides as follows:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be subordinate to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

See Williams v. Nussbaum, 419 So. 2d 715, 717 n. 1 (Fla. 1st DCA 1982)(stating that an intervenor "may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by the original parties.").

9. Furthermore, Florida courts hold that the right to intervene should be liberally construed. As the Florida Supreme Court has stated:

> It is generally been held that the interest which will entitle a person to intervene under this provision must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a

> claim to the demand in the suit or some part thereof, or a claim to, or lien upon the property or some part thereof, which is the subject matter of the litigation.

Miracle House Corporation v. Haige, 96 So. 2d 417, 418 (Fla. 1957)(citations and internal quotes omitted).

10. Intervenor, BOB GRAHAM, has such an interest. To the extent that Plaintiffs, CORRINE BROWN and MARIO DIAZ-BALART, seek to remove Amendment 6 from the 2010 general election and nullify his constitutional right to seek the State Constitution through the initiative process set forth in Article XI, Section 3, Florida Constitution, he has a direct and immediate interest in this litigation and he will gain or lose by the direct legal operation and effect of any judgment entered by this Court.

Prayer

WHEREFORE, Intervenor, BOB GRAHAM, respectfully asks this Court to enter an order granting this motion to intervene as a defendant in this action with the right to litigate all matters arising therein.

Respectfully submitted on this 11th day of June 2010 by:

MARK HERRON
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Facsimile: (850) 656-6750

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided to the following by United States Postal Service on this 11th day of June, 2010:

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Mark Herron

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

CASE NO: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

INTERVENOR'S COMPLAINT OF THE FLORIDA SENATE

COMES NOW, Intervenor, the FLORIDA SENATE, through its President Jeff Atwater (the "Florida Senate"), and by and through its undersigned counsel and hereby files this, its Intervenor's Complaint against the Defendant DAWN K. ROBERTS (hereinafter referred to as the "Defendant"), in her capacity as Interim Secretary of State of the State of Florida, and in support thereof states the following:

1. This Complaint is filed in addition to the claims alleged by Plaintiffs' in their initial Complaint. On June 9, 2010, this Court granted the Florida Senate and the Florida House of Representative's Motions to Intervene into the case at bar as Party Plaintiff's. The Florida Senate expressly adopts and incorporates the claims raised by Plaintiffs and the Florida House of Representatives in their respective Complaints.

2. This lawsuit, filed by United States Congressman Mario Diaz-Balart and United States Senator Corrine Brown, challenges the validity of proposed constitutional amendments to Florida's constitutional apportionment processes that seek to impose a new set of contradictory and unworkable standards thereon. Pursuant to this Court's Order granting leave to the Florida

Senate to intervene as a Party Plaintiff, the claims raised herein will apply to Amendments 5 and 6.

PARTIES, JURISDICTION AND VENUE

3. The Florida Senate is a legislative body created by Article III of the Constitution of the State of Florida vested, along with the Florida House of Representatives, with the legislative power of the State

4. Pursuant to Article III, Section 16 of the Constitution of the State of Florida, the Florida Senate (along with the House of Representatives) is vested with the duty to apportion the State and Congressional voting districts in accordance with the United States Constitution, the Constitution of the State of Florida and all applicable state and federal law in the second year following each decennial census (2010). Specifically, Article III, Section 16(a) of the Florida Constitution mandates that the "legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state..." The Florida Legislature is also vested with the duty to reapportion the congressional districts apportioned to the State of Florida.

5. Defendant, in her capacity as Interim Secretary of the State of Florida, is the chief elections officer of the State of Florida. In that capacity, Defendant is charged with the duty under Florida law to certify the items, including proposed constitutional amendments 5 and 6, which are scheduled to be included on the next statewide general election ballot. A copy of the proposed constitutional amendments at issue in this litigation is attached hereto as Exhibit A.

6. Venue is proper in this Court because the Defendant is headquartered in Leon County, Florida.

7. This Court has authority to grant declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes.

8. The Court also has jurisdiction over this cause, because the proposed constitutional amendments at issue will be in express conflict with paramount federal law, the Federal Voting Rights Act of 1965 (42 U.S.C. § 1971, *et seq.*). Thus, this Court has jurisdiction to enjoin the proposed constitutional amendments from being placed on the ballot as their contradictions with federal law will render them futile and incapable of being made operative under any circumstances. *See Gray v. Winthrop*, 115 Fla. 721 (1934).

GENERAL ALLEGATIONS

I. The Redistricting Process

9. The Constitution of the State of Florida establishes a carefully constructed, time-sensitive process for the decennial reapportionment of state legislative districts by the Legislature. Art. III, § 16, Fla. Const.

10. The redistricting process for the 2012 cycle has already begun. Committees of the Florida Legislature have met on numerous occasions to plan for the reapportionment process and to discuss the proposed constitutional amendments at issue and their impact upon the apportionment process. In early 2011, the United States Census Bureau will release state-by-state data, and the Florida Legislature will hold dozens of public hearings across the state to listen to the voters and gather essential information.

11. In contrast to state legislative redistricting, the Constitution of the State of Florida does not regulate congressional redistricting, and congressional plans are not subject to automatic review by the Florida Supreme Court. Pursuant to its authority to regulate elections

for Congress, *see* U.S. Const, Art. I, § 4, cl. 1, the Florida Legislature has, in recent decades, redrawn Florida's congressional districts simultaneously with its decennial reapportionment of state legislative districts.

II. The Challenged Amendments

12. The Florida Department of State, Division of Elections, approved Amendments 5 and 6 for circulation on September 28, 2007. These proposed constitutional amendments have since been certified for placement on the 2010 general election ballot in November, 2010.

13. The proposed constitutional amendments purport to create new, fact-intensive criteria applicable to redistricting. One applies to state legislative redistricting (the "State Legislative Petition"), while the other imposes virtually identical requirements upon congressional redistricting.

14. The criteria mandated by the proposed constitutional amendments at issue in this litigation are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rules by which their effects can be divined and their purposes accomplished. Moreover, they lack judicially discoverable or manageable standards that would enable the courts to construe and enforce their requirements coherently, objectively, predictably, and systematically. Furthermore, the proposed Amendments contain an unconstitutional and unworkable "intent" standard that will impermissibly delve into the intent of the Legislature as a whole while also chilling the public hearings that are vital to the redistricting process. Lastly, the proposed constitutional amendments also patently violate paramount federal law relative to the voting rights of minorities and will therefore ultimately be futile and inoperable.

COUNT I – REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF DUE TO THE AMENDMENTS PATENT CONFLICT WITH PARAMOUNT FEDERAL LAW

15. The allegations contained in Paragraphs 1 through 14 above are incorporated as though restated herein.

16. This is an action for declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes. Additionally, pursuant to the Supreme Court of Florida holding in the case of *Gray v. Winthrop*, an administrative officer may be enjoined from placing a proposed constitutional amendment on the ballot when the amendment, if adopted, would patently violate paramount federal law, and would inevitably be futile and incapable of being made operative under any circumstances. 115 Fla. 721 (Fla. 1934).

17. State statutes and constitutions are subject to applicable prohibitions and limitations of the United States Constitution, the supreme law of the land, which all officers and all electors are required to take an oath to support. State statutes or state constitutions are also controlled by, and subject to federal organic law and federal statutes by virtue of the supremacy clause of the United States Constitution. *U.S. v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1311 n.14 (11th Cir. 1999) (explaining that federal forfeiture statutes trump the homestead protections of the Florida constitution); *see also, Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F. Supp. 282, 289 (S.D. Tex. 1986) ("assuming that the [federal statute] is truly in conflict with the Texas Constitution, the Supremacy Clause of the United States Constitution requires that the provisions of the federal statute prevail.").

18. The language and application of the proposed constitutional amendments at issue will patently conflict with paramount federal law, namely the Voting Rights Act of 1965 (42 U.S.C. § 1971).

19. Section 2 of the Voting Rights Act protects minorities from electoral laws or procedures that cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Moreover, a reapportionment plan is violative of section 5 of the Voting Rights Act if the plan would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003). Five Florida counties are currently covered jurisdictions under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973. Loss of minority districts from a statewide plan is sufficient to show a violation of section 5 of the Voting Rights Act. *Georgia v. Ashcroft*, 539 U.S. at 479.

20. To comply with the non-vote dilution provision of Section 2 and the non-retrogression standard of Section 5, federal courts have expressly authorized and affirmed a legislature's use of incumbency and political party affiliation data in the redistricting process. As recently as 2002 in Florida, a three judge federal panel expressly held that certain challenged districts from the 2002 Florida Reapportionment plan were in compliance with the Voting Rights Act by relying upon political party and incumbency data in the same manner as the Florida Legislature did during the redistricting process. *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D. Fla. 2002).

21. In upholding two questioned Florida Congressional Minority Districts, Districts 3 and 23 (Corrine Brown and Alcee Hastings), the *Martinez* Court expressly upheld these districts as affording minorities sufficient opportunities to participate in political process based upon political party affiliation data and the incumbent status of the elected official, just as the Legislature did in crafting the 2002 plan. *Id.* at 1302-03. Since Amendment 5 applies to state legislative districts, the vote dilution and retrogressive effects that will be caused by the

Amendments prohibition on considering political party and incumbency data (alleged supra) will also be applicable to State House and State Senate minority seats as well, such as those held by Senator Chris Smith (Senate District 29) and Senator Gary Siplin (Senate District 19), among others.

22. The proposed constitutional amendments at issue, however, expressly prohibit the Florida Legislature from having an intent to favor or disfavor a political party or an incumbent. Under this mandate, the Florida Legislature would be legally prohibited from utilizing political party or incumbency data in the redistricting process which it has been expressly authorized to use by the Voting Rights Act, vis-a-vis the *Martinez* Court, to ensure that the crafted apportionment plan is in compliance with the Voting Rights Act.

23. This prohibition, on its face, patently contravenes both the *Martinez* Court's express approval of the Florida Legislature's use of such data and the *Martinez* Court's own utilization of such data in finding that challenged minority districts were in compliance with the Voting Rights Act. If the Florida Legislature is prohibited from utilizing political party or incumbency data in the redistricting process to ensure that retrogression does not occur, minority seats will be lost as the likelihood of a district's performance for a minority candidate has been determined based upon data such as political party affiliation and incumbency. *See Martinez v. Bush, supra.*

24. The proposed constitutional amendments will interfere with and obstruct the opportunity of minority voters to participate in the political process and to elect candidates of their choice. The proposed constitutional amendments will also cause the loss of minority seats as political party and incumbency data will be precluded from consideration in the redistricting process. In particular, by prohibiting the use of incumbency as a factor in reapportionment,

minority voters will be denied the benefits of the achievements and participation of their elected officials in plain violation of federal law. When a plan crafted under the proposed constitutional amendments causes the loss of minority seats, the criteria mandated by the proposed constitutional amendments and the resulting apportionment plan itself will be inexorably in violation of the non-vote dilution and non-retrogression mandates of the Voting Rights Act.

25. On January 29, 2009, the Florida Supreme Court performed its narrowly-tailored review of the proposed constitutional amendments at issue and rendered an advisory opinion that their summaries are clear and unambiguous and that the proposed amendments are limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

26. Subsequently, on March 9, 2009 the United States Supreme Court rendered its opinion in the case of *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). Therein, the Court revisited the protections afforded to the maintenance and creation of minority districts pursuant to section 2 of the Voting Rights Act. This case was decided after the proposed constitutional amendments at issue were certified to the general election ballot.

27. Due to the proposed constitutional amendments' express violation and contradiction of paramount federal law, as described above, the proposed constitutional amendments will be futile and incapable of being made operative under any circumstance; as a result, the Defendant must be enjoined from placing proposed Amendments 5 and 6 on the ballot in order to avoid inevitable litigation and undue expenses to the State.

28. The Florida Senate has a clear legal right to injunctive relief and lacks an adequate remedy at law.

29. It is in the public interest for this Court to grant injunctive relief to prevent irreparable harm to the Florida Senate and the voters of Florida.

COUNT II-DECLARATORY RELIEF

30. This is a claim declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes. The allegations contained in Paragraphs 1 through 14 above are incorporated as though restated herein.

31. The criteria mandated by the proposed constitutional amendments are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished.

32. For example, pursuant to subsection (1) of the proposed constitutional amendments, "No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or incumbent." (See Exhibit A). Hence, the proposed constitutional amendments are unworkable because they provide no parameters or guidance as to how the "intent to favor or disfavor" a political party or incumbent will be ascertained.

33. The public hearing process currently used in Florida that allows the electorate to espouse their views relative to their respective districts will be chilled as any statements made to legislators in favor of a party or incumbent will be utilized to support a claim that a district was drawn with mal-intent. Furthermore, Legislators will be unable to amend proposed districts based upon comments received from the voters of Florida at public hearings as said statements will be used to support a claim that a district was drawn with an impermissible "intent to favor or disfavor."

34. Most importantly, any searching judicial scrutiny into the intent of specific Legislators and their decisions would violate the separation of powers scheme specifically set out in the Constitution of the State of Florida.

35. Moreover, the Amendments are also unworkable due to their mandate that districts "shall be compact." (See Exhibit A).

36. The proposed constitutional amendments do not provide the Florida Senate with: a definition of what a "compact" district is; what a "compact" district looks like, or with any parameters whatsoever that would provide guidance to the Florida Senate as to what would constitute a "compact" district.

37. These facial and operational defects will substantially impede the Florida Senate's ability to effectively carry out its constitutionally mandated reapportionment duties since it will perpetually be operating in a state of legal and operational uncertainty with respect to its perceived intent as well as attempting to comply with an inherently subjective compactness requirement.

38. Moreover, as noted above, any searching judicial scrutiny into the intent of specific Legislators and their decisions would violate the separation of powers scheme specifically set out in the Constitution of the State of Florida.

39. The parties hereto have a bona fide, actual, present practical need for declaration by this Court.

40. The declaration sought herein concerns a present, ascertained or ascertainable state of facts, or a present controversy as to a state of facts.

41. Constitutional rights and obligations of the Florida Senate are dependent upon the law applicable to the facts of this case.

42. The adverse interests are all before this Court.

43. The Florida Senate has an actual, present and adverse interest in the subject matter of this Complaint.

44. The relief sought herein in not merely the giving of legal advice or the answer to questions posed for curiosity but is an actual controversy necessitating a decision.

45. The Florida Senate has a clear legal right to injunctive relief and lacks an adequate remedy at law.

46. It is in the public interest for this Court to grant injunctive relief to prevent irreparable harm to the Florida Senate and to the voters of Florida.

WHEREFORE, the Plaintiff-Intervenor, Florida Senate, respectfully requests this Court to:

a. Hold that the proposed Amendments 5 and 6 violate paramount federal law, and will thus be futile and incapable of being made operative under any circumstances in violation of Florida law;

b. Hold that proposed Amendments 5 and 6 to the Florida Constitution are also vague, conflicting, violative of separation of powers, and are wholly incapable of being made operative

c. Enjoin the Defendant from placing proposed Amendments 5 and 6 on the 2010 general election ballot; and

d. Grant Plaintiff-Intervenor such other relief as the Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by U.S. mail to Stephen M. Cody, Esq., Attorney for Plaintiffs, 16610 S.W. 82 Court, Palmetto Bay, FL 33157, George Meros, Esq., Attorney for Intervenor, Gray Robinson, P.A., 301 South

Bronough Street, Suite 600, P.O. Box 11189 (32302-3189), Tallahassee, Florida 32301 and Michael J. Tanner, Esq., Attorney for Defendant, Tanner Bishop, The Modis Building, One Independent Drive, Suite 1700, Jacksonville, Florida 32202, this 14th day of June, 2010.

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CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS:

_____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: / / **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE | DA | SERIAL NUMBER: 07-15

EXHIBIT

tabbies

A

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS: _____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: ___ / ___ / ___ **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new Section 21 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

BALLOT SUMMARY: Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new Section 21 to Article III

Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:
(1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-16

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant.

NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned will bring on for hearing the Motion of Bob Graham to Intervene as a Defendant, before the Honorable Jackie Fulford, Circuit Court Judge, in Room 365-D at the Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida, on **Wednesday, June 23, 2010**, beginning at **7:20 a.m.**, or as soon thereafter as counsel may be heard. One half hour has been reserved for this hearing.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Respectfully submitted this 15th day of June 2010 by:

Lynn C. Hearn

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Lynn C. Hearn

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO MOTION OF BOB GRAHAM TO INTERVENE AS DEFENDANT

Intervening Plaintiff, the Florida House of Representatives (the "House"), responds to Bob Graham's Motion to Intervene as a Defendant on behalf of two proposed constitutional amendments (the "Amendments") sponsored by FairDistrictsFlorida.org ("Fair Districts").

The Motion must be denied for at least two reasons:

First, Graham describes himself as a mere supporter of the Amendments who hopes to vote for them in November. If this interest warranted intervention, the Court would have to extend an equal privilege to any politically interested member of the general public. And Graham adds nothing to the already robust defense presented by the Secretary of State.

Second, Graham hides the ball and does not disclose his position as Honorary Chairman of Fair Districts. Graham's proposed intervention is a thin covering for Fair Districts' vicarious

participation. The Court must reject intervention by surrogate.[1]

Legal Standard

Under Florida Rule of Civil Procedure 1.230, a court must first "determine that the interest asserted is appropriate to support intervention." *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992). The asserted interest must be "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Sullivan v. Sapp*, 866 So. 2d 28, 33 (Fla. 2004) (quoting *Carlisle*, 593 So. 2d at 507).

"Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention." *Carlisle*, 593 So. 2d at 507. In the exercise of its discretion, the court must consider any "relevant circumstance." *Id.*

Intervention, therefore, "is not a matter of right, but rests within the sound discretion of the trial judge." *Dep't of Children & Family Servs. v. Brunner*, 707 So. 2d 1197, 1198 (Fla. 1st DCA 1998); *accord Fasig v. Fla. Soc'y of Pathologists*, 769 So. 2d 1151, 1153 (Fla. 5th DCA 2000). A trial court's denial of a motion to intervene is reviewed under the deferential abuse-of-discretion standard. *Litvak v. Scylla Props., LLC*, 946 So. 2d 1165, 1172 (Fla. 1st DCA 2006).

Argument

The sole interest Graham discloses is as a voter and taxpayer who supports the Amendments and hopes to vote for them in November. This is insufficient. Unknown numbers of Florida citizens share the same interest. Unknown numbers of Florida citizens feel a similar interest in the defeat of the Amendments. Were the Court to grant intervention on such grounds,

---

[1] The Motion does not identify "Bob Graham" beyond the representation that Bob Graham is a taxpayer and registered voter who supports the Amendments and hopes to vote for them in November. The House presumes that "Bob Graham" is former Governor and United States Senator Bob Graham.

it must extend the same privilege to all supporters and opponents, and there would be no logical end to interventions. This litigation would become inefficient, cumbersome, or impracticable.

Graham does not suggest, moreover, that the Defendant is unable to protect the asserted interest. "A trial court can, within its discretion, deny a motion for intervention when it is clear that an existing party can adequately protect the proposed intervenor's asserted interest." *Dep't of Children & Family Servs. v. Brunner*, 707 So. 2d 1197, 1198 (Fla. 1st DCA 1998); *accord Fla. Wildlife Fed., Inc. v. Bd. of Trs. of the Internal Improvement Tr. Fund*, 707 So. 2d 841 (Fla. 5th DCA 1998). Here, the Defendant has retained outside counsel who has appeared before the Court and given every indication of competence and willingness to defend the Amendments.

The House opposes any effort by Graham to appear as a surrogate for Fair Districts. Graham is more than a mere supporter of the Amendments: he is an Honorary Chairman of Fair Districts. Graham is represented in this litigation by Fair Districts' attorneys, *see Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009), and by the same attorneys who, in pending litigation, now challenge a redistricting amendment opposed by Fair Districts, *see Fla. State Conf. of NAACP Branches v. Dep't of State*, Case No. 2010-CA-1803 (Fla. 2d Cir. Ct.). Two plaintiffs in that case are themselves Honorary Chairmen of Fair Districts, and, like Graham, neither has disclosed his affiliation to the Court.

Fair Districts has not sought to intervene in its own right—and for good reason. Because its Amendments fail to inform voters of their harmful effects on minority rights, a direct defense is politically unpalatable. And as a party, Fair Districts would be subject to full discovery into the drafting and meaning of the Amendments.

Fair Districts should not be permitted, however, to participate surreptitiously through a proxy. If Fair Districts seeks the benefits of intervention—presenting its arguments to the Court

through its counsel—it should move to intervene and become a party in name, as well as fact, subject to discovery to the same extent as other parties. It should not be permitted to shield itself from public accountability for the positions it might assert in this Court.

* * *

Graham's asserted interest is no different from the interest shared by all politically interested Florida citizens. Graham does not claim that the Defendant's counsel is unable to protect the asserted interest. And the proposed intervention is little better than a ruse to permit Fair Districts to participate anonymously, without any responsibility for the statements it might make through others. For all of these reasons, and especially because the proposed intervention flies under false colors, the Court should exercise its broad discretion to deny Graham's Motion.

WHEREFORE, Intervening Plaintiff, the Florida House of Representatives, requests that the Court deny Bob Graham's Motion to Intervene, or allow limited discovery to determine the extent of Fair Districts' involvement in Graham's proposed intervention.

Respectfully submitted,

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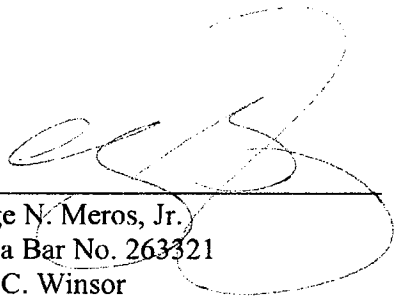

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IN THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v. CASE NO: 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

NOTICE OF APPEARANCE

Michael G. Tanner of the law firm of Tanner Bishop gives notice of appearance as counsel for the Defendant in this cause, and hereby requests that a copy of all pleadings, correspondence, orders or other papers be provided to the undersigned at the address provided below.

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

CASE NO: 10-CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S RESPONSE IN OPPOSITION TO MOTION OF BOB GRAHAM TO INTERVENE AS DEFENDANT

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel and hereby files this, its Response in Opposition to the Motion of Bob Graham ("Graham") to Intervene as a Defendant into the above styled litigation and in support thereof states the following:

I. INTRODUCTION

1. On June 11, 2010, potential Intervenor Graham filed a Motion to Intervene into the case at bar as a party Defendant.

2 For the reasons more fully stated herein, Graham's Motion to Intervene must be denied as he does not have a direct or immediate legal interest in the narrow subject matter of this litigation sufficient to warrant intervention as a party. Furthermore, Graham will not gain or lose anything by the direct legal operation and effect of any judgment in this case.

6-17-10

II. MEMORANDUM OF LAW

A. Standard of Review

Under Florida Rule of Civil Procedure 1.230, a court must first "determine that the interest asserted is appropriate to support intervention" by the movant. *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992). The asserted interest must be "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Sullivan v. Sapp*, 866 So. 2d 28, 33 (Fla. 2004) (quoting *Carlisle*, 593 So. 2d at 507). A showing of an indirect, inconsequential or contingent interest is wholly inadequate. *Stefanos v. Rivera-Berrios*, 673 So.2d 12, 13 (Fla. 1996). Furthermore, to justify intervention, the asserted interest must be already at issue and be of a kind the would-be intervenor is a proper part to raise. *Y.H. v. F.L.H.*, 784 So.2d 565 (Fla. 1st DCA 2001).

"Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention." *Carlisle*, 593 So. 2d at 507. In the exercise of its discretion, the court must consider any "relevant circumstance." *Id.* Intervention, while it can be liberally granted, is not an absolute right and rests within the sound discretion of the trial court. *Florida Wildlife Federation, Inc. v. Board of Trustees of Internal Imp.*, 707, So.2d 841 (5th DCA. 1998).

B. Graham Does Not Have a Sufficient Interest to Intervene as a Party Defendant

Florida case law unambiguously demands the denial of Graham's Motion to Intervene. As sole justification for his Motion to Intervene as a party-defendant, Graham alleges that he has a "direct and immediate interest" in this litigation only because he is a registered voter and taxpayer in the State of Florida who intends to vote in the November 2010 general election. (Graham Motion to Intervene, par. 5). Graham further states, albeit erroneously and in

conclusory fashion, that he has a right to intervene into this case as an interested party because the Plaintiffs' are allegedly seeking to nullify his right to amend the Florida Constitution. (Graham Motion to Intervene, par. 10). Graham's contention in this regard is simply incorrect. The narrow legal issue before the Court in this litigation is not whether the Florida Constitution can be amended by initiative but whether the two proposed constitutional amendments on redistricting are, in fact, legal and valid under Florida and federal law. Graham remains free to vote in the general election and to support various constitutional initiatives. However, he has no legitimate interest in being allowed to vote on proposed constitutional amendments that may be illegal and invalid.

Plainly, the allegations contained in Graham's Motion to Intervene fall far short of establishing the requisite "interest" in the narrow scope of this litigation so as to justify intervention. Simply put, this litigation is a narrowly-tailored and time-sensitive challenge to the legal and procedural validity of two proposed constitutional amendments currently set to be placed on the November 2010 general election ballot. In his Motion to Intervene, Graham has failed to establish any special interest or personal right, aside from the right to participate in the initiative process as millions of other Florida citizens have (not the legal process of determining the validity of proposed constitutional amendments), that would make his participation in the narrow legal issue presented by this case necessary. Absent such a direct showing, Graham is not entitled to intervene into this case as he will not gain or lose by legal operation of a judgment herein. *See Kissoon, M.D. v. Araujo*, 849 So.2d 426 (Fla. 1st DCA 2003)

Indeed, Grahams' proffered support and desire to vote for the proposed constitutional amendments at issue, should they be found to be legal and placed on the ballot, is the kind of contingent and indirect interest that has been found to be wholly inadequate to support

intervention. *See Stefanos v. Rivera-Berrios, supra.* Additionally, Graham, in his individual capacity, is not a proper party-defendant to assert a claim relative to the ministerial responsibilities of the Secretary of State relative to placing the proposed constitutional amendments at issue onto the 2010 general election ballot, nor is he, solely as a Florida voter, a proper party to defend the validity and constitutionality of these proposed amendments which seek to vastly alter the reapportionment responsibilities of the Florida Legislature. *See Y.H. v. F.L.H. supra.*

It should be noted that Graham serves as an Honorary Co-Chair of Fair Districts Florida, a political organization that sponsored the proposed constitutional amendments at issue. Graham's status within the organization that sponsored the Amendments at issue raises serious questions as to whether FDF is entitled to intervene into the case at bar. However, since Fair Districts Florida has not yet sought intervention into this litigation, the Florida Senate will not address their ability to do so at this juncture. Should Fair Districts Florida seek intervention through Graham or others subsequent to Graham's instant application, the Florida Senate expressly reserves the right to file supplemental memorandums of law relative to whether Fair Districts Florida possesses a sufficient "interest" in this litigation to justify formal intervention.

WHEREFORE, the Florida Senate respectfully requests that this Honorable Court enter an Order denying the Motion of BOB GRAHAM to Intervene as a Defendant, and for all such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 17th day of June, 2010.

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Corrine Brown and Mario Diaz-Balart et al v. Dawn K. Roberts, et al.
Case No.: 2010-CA-1824

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant.
_____/

REPLY BY BOB GRAHAM TO PLAINTIFFS' RESPONSES TO GRAHAM'S MOTION TO INTERVENE

BOB GRAHAM files this reply to the responses by Plaintiffs Brown and Diaz-Balart, Intervening Plaintiff the Florida House of Representatives and Intervening Plaintiff the Florida Senate (collectively, "Plaintiffs") to the Motion of Bob Graham to Intervene as a Defendant.

As demonstrated below, Bob Graham is entitled to intervention. Graham has a legally cognizable interest in this proceeding, and this Court should permit him to intervene.

I. GRAHAM HAS A LEGALLY COGNIZABLE INTEREST IN THIS ACTION

Bob Graham is a Florida citizen and registered voter who supports Amendments 5 and 6 and wishes to be able to vote in favor of these citizens' initiatives in the upcoming general election.[1] Were Plaintiffs to obtain the relief they seek in this action, Amendments 5 and 6 will be removed from the ballot and Graham will be unable to vote for their adoption. Conversely, if judgment is entered in favor of the defendant, Amendments 5 and 6 will remain on the ballot and Graham will be able to vote in favor of them. This is an interest "of such a direct and immediate character that [he] will either gain or lose by the direct legal operation and effect of the judgment." *Miracle House Corp. v. Haige*, 96 So. 2d 417, 418 (Fla. 1957).

It is well-settled in Florida that a voter has standing to participate in litigation regarding whether a proposed constitutional amendment satisfies constitutional and statutory requirements for placement on the ballot. In *Crawford v. Gilchrist*, 59 So. 963 (Fla. 1912), the Governor sued to prohibit the Secretary of State from placing constitutional amendments proposed by the legislature on the ballot because the legislature had not met certain procedural requirements in passing the joint resolutions. The Court held the Governor, who sued as "Governor and also a citizen, taxpayer and elector, [was clearly] a proper party to these injunction proceedings." *Id.* at 967. Likewise, in *City of Hialeah v. Delgado*, 963 So. 2d 754 (Fla. 3d DCA 2007), *rev. dismissed*, 970 So. 2d 824 (Fla. 2007), the appellate court found the trial court was "entirely correct"

[1] The initial complaint in this action challenged only Amendment 6. Subsequent to the filing of Bob Graham's motion to intervene, the Senate filed a complaint challenging Amendment 5. Bob Graham has actively supported both amendments and wishes to vote in favor of them in the general election.

in ruling that the plaintiff had standing as a citizen and voter to challenge whether ballot language complied with subsection 101.161(1), Florida Statutes. *Id.* at 756.

Having standing to sue means having a "legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation." *Equity Resources, Inc. v. County of Leon,* 643 So. 2d 1112, 1117 (Fla. 1st DCA 1994), *rev. denied,* 651 So. 2d 1194 (Fla. 1995). This interest is virtually identical to the interest necessary for intervention, i.e., an "interest . . . of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Morgareidge v. Howey,* 78 So. 14, 15 (Fla. 1918). Thus if a citizen and voter has sufficient interest to *sue* regarding the placement of a proposed constitutional amendment on the ballot, he necessarily must also have sufficient interest to intervene to *defend* a citizens' initiative against removal from the ballot. Graham has just such an interest.

Contrary to Plaintiffs' assertion, Graham need not assert an interest above and beyond the interests of other Florida voters to be eligible for intervention; this argument "misapprehends the difference between taxpayer standing and standing in election law cases." *City of Hialeah,* 963 So. 2d at 756. Graham's interest is indeed the same as other voters who wish to amend their constitution by voting in favor of Amendment 6; all such voters have a direct and immediate interest in this litigation in that they will gain

or lose—i.e., be able to vote for constitutional amendments they support, or not—by direct legal operation and effect of the judgment in this case.[2]

But this hardly means, as Plaintiffs assert, that the Court must permit intervention by "all supporters and opponents, and there will be no logical end to interventions," causing the litigation to become "inefficient, cumbersome, or impracticable." (House Response at 2-3). This fantastical parade of horribles ignores the Court's obligation to exercise "sound discretion to determine whether to permit intervention," by considering "a number of factors, including the derivation of the interest, . . . the size of the interest, the potential for conflicts or new issues, and any other relevant circumstance." *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992). If an unwieldy number of voters were to seek to intervene in this action, it certainly would be appropriate for the Court to exercise its discretion to deny intervention to prevent the litigation from becoming unmanageable. But Graham is the only voter who has sought intervention and Plaintiffs have not asserted his intervention will delay or disrupt the proceedings or prejudice Plaintiffs in any way; nor will it. Under such circumstances, intervention should be granted. *Bay Park Towers Condo. Ass'n v. H.J. Ross & Assocs.*, 503 So. 2d 1333, 1335 (Fla. 3d DCA 1987).

[2] To the extent Plaintiffs contend that Graham must identify an interest beyond that of other Florida voters who support Amendments 5 and 6, Plaintiffs themselves have identified such an interest by noting that Graham is an Honorary Co-Chairman of Fair Districts. (House Response at 3; Senate Response at 4).

II. GRAHAM'S INTERESTS IN THIS ACTION EXTEND BEYOND THE INTERESTS OF THE DEFENDANT SECRETARY OF STATE.

The Secretary of State's role with regard to placing on the ballot constitutional amendments proposed by initiative petition is purely ministerial; the Secretary determines whether the requisite number of petitions have been submitted by the appropriate date, assigns ballot position, submits the amendments for publication, and submits them to the counties for ballot printing. Art. XI, § 3, Fla. Const.; §§ 100.371, 101.161(2), Fla. Stat.; Rule 1S-2.0011, Fla. Admin. Code. The Secretary has an overriding interest in ensuring these processes occur timely, uniformly, and without disruption.

Because this action directly threatens to disrupt these processes for Amendments 5 and 6, the Secretary has a substantial interest in actively defending this action. It is clearly in the Secretary's interest to preserve the finality of the Florida Supreme Court's decision approving these proposed citizen initiatives for placement on the ballot. *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009). Indeed the absence of jurisdiction of this Court to second guess the determination by the Florida Supreme Court that Amendments 5 and 6 are entitled to ballot placement is precisely the type of issue in which the Secretary has a distinct interest. It is likewise in the Secretary's interest to block a challenge regarding the effect of a proposed amendment before the election, as such a challenge flies in the face of the constitutionally-mandated approval process and carefully constructed election deadlines and procedures.

Graham shares the Secretary's interests in preventing relitigation of issues already decided by the Florida Supreme Court and preventing disruptive, pre-election litigation of the effect of proposed amendments. However, in the event this Court rejects these threshold arguments and permits this case to venture into issues already decided by the Florida Supreme Court or entertains Plaintiffs' arguments regarding the post-election effects of these amendments, the Secretary's interests will no longer be co-extensive with Graham's. Graham, as an active supporter of Amendments 5 and 6, has an interest not only in the smooth operation of the election processes, but also in defending the ultimate merits of the amendments to accomplish true redistricting reform. It is anticipated the Secretary, a ministerial state officer, will have little interest in engaging in complicated legal arguments regarding whether, for example, these citizen-initiated amendments can be implemented consistent with the federal Voting Rights Act. Graham's interests are therefore broader than those of the Secretary. Where an intervenor's interests will not be fully protected by the existing party in litigation, it is an abuse of discretion to deny intervention. *Southland Life Ins. Co. v. Abelove*, 556 So. 2d 805, 806 (Fla. 5th DCA 1990) (insurer should have been permitted to intervene in insured's action against tortfeasor, because insurer's interests would not be fully protected by insured's suit); *Bay Park Towers*, 503 So. 2d at 1334-35 (condo association should have been permitted to intervene in action by individual owner regarding defective plumbing system, because the association's interests regarding the common elements would not be protected by the individual owner's suit).

WHEREFORE, Bob Graham respectfully requests that this Court enter an order permitting him to intervene as a defendant in this action and award such further relief as the Court deems appropriate.

Respectfully submitted,

Lynn C. Hearn

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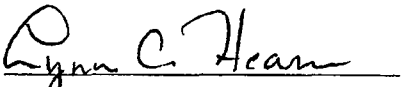

Lynn C. Hearn

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
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CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION FOR STAY OF DISCOVERY

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves the Court to enter an order staying all discovery in this case pending resolution of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

I. BACKGROUND

On September 28, 2007 the Florida Department of State, Division of Elections (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States Congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, the "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts").

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (relating to ballot title and summary).

The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued its opinion holding "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010 general election. *Id.*

On May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major ramifications" posed by Amendment 6. [Complaint, ¶ 5.] Plaintiffs were joined in their challenge to Amendment 6 by Intervenors The Florida House of Representatives on May 26, 2010, and by The Florida Senate on May 27, 2010 (together, the "Intervening Plaintiffs"). The Intervening Plaintiffs also challenge Amendment 5 on various grounds.

At the time they filed their Complaint, the Plaintiffs filed a Notice of Priority Status requesting an expedited disposition schedule for this case pursuant to Rules 2.215(g) and 2.545(c)(1), Florida Rules of Judicial Administration (the "Priority Notice"). The Plaintiffs asserted that various deadlines attendant to ballot preparation for the 2010 general election

necessitate expedited consideration of their claims. [Priority Notice, ¶¶ 2-5]

Following a hearing on June 9, 2010, the Court entered a Scheduling Order for this case which directs the parties to exchange witness lists, exhibit lists, and expert disclosures on an expedited basis (all to be completed by July 12) and directs that discovery must be completed by July 21, 2010. [Scheduling Order, ¶¶ 1-5] The Scheduling Order sets the case for non-jury trial beginning on July 26. [*Id.* ¶ 6]

In conjunction with this Motion, Defendant has filed its Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss"). The Motion to Dismiss demonstrates that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs in this case.

The Defendant has also filed a motion asking the Court to expedite its consideration and disposition of the issues raised in the Motion to Dismiss.

This Motion asks the Court to stay discovery pursuant to the Court's inherent authority to manage proceedings in a manner that avoids unnecessary costs or delay.

II. ARGUMENT

The Court has the inherent authority to stay discovery

The Florida Rules of Civil Procedure invest trial courts with "broad discretion . . . to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (quoting Fla. R. Civ. P. 1.280(c)). "In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it." *Rasmussen*, 500 So. 2d at 535. The court should

"assess all of the interests that would be served by the granting or denying of discovery—the importance of each and the extent to which the action serves each interest." *Id.*

The trial court's broad discretion includes the "'inherent power to stay discovery until preliminary issues can be settled which may be dispositive of some important aspect of the case.'" *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997) (citing *Petrus v. Bowen*, 833 F.2d 581 (5th Cir. 1987)); see also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (discovery may be stayed to determine the dispositive issue of immunity of government officials).[1]

Preliminary motions presenting purely legal questions should be resolved before discovery begins, as neither the parties nor the court have any need for discovery at this juncture. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). "Courts have held good cause to stay discovery exists when resolution of a preliminary motion may dispose of the entire action." *Nankvil v.. Lockheed Martin Corp.*, 216 F.R.D. 689, 692 (M.D. Fla. 2003). Accordingly, courts may stay the discovery process in order to avoid abuse of the process and prejudice to the parties. *See Chudasama*, 123 F.3d at 1367-68; *see also Staup v. Wachovia Bank, N.A.*, 2008 WL 1771818, *1 (S.D. Fla. 2008) (finding that requiring discovery before resolution of motion to dismiss would impose an undue burden on defendant). Furthermore, public policy can "support[] the denial of the discovery, after a proper balancing of the competing interests to be served by granting discovery or by denying it." *Sugarmill Woods Civic Ass'n, Inc. v. S. States Util.*, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997) (citations omitted).

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[1] The Florida Rules of Civil Procedure are "patterned very closely after the Federal rules[.] . .[,]" and Florida courts will "closely examine and analyze Federal decisions and commentaries" to aid in interpreting the Florida Rules. *Deltona Corp. v. Bailey*, 336 So. 2d 1163, 1170 (Fla. 1976) (citing *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 610 (Fla. 4th DCA 1975).

In the context of motions to dismiss for lack of personal jurisdiction, the Florida Supreme Court has adopted the federal standard, which permits discovery as to the question of whether the court has jurisdiction over the defendant, but prohibits discovery on the merits of the case until the pending motion to dismiss for lack of personal jurisdiction is finally resolved. *Cf. Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992) ("Limited discovery on jurisdictional issues will assist the trial court in answering the question of whether to grant or deny jurisdiction. . . . We emphasize that the discovery which is envisioned by our holding here should not be broad, onerous or expansive, **nor should it address the merits of the case.**" (emphasis added)).

The balance of competing interests favors a stay of discovery

The Defendant asks the Court to stay discovery until its challenge to the Court's subject matter jurisdiction asserted in its Motion to Dismiss is addressed and ruled upon. If the Court grants the Motion to Dismiss, that relief will obviate the need for any discovery at all, and the Defendant has asked the Court to expedite its hearing and resolution of the Motion to Dismiss such that any delay occasioned by a stay would be minimal.

Consequently, any harm from a stay of discovery is greatly outweighed by the benefit of avoiding the substantial expense (for all parties) that discovery in this case will undoubtedly entail.

Furthermore, the public policy concerns here should be accorded particular weight. Three of the litigants are public bodies, litigating with scarce public resources. The Florida Supreme Court has already addressed the Amendments, finding them appropriate to appear on

the ballot in November 2010,[2] and until the dispositive question of whether the Plaintiffs and Intervening Plaintiffs may re-litigate that holding here is resolved, the Defendant should not be made to bear the burden of discovery.

III. CONCLUSION

For these reasons, the Defendant asks the Court to stay discovery in this matter pending the resolution of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Dated this 22nd day of June, 2010.

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[2] *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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

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DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO THE INTERVENOR'S COMPLAINT OF THE FLORIDA SENATE

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), pursuant to Rule 1.110, Fla.R.Civ.P., responds, in seriatim, to the separately-numbered paragraphs of the Intervenor's Complaint of the Florida Senate (the "Complaint") as follows:

1. Defendant admits that the Court granted the Florida Senate and the Florida House of Representatives' Motions to Intervene into this case as Party Plaintiff's. Defendant is otherwise without knowledge as to the allegations contained in paragraph 1 of the Complaint and therefore denies the remaining allegations.

2. Defendant admits that the lawsuit filed by Mario Diaz-Balart and Corrine Brown challenges the validity of proposed constitutional Amendment 6. Defendant further admits that the Court's Order granting leave to the Florida Senate to intervene as a Party Plaintiff speaks for

itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 2 of the Complaint and therefore denies the remaining allegations.

PARTIES, JURISDICTION AND VENUE

3. Defendant admits the allegations contained in paragraph 3 of the Complaint.

4. Defendant admits that Art. III, § 16 of the Fla. Const. speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 4 of the Complaint and therefore denies the remaining allegations.

5. Defendant admits the allegations contained in paragraph 5 of the Complaint.

6. Defendant denies the allegations contained in paragraph 6 of the Complaint.

7. Defendant admits that §§ 26.012 and 86.011, Fla. Stat. speak for themselves. Defendant specifically denies that the circuit court has jurisdiction to enter relief in this case. Defendant otherwise denies the allegations contained in paragraph 7 of the Complaint.

8. Defendant that admits that *Gray v. Winthrop,* 115 Fla. 721 (1934) and the Federal Voting Rights Act of 1965 (42 U.S.C. § 1971, *et seq.*) (the "Voting Rights Act") speak for themselves. Defendant specifically denies that the circuit court has jurisdiction to enter relief in this case. Defendant denies the remaining allegations contained in paragraph 8 of the Complaint.

GENERAL ALLEGATIONS

I. The Redistricting Process

9. Defendant admits that Art. III, § 16, Fla. Const. speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 9 of the Complaint and therefore denies the remaining allegations.

10. Defendant is without knowledge as to the allegations contained in paragraph 10 of the Complaint and therefore denies the allegations.

11. Defendant admits that U.S. Const., Art. I, § 4, speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 11 of the Complaint and therefore denies the remaining allegations.

II. The Challenged Amendments

12. Defendant admits the allegations contained in paragraph 12 of the Complaint.

13. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 13 of the Complaint and therefore denies the remaining allegations.

14. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 14 of the Complaint and therefore denies the remaining allegations.

COUNT I

15. Defendant realleges and incorporates her responses to paragraphs 1 through 14 of the Complaint, as if fully set forth herein.

16. Defendant admits that §§ 26.012 and 86.011, Fla. Stat. and *Gray v. Winthrop,* 115 Fla. 721 (Fla. 1934) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 16 of the Complaint and therefore denies the remaining allegations.

17. Defendant admits that *U.S. v. 817 N.E. 29th Drive, Wilton Manors, Fla.,* 175 F.3d 1304 (11th Cir. 1999) and *Alabama-Coushatta Indian Tribe of Texas v. Mattox,* 650 F. Supp. 282 (S.D. Tex. 1986) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 17 of the Complaint and therefore denies the remaining allegations.

18. Defendant admits that the Voting Rights Act, proposed Amendment 5, and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 18 of the Complaint and therefore denies the remaining allegations.

19. Defendant admits that *Thornburg v. Gingles,* 478 U.S. 30 (1986), *Georgia v. Ashcroft,* 539 U.S. 461 (2003), and the Voting Rights Act speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 19 of the Complaint and therefore denies the remaining allegations.

20. Defendant admits that *Martinez v. Bush,* 234 F.Supp.2d 1275 (S.D. Fla. 2002) and the Voting Rights Act speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 20 of the Complaint and therefore denies the remaining allegations.

21. Defendant admits that *Martinez v. Bush,* 234 F.Supp.2d 1275 (S.D. Fla. 2002), proposed Amendment 5, and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 21 of the Complaint and therefore denies the remaining allegations.

22. Defendant admits that *Martinez v. Bush,* 234 F.Supp.2d 1275 (S.D. Fla. 2002), the Voting Rights Act, proposed Amendment 5, and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 22 of the Complaint and therefore denies the remaining allegations.

23. Defendant admits that *Martinez v. Bush,* 234 F. Supp. 2d 1275 (S.D. Fla. 2002) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 23 of the Complaint and therefore denies the remaining allegations.

24. Defendant admits that the Voting Rights Act, proposed Amendment 5, and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 24 of the Complaint and therefore denies the remaining allegations.

25. Defendant admits that *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 25 of the Complaint and therefore denies the remaining allegations.

26. Defendant admits that *Bartlett v. Strickland,* 129 S. Ct. 1231 (2009) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 26 of the Complaint and therefore denies the remaining allegations.

27. Defendant admits that the Voting Rights Act, proposed Amendment 5, and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 27 of the Complaint and therefore denies the remaining allegations.

28. Defendant denies the allegations contained in paragraph 28 of the Complaint.

29. Defendant is without knowledge as to the allegations in paragraph 29 of the Complaint and therefore denies the allegations.

COUNT II

30. Defendant realleges and incorporates her responses to paragraphs 1 through 14 of the Complaint, as if fully set forth herein. Defendant admits that §§26.012 and 86.011, Fla. Stat. speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 30 of the Complaint and therefore denies the remaining allegations.

31. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 31 of the Complaint and therefore denies the remaining allegations.

32. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 32 of the Complaint and therefore denies the remaining allegations.

33. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 33 of the Complaint and therefore denies the remaining allegations.

34. Defendant is without knowledge as to the allegations contained in paragraph 34 of the Complaint and therefore denies the allegations.

35. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 35 of the Complaint and therefore denies the remaining allegations.

36. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 36 of the Complaint and therefore denies the remaining allegations.

37. Defendant is without knowledge as to the allegations contained in paragraph 37 of the Complaint and therefore denies the allegations.

38. Defendant is without knowledge as to the allegations contained in paragraph 38 of the Complaint and therefore denies the allegations.

39. Defendant denies the allegations contained in paragraph 39 of the Complaint.

40. Defendant denies the allegations contained in paragraph 40 of the Complaint.

41. Defendant is without knowledge as to the allegations contained in paragraph 41 of the Complaint and therefore denies the allegations.

42. Defendant denies the allegations contained in paragraph 42 of the Complaint.

43. Defendant is without knowledge as to the allegations contained in paragraph 43 of the Complaint and therefore denies the allegations.

44. Defendant denies the allegations contained in paragraph 44 of the Complaint.

45. Defendant denies the allegations contained in paragraph 45 of the Complaint.

46. Defendant denies the allegations contained in paragraph 46 of the Complaint.

All allegations contained in the Complaint that are not specifically addressed are hereby denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

47. To the extent the Florida Senate is attempting to assert a cause of action for declaratory relief in Count I of the Complaint, such count fails to state a cause of action due to the Senate's failure to allege ultimate facts demonstrating its right to declaratory relief or to assert a prayer in Count I seeking such relief.

48. In addition to the forgoing, both Count I and Count II of the Complaint further fail to state a cause of action for declaratory relief because the allegations contained therein demonstrate that the declaration sought by the Senate is premised upon speculation about the possible impact the proposed constitutional amendments may have in the future as opposed to present or ascertainable facts. Further, the allegations of the Complaint do not demonstrate a bona fide, actual need for a declaration; rather, they simply allege, at best, disagreement with the Florida Supreme Court's determination that the ballot summaries for proposed Amendments 5

and 6 are clear, unambiguous, and limited to a single subject. Finally, the allegations contained in the Complaint demonstrate that the Senate is simply seeking a second legal opinion as to whether the ballot summaries for proposed Amendment 5 and Amendment 6 comply with Florida law.

Second Affirmative Defense

49. Each claim asserted in the Senate's Complaint fails to state a cause of action because proposed Amendment 5 and proposed Amendment 6, including their respective ballot summaries, comply in all respects with the requirements of Florida law. The Senate's Complaint further fails to state a cause of action inasmuch as *Gray v. Winthrop,* 115 Fla. 721 (1934) has been rejected by the Florida Supreme Court as being inapplicable in pre-election challenges to citizen-initiative constitutional amendments.

Third Affirmative Defense

50. The Florida Supreme Court has mandatory and exclusive jurisdiction to consider pre-election challenges to proposed constitutional amendments and ballot summaries, including those at issue in this case. As such, this Court lacks subject matter jurisdiction over the issues raised in the Senate's Complaint.

Fourth Affirmative Defenses

51. The Senate's claims are barred by the doctrine of ripeness. On January 29, 2009, the Florida Supreme Court rendered its opinion holding that the ballot summaries at issue comply with relevant Florida law and are clear, unambiguous, and limited to a single subject. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009). The Senate, which actively participated in the advisory opinion action, may not now seek to block the proposed amendments from appearing on the ballot; rather, the Senate's

proper remedy is to seek to void the result of the election should Amendment 5 or Amendment 6 become law. Thus, because the citizens of Florida have yet to vote on and approve proposed Amendment 5 or Amendment 6, the claims asserted in the Senate's Complaint are not yet ripe for judicial determination.

Fifth Affirmative Defense

52. The Senate's Complaint is barred by the doctrine of laches inasmuch as the Senate has unreasonably delayed asserting the claims alleged therein. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), setting forth its findings. The Senate actively opposed Amendments 5 and 6 in the advisory opinion proceedings, asserting numerous arguments as to why the proposed amendments and their ballot summaries were misleading and/or did not comply with Florida law. Despite its prior participation and assertion of arguments against proposed Amendments 5 and 6, the Senate now, sixteen months later, attempts to allege additional claims relating to purported deficiencies of Amendments 5 and 6. Each of these additional claims are substantially similar to the arguments already resolved by the Florida Supreme Court, or are claims that could have, and should have, been brought in the earlier proceedings. As a result of the Senate's unjustified delay in asserting its additional claims, Defendant will experience undue prejudice in now being forced to defend a suit which has been, or could have been, resolved by the Florida Supreme Court over a year ago.

Sixth Affirmative Defense

53. The Senate's claims are barred by the doctrine of waiver. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), setting forth its findings. The Senate actively opposed Amendments 5 and 6 in the advisory opinion proceedings, asserting numerous arguments as to why the proposed amendments and their ballot summaries were misleading and/or did not comply with Florida law. Despite its prior participation and assertion of arguments against proposed Amendments 5 and 6, the Senate now, sixteen months later, attempts to allege additional claims relating to purported deficiencies of Amendments 5 and 6. Because each of the Senate's alleged causes of action asserted in its Complaint could have, and should have, been asserted in the prior proceedings before the Florida Supreme Court, the Senate has waived its right to bring a separate action seeking a determination that proposed Amendments 5 and 6 do not comply with Florida law.

Dated this 22nd day of June, 2010.

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By: _____
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FILED
10 JUN 22 AM 8:29

DEFENDANT'S RESPONSE TO
MOTION OF BOB GRAHAM TO INTERVENE

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant") submits this response to the Motion of Bob Graham to Intervene as a Defendant filed on June 11, 2010 ("Motion"). For the following reasons, the Defendant supports the Motion.

The Defendant, as the State of Florida's chief elections officer, has an interest in insuring that the elections process in 2010 is orderly and is not disrupted by last-minute, piece-meal litigation such as this case. The Defendant's role in this case is appropriately to defend the lawful elections procedures that have been applied to Amendments 5 and 6 and, most particularly as a threshold matter, to object to this Court's exercise of jurisdiction in this case.

The Plaintiffs elected to join only the Defendant—an essentially nominal party—and not to join the sponsor or other proponents of the Amendments. By that choice, the Plaintiffs have

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necessitated the intervention of a party such as Mr. Graham to defend the merits of the Amendments.

For the foregoing reasons, the Defendant asks the Court to grant the Motion and allow Mr. Graham to participate in this case to the full extent that the Court has already ordered that the Intervening Plaintiffs can participate.

Dated this 22nd day of June, 2010.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION FOR EXPEDITED DISPOSITION

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves the Court to expedite disposition of the issues raised by (i) Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss") and (ii) Defendant's Motion for Stay of Discovery (the "Motion for Stay"), filed on even date.

I. PRELIMINARY STATEMENT

When subject matter jurisdiction is in doubt, the Court must promptly address and resolve the question – *sua sponte* if necessary – before allowing the case to proceed.

And while jurisdiction remains in doubt, discovery should be stayed in order to conserve the time and resources of the Court and the litigants. This is especially so here where three of the litigants are public bodies expending public resources in this case.

II. BACKGROUND

On September 28, 2007 the Florida Department of State, Division of Elections (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States Congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, the "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts").

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (relating to ballot title and summary).

The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued its opinion holding "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010 general election. *Id.*

On May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major

ramifications" posed by Amendment 6. [Complaint, ¶ 5] Plaintiffs were joined in their challenge to Amendment 6 by Intervenors The Florida House of Representatives on May 26, 2010, and by The Florida Senate on May 27, 2010 (together, the "Intervening Plaintiffs"). The Intervening Plaintiffs also challenge Amendment 5 on various grounds.

At the time they filed their Complaint, the Plaintiffs filed a Notice of Priority Status requesting an expedited disposition schedule for this case pursuant to Rules 2.215(g) and 2.545(c)(1), Florida Rules of Judicial Administration (the "Priority Notice"). The Plaintiffs asserted that various deadlines attendant to ballot preparation for the 2010 general election necessitate expedited consideration of their claims. [Priority Notice, ¶¶ 2-5]

Following a hearing on June 9, 2010, the Court entered a Scheduling Order for this case which directs the parties to exchange witness lists, exhibit lists, and expert disclosures on an expedited basis (all to be completed by July 12) and directs that discovery must be completed by July 21, 2010. [Scheduling Order, ¶¶ 1-5] The Scheduling Order sets the case for non-jury trial beginning on July 26. [*Id.* ¶ 6]

In conjunction with this Motion, Defendant has filed the Motion to Dismiss and the Motion for Stay. The Motion to Dismiss demonstrates that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs in this case. The Motion for Stay seeks a stay of all discovery pending the Court's resolution of the Motion to Dismiss.

This Motion asks the Court, pursuant to its inherent authority to manage cases before it, to expedite its consideration and disposition of the issues raised in Defendant's Motion to Dismiss and Motion for Stay to ensure a speedy resolution of the vital, threshold questions addressed therein.

III. ARGUMENT

The Court is authorized to expedite its resolution of the Motions

The Florida Rules of Civil Procedure and the Florida Rules of Judicial Administration equip trial courts with the authority to insure the just and expeditious disposition of cases. *See* Fla. R. Civ. P. 1.010 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."); Fla. R. Jud. Admin. 2.215(g) ("Particular attention shall be given to . . . challenges involving elections and proposed constitutional amendments.").

As Plaintiffs acknowledged in their Priority Notice, cases such as this are particularly appropriate for expedited disposition. [Priority Notice, ¶ 5]

The Court should expedite resolution of the Motion to Dismiss

The Motion to Dismiss asserts that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs because the Florida Supreme Court has the exclusive jurisdiction to determine whether a proposed amendment to the Florida Constitution may appear on the ballot.

Challenges to the Court's subject matter jurisdiction must be resolved as promptly as possible.

It is well-settled in Florida law that "[i]f [a] court is without jurisdiction, it is powerless to act in the case." *Roberts v. Seaboard Sur. Co.*, 29 So. 2d 743, 748 (Fla. 1947) (internal citation omitted). Thus, "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997). "The limits of a court's jurisdiction are of 'primary concern,' requiring the court to

address the issue 'sua sponte when any doubt exists.'" *Id.* (quoting *Mapoles v. Wilson*, 122 So. 2d 249, 251 (Fla. 1st DCA 1960)).

The Scheduling Order requires dispositive motion briefing to be completed by July 21, 2010 [Scheduling Order, ¶ 3] but it does not restrict the Court's earlier consideration of the jurisdictional challenge raised in the Motion to Dismiss. In keeping with the expedited relief requested here, the Scheduling Order allows dispositive motions to be heard "before trial at a time to be determined." [Scheduling Order, ¶ 6]

Notably, expediting disposition of the Motion to Dismiss will eliminate the expense associated with discovery and trial – concerns which are especially acute in this case where three of the litigants are public bodies, litigating with scarce public funds.

The Court should expedite resolution of the Motion for Stay

Defendant's Motion for Stay argues that a stay of discovery is proper because the Court lacks subject matter jurisdiction in this case.

The Court is authorized to order a stay because the discovery rules invest trial courts with "broad discretion . . . to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (quoting Fla. R. Civ. P. 1.280(c)). Public policy can "support[] the denial of discovery, after a proper balancing of the competing interests to be served by granting discovery or by denying it." *Sugarmill Woods Civic Ass'n, Inc. v. S. States Util.*, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997) (citations omitted).

As discussed in the Motion for Stay, the Defendant should not be subjected to the burden of discovery in this case when *bona fide* questions as to the court's subject matter jurisdiction are present.

IV. CONCLUSION

For these reasons, the Defendant respectfully asks the Court to hear the Motion to Dismiss and the Motion for Stay at the earliest available date on the Court's calendar and thereafter to rule on the motions as promptly as possible.

Dated this 22nd day of June, 2010.

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Attorneys for Dawn K. Roberts, in her capacity as Florida Interim Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as the Interim Secretary of State of the State of Florida

Defendant.
_____/

GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Governor Charlie Crist, by and through undersigned counsel, respectfully asks for leave to appear as amicus curiae and file the attached Memorandum of Law in Support of Defendant's Motion to Dismiss and Answer to Complaint for Declaratory and Injunctive Relief.

1. The subject of this litigation involves two redistricting measures, proposed constitutional amendments 5 and 6.

2. The particular issue to be addressed is whether the placement of Amendments 5 and 6 on the November election ballot violates article XI, section 3 of the Florida Constitution and section 101.161(1), Florida Statutes, which require that a proposed constitutional amendment embrace one subject and be accompanied by a statement of its "substance," printed in "clear and unambiguous language."

3. The Governor seeks to appear in this case in furtherance of his obligation to "take care that the laws be faithfully executed." Article IV, § 1(a), Fla. Const. Specifically, the Governor seeks to ensure faithful execution of section 100.371, Florida Statutes, which provides for placement of citizen initiatives on the ballot; article XI, section 3, Florida Constitution, and section 101.161(1), Florida Statutes, which require ballot clarity; and article IV, section 10, and article V, section 3, of the Florida Constitution, which provide the Florida Supreme Court with exclusive jurisdiction to determine the validity of a citizen initiative petition.

4. The constitutional process balances essential judicial review of ballot clarity with the need for finality, providing the public with sufficient time to analyze and debate proposed amendments before votes are cast. To that end, the constitution limits the scope of review to whether the amendment embraces a single subject and whether the ballot title and summary are clear, *Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1226 (Fla. 2006), and confines the judicial forum to the Florida Supreme Court, *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995).

5. Section 101.161(1) arises from the constitutional mandate that all amendments be submitted to the people for a vote. *See* art. XI, §§ 1, 3, 5, Fla. Const. The Court must be circumspect in reviewing a citizen initiative, acting only "with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Advisory Op. to Att'y Gen. re Fla. Minimum Wage Amendment*, 880 So. 2d 636, 639 (Fla. 2004) (quotation marks omitted) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Governor Crist seeks to appear as amicus curiae to help ensure that the public policy embodied in the statutes and constitutional provisions cited herein be preserved by ensuring that the citizen initiative process be as free of unnecessary and untimely hurdles as possible.

6. It is profoundly important to our system of constitutional democracy that the limited pre-election review process take place in the proper forum and involve only issues that are relevant to ballot clarity. The Governor appears as amicus curiae to help ensure that this State remains true to those sacrosanct provisions of law.

7. The Governor has requested and obtained the consent of the Defendant Dawn K. Roberts, Proposed Defendant Intervenor Bob Graham, and Plaintiff Intervenors Florida House of Representatives and Florida Senate. Plaintiffs Corrine Brown and Mario Diaz-Balart are opposed to this Motion.

WHEREFORE, the Governor respectfully requests the Court grant this Motion for Leave to Appear as Amicus Curiae.

RESPECTFULLY SUBMITTED this 22nd day of June, 2010.

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
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CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO THE FLORIDA HOUSE OF REPRESENTATIVES' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), pursuant to Rule 1.110, Fla.R.Civ.P., responds, in seriatim, to the separately-numbered paragraphs of the Florida House of Representatives' Motion to Intervene (the "Complaint")[1] as follows:

1. Defendant admits that the Florida Department of State has certified two proposed constitutional amendments for placement on the ballot for the November 2010 general election. Defendant further admits that *Harris v. Moore,* 752 So. 2d 1241 (Fla. 4th DCA 2000) and *State of Florida ex rel. Citizens Proposition for Tax Relief v. Firestone,* 386 So. 2d 561 (Fla. 1980)

[1] Pursuant to the Court's Order Granting Florida House of Representatives' Motion to Intervene dated June 11, 2010, the allegations contained in the Motion to Intervene were accepted by the Court as the Florida House of Representatives' operative pleading in this case.

speak for themselves. Defendant further admits that a copy of proposed Amendment 6 is attached to the Complaint. Defendant is otherwise without knowledge as to the allegations contained in paragraph 1 of the Complaint and therefore denies the remaining allegations.

2. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant further admits that FairDistrictsFlorida.org is the sponsor of proposed Amendments 5 and 6. Defendant is otherwise without knowledge as to the allegations contained in paragraph 2 of the Complaint and therefore denies the remaining allegations.

3. Defendant admits that the website http://www.fairdistrictsflorida.org/home.php speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 3 of the Complaint and therefore denies the remaining allegations.

4. Defendant admits that *Growe v. Emison,* 507 U.S. 25 (1993), *Gaffney v. Cummings,* 412 U.S. 735 (1973), *Burns v. Richardson,* 384 U.S. 73 (1966), and *Bartlett v. Strickland,* 129 S. Ct. 1231 (2009) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 4 of the Complaint and therefore denies the remaining allegations.

5. Defendant admits that proposed constitutional Amendments 5 and 6 speak for themselves. Defendant further admits that *Reynolds v. Sims,* 377 U.S. 533 (1964) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 5 (including footnote 2) of the Complaint and therefore denies the remaining allegations.

6. Defendant admits that *Davis v. Bandemer,* 478 U.S. 109 (1986) and *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature,* 926 So. 2d 1218 (Fla. 2006) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in

paragraph 6 (including footnote 3) of the Complaint and therefore denies the remaining allegations.

7. Defendant admits that *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature,* 926 So. 2d 1218 (Fla. 2006) and *Adv. Op. to Att'y Gen. re Add'l Homestead Tax Exemption,* 880 So. 2d 646 (Fla. 2004) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 7 of the Complaint and therefore denies the remaining allegations.

8. Defendant admits that The Florida House of Representatives has sought, and been granted the right, to intervene in this case. Defendant is otherwise without knowledge as to the allegations contained in paragraph 8 of the Complaint and therefore denies the remaining allegations.

THE EXISTING CLAIMS

9. Defendant admits that Plaintiffs Corrine Brown ("Brown") and Mario Diaz-Balart ("Diaz-Balart") are both members of the United States House of Representatives and initiated this action on May 24, 2010. Defendant further admits that Brown and Diaz-Balart's complaint consists of eight counts, each of which alleges that the ballot summary for Amendment 6 is misleading. Defendant further admits that Brown and Diaz-Balart have sued Defendant, whose duties include certifying proposed constitutional amendments for placement on the election ballot. Defendant is otherwise without knowledge as to the allegations contained in paragraph 9 of the Complaint and therefore denies the remaining allegations.

10. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant further admits that Brown and Diaz-Balart have only challenged

proposed Amendment 6 and have not challenged proposed Amendment 5. Defendant is otherwise without knowledge as to the allegations contained in paragraph 10 of the Complaint and therefore denies the remaining allegations.

INTERVENTION OF THE FLORIDA HOUSE OF REPRESENTATIVES

Paragraphs 11 through 15 of the Complaint relate solely to the Florida House of Representatives' ability to intervene in this matter. This issue has already been resolved by this Court pursuant to its Order Granting Florida House of Representatives' Motion to Intervene dated June 11th, 2010. To the extent a response is necessary, Defendant responds as follows:

11. Defendant admits that The Florida House of Representatives Rule 2.6 speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 11 of the Complaint and therefore denies the remaining allegations.

12. Defendant admits that Florida Rule of Civil Procedure 1.230, *Grimes v. Walton County,* 591 So. 2d 1091 (Fla. 1st DCA 1992) and *Nat'l Wildlife Fed. Inc. v. Glisson,* 531 So. 2d 996 (Fla. 1st DCA 1988) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 12 of the Complaint and therefore denies the remaining allegations.

13. Defendant admits that *Union Cent. Life Ins. Co. v. Carlisle,* 593 So. 2d 505 (Fla. 1992) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 13 of the Complaint and therefore denies the remaining allegations.

14. Defendant admits that *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone,* 386 So. 2d 561 (Fla. 1980) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 14 of the Complaint and therefore denies the remaining allegations.

11. Defendant is without knowledge as to the allegations contained in paragraph 15 of the Complaint and therefore denies the allegations.

The Florida House of Representatives' Proposed Claims

11. Defendant admits that Counts I-VI of Brown and Diaz-Balart's complaint allege that the ballot summary for proposed Amendment 6 is misleading. Defendant is otherwise without knowledge as to the allegations contained in paragraph 16 of the Complaint and therefore denies the remaining allegations.

12. Defendant is without knowledge as to the allegations contained in paragraph 17 of the Complaint and therefore denies the allegations.

13. Defendant admits that proposed Amendment 5 and proposed Amendment 6 speak for themselves. Defendant is without knowledge as to the allegations contained in paragraph 18 of the Complaint and therefore denies the allegations.

14. Defendant is without knowledge as to the allegations contained in paragraph 19 of the Complaint and therefore denies the allegations.

15. Defendant admits that proposed Amendment 5 speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 20 of the Complaint and therefore denies the remaining allegations.

16. Defendant admits that Art. III, § 16, Fla. Const. speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 21 of the Complaint and therefore denies the remaining allegations.

17. Defendant admits that Art III, § 16, Fla. Const. and *In re Constitutionality of House Joint Resolution 1987,* 817 So. 2d 819 (Fla. 2002) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 22 of the Complaint

and therefore denies the remaining allegations.

18. Defendant admits that §§ 99.061, 100.031, 100.061, Fla. Stat. (2009) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 23 of the Complaint and therefore denies the remaining allegations.

19. Defendant admits that Art. III, § 16, Fla. Const. speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 24 of the Complaint and therefore denies the remaining allegations.

20. Defendant admits that Art. III, § 16, Fla. Const. speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 25 of the Complaint and therefore denies the remaining allegations.

21. Defendant admits that proposed Amendment 5 speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 26 of the Complaint and therefore denies the remaining allegations.

22. Defendant admits that *In re Constitutionality of House Joint Resolution 1987,* 817 So. 2d 819 (Fla. 2002) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 27 of the Complaint and therefore denies the remaining allegations.

23. Defendant is without knowledge as to the allegations contained in paragraph 28 of the Complaint and therefore denies the allegations.

24. Defendant is without knowledge as to the allegations contained in paragraph 29 of the Complaint and therefore denies the allegations.

25. Defendant admits that *In re 2001 Redistricting Cases,* 44 P.3d 141 (Alaska 2002) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in

paragraph 30 of the Complaint and therefore denies the remaining allegations.

26. Defendant admits that proposed Amendment 5 speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 31 of the Complaint and therefore denies the remaining allegations.

27. Defendant admits that proposed Amendment 5 speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 32 of the Complaint and therefore denies the remaining allegations.

The Addition of the New Claims

Paragraphs 33 through 37 relate solely to the Florida House of Representatives' request to assert additional claims in this matter despite its status as an intervening plaintiff. The Court has already accepted the allegations contained in the Complaint as the operative pleading of the Florida House of Representatives. To the extent a response is necessary, Defendant responds as follows:

28. Defendant admits that *Litvak v. Scylla Props., LLC,* 946 So. 2d 1165 (Fla. 1st DCA 2006), *Smith v. Atl. Boat Builder Co.,* 356 So. 2d 359 (Fla. 1st DCA 1978), and *Williams v. Nussbaum,* 419 So. 2d 715 (Fla. 1st DCA 1982) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 33 of the Complaint and therefore denies the remaining allegations.

29. Defendant admits that *Grimes v. Walton County,* 591 So. 2d 1091 (Fla. 1st DCA 1992) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 34 of the Complaint and therefore denies the remaining allegations.

30. Defendant is without knowledge as to the allegations contained in paragraph 35 of the Complaint and therefore denies the allegations.

31. Defendant admits that the House of Representatives' Complaint was filed after this case was initiated. Defendant is otherwise without knowledge as to the allegations contained in paragraph 36 of the Complaint and therefore denies the remaining allegations.

32. Defendant admits that the Florida House of Representatives' Motion to Intervene has been accepted by the Court as the operative pleading of the House of Representatives. Defendant further admits that *Wogisch v. Tiger,* 193 So. 2d 187 (Fla. 4th DCA 1966) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 37 of the Complaint and therefore denies the remaining allegations.

All allegations contained in the Complaint that are not specifically addressed are hereby denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

33. Each claim asserted in the Florida House of Representatives' Complaint fails to state a cause of action for declaratory relief due to the House's failure to allege ultimate facts demonstrating its right to such relief. In particular, the House fails to allege that its rights, powers, or privileges are dependant upon the law applicable to the facts of this case or that the declaration sought by the House deals with a present or ascertainable set of facts as opposed to speculation about the possible impact the proposed constitutional amendments may have in the future. Further, the allegations of the Complaint do not demonstrate a bona fide, actual need for a declaration; rather, they simply allege, at best, disagreement with the Florida Supreme Court's determination that the ballot summaries for proposed Amendments 5 and 6 are clear, unambiguous, and limited to a single subject. Finally, the allegations contained in the Complaint

demonstrate that the House is simply seeking a second legal opinion as to whether the ballot summaries for proposed Amendment 5 and Amendment 6 comply with Florida law.

Second Affirmative Defense

34. Each claim asserted in the House's Complaint fails to state a cause of action for injunctive relief inasmuch as the Complaint lacks any allegations of ultimate fact regarding the House's likelihood of irreparable harm, unavailability of an adequate remedy at law, or substantial likelihood of success on the merits.

Third Affirmative Defense

35. Each claim asserted in the House's Complaint fails to state a cause of action because proposed Amendment 5 and proposed Amendment 6, including their respective ballot summaries, comply in all respects with the requirements of Florida law.

Fourth Affirmative Defense

36. The Florida Supreme Court has mandatory and exclusive jurisdiction to consider pre-election challenges to proposed constitutional amendments and ballot summaries, including those at issue in this case. As such, this Court lacks subject matter jurisdiction over the issues raised in the House's Complaint.

Fifth Affirmative Defenses

37. The House's claims are barred by the doctrine of ripeness. On January 29, 2009, the Florida Supreme Court rendered its opinion holding that the ballot summaries at issue comply with relevant Florida law and are clear, unambiguous, and limited to a single subject. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009). The House, which actively participated in the advisory opinion action, may not now seek to block the proposed amendments from appearing on the ballot; rather, the House's

proper remedy is to seek to void the result of the election should Amendment 5 or Amendment 6 become law. Thus, because the citizens of Florida have yet to vote on and approve proposed Amendment 5 or Amendment 6, the claims asserted in the House's Complaint are not yet ripe for judicial determination.

Sixth Affirmative Defense

38. The House's Complaint is barred by the doctrine of laches inasmuch as the House has unreasonably delayed asserting the claims alleged therein. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), setting forth its findings. The House actively opposed Amendments 5 and 6 in the advisory opinion proceedings, asserting numerous arguments as to why the proposed amendments and their ballot summaries were misleading and/or did not comply with Florida law. Despite its prior participation and assertion of arguments against proposed Amendments 5 and 6, the House now, sixteen months later, attempts to allege additional claims relating to purported deficiencies of Amendments 5 and 6. Each of these additional claims are substantially similar to the arguments already resolved by the Florida Supreme Court, or are claims that could have, and should have, been brought in the earlier proceedings. As a result of the House's unjustified delay in asserting its additional claims, Defendant will experience undue prejudice in now being forced to defend a suit which has been, or could have been, resolved by the Florida Supreme Court over a year ago.

Seventh Affirmative Defense

39. The House's claims are barred by the doctrine of waiver. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), setting forth its findings. The House actively opposed Amendments 5 and 6 in the advisory opinion proceedings, asserting numerous arguments as to why the proposed amendments and their ballot summaries were misleading and/or did not comply with Florida law. Despite its prior participation and assertion of arguments against proposed Amendments 5 and 6, the House now, sixteen months later, attempts to allege additional claims relating to purported deficiencies of Amendments 5 and 6. Because each of the House's alleged causes of action asserted in its Complaint could have, and should have, been asserted in the prior proceedings before the Florida Supreme Court, the House has waived its right to bring a separate action seeking a determination that proposed Amendments 5 and 6 do not comply with Florida law.

40.

Dated this 22nd day of June, 2010.

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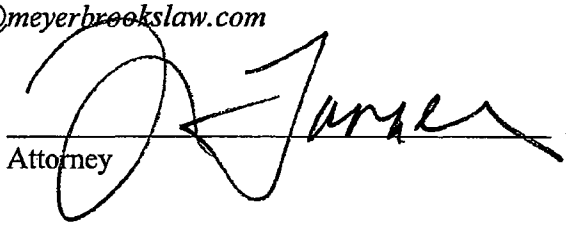

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as the Interim
Secretary of State of the State of Florida

Defendant.

_____/

GOVERNOR CHARLIE CRIST'S MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Governor Charlie Crist, by and through undersigned counsel, hereby submits the following memorandum of law in support of Defendant's Motion to Dismiss the complaints filed by Plaintiffs Corrine Brown and Mario Diaz-Balart and Plaintiff Intervenors the Florida Senate and Florida House of Representatives (hereinafter "Plaintiffs"). For the reasons stated in the Defendant's motion to dismiss, and for the reasons stated herein, Governor Crist respectfully urges that this Court dismiss the Plaintiffs' complaints.

Interest of Amicus Curiae

Governor Crist appears as amicus curiae in this matter in furtherance of his constitutional obligation to "take care that all laws be faithfully executed." Art. IV, § 1(a), Fla. Const. The Governor seeks to ensure faithful execution of section 100.371, Florida Statutes, which provides

for placement of citizen initiatives on the ballot; section 101.161(1), Florida Statutes, which requires that a proposed constitutional amendment be accompanied by a statement of its "substance," printed in "clear and unambiguous language;" and article IV, section 10, and article V, section 3, of the Florida Constitution, which provide the Florida Supreme Court with exclusive jurisdiction to determine the validity of citizen initiative petitions.

Section 101.161(1) arises from the constitutional mandate that all amendments be submitted to the people for a vote. *See* art. XI, §§ 1, 3, 5, Fla. Const. Accordingly, the Court must be circumspect in reviewing a citizen initiative, having "no authority to inject itself in the process, unless the laws governing the process have been clearly and conclusively violated." *Advisory Op. to Att'y Gen. re Fla. Minimum Wage Amendment*, 880 So. 2d 636, 639 (Fla. 2004) (quotation marks omitted). The "Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Id.* (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Governor Crist appears as amicus curiae to oppose the Plaintiffs' initiation of this proceeding, which can best be described as an end-run around the Supreme Court's limited, exclusive review of the people's ability to amend their constitution through the citizen initiative process.

In 1986 the Legislature proposed the amendments that are now article IV, section 10, and article V, section 3(b)(10), of the Florida Constitution, which provide for an orderly process to expeditiously vet citizen-proposed amendments for placement on the ballot. The system balances essential judicial review of ballot clarity with the need for finality, providing the public with sufficient time to analyze and debate proposed amendments before they cast their votes. To that end, the constitution limits the scope of review to whether the amendment embraces a single subject and whether the ballot title and summary are clear, *Advisory Op. to Att'y Gen. re Fla.*

Marriage Prot. Amendment, 926 So. 2d 1226 (Fla. 2006), and confines the judicial forum to the Florida Supreme Court, *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995).

Successive legal challenges such as those brought by the Plaintiffs contravene the purpose of the limited pre-election review process. By raising issues that are not relevant to ballot clarity, and by raising those issues in the wrong court (thereby creating the likelihood of district court and Supreme Court review), Plaintiffs turn the process on its head—prolonging a legal imbroglio at the expense of healthy political debate. The bringing of "multiple challenges to initiatives" has rightly been characterized as a "tactic[]" that "prevent[s] the electorate from voting," where "each subsequent challenge unnecessarily wastes scarce judicial resources and acts as a de facto burden to the initiative process." Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 Fla. Coastal L.J. 15, 32–34 (2004). It is profoundly important to our system of constitutional democracy that the public policy embodied by the statutes and constitutional provisions cited herein be preserved by ensuring that the citizen initiative process be as free of unnecessary and untimely hurdles as possible. The Governor appears as amicus curiae to help ensure that this State remains true to those sacrosanct provisions of law, which can only be accomplished by this Court expeditiously dismissing Plaintiffs' complaints.

Background

Article XI, section 3 of the Florida Constitution gives the people the power to revise or amend the Constitution through the initiative process. Two citizen initiatives proposing changes to how legislative and congressional districts are drawn have been placed on the November 2 election ballot. The Department of State has designated the citizen initiative relating to

legislative districts as Amendment 5, and the other, relating to congressional districts, as Amendment 6 (hereinafter "Amendments").

There are currently no provisions in the Florida Constitution regarding the boundaries of congressional districts but the Constitution does provide for legislative districts.[1] Article III, section 16(a) requires the Legislature to "apportion the state in accordance with the constitution of the state and of the United States into" senatorial and representative districts "of either contiguous, overlapping or identical territory." The current process allows the Legislature to fashion those districts with the intent to favor an incumbent or a certain political party. No directive in the Florida Constitution constrains the Legislature from shaping districts to ensure political success, or from favoring one candidate, party, or demographic group over another in the drawing of legislative and congressional boundaries. In fact, these practices have become the norm in Florida and elsewhere.

Amendments 5 and 6 are intended to reduce and eliminate partisanship and political favoritism in drawing legislative and congressional districts. The Amendments would add additional standards by requiring districts to be drawn in such a way as to not favor or disfavor any incumbent or political party or deny any racial or language minority the ability to participate in the political process or in the election of their representatives.

Article V, section 3 of the Florida Constitution, requires the Supreme Court to render an advisory opinion as to the validity of a citizen initiative when requested by the Attorney General. In *Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 191 (Fla. 2009) (hereinafter "*Legislative District Boundaries*"), the

[1] The United States Supreme Court has held that the responsibility of "apportionment of ... federal congressional and state legislative districts" falls upon the States. *Growe v. Emison*, 507 U.S. 25, 34 (1993).

Supreme Court held that Amendments 5 and 6 and their ballot titles and summaries comply with article XI, section 3 of the Florida Constitution and section 101.161(1), Florida Statutes, by embracing only one subject and using clear and unambiguous language.

Argument

The Florida Supreme Court unanimously concluded that Amendments 5 and 6 do not violate the single-subject requirement and that their titles and summaries are not misleading. *Legislative District Boundaries*, 2 So. 3d at 184, 191. The Legislature exercised its opportunity to appear in that litigation and argue against the amendments' validity. Now, sixteen months after the Florida Supreme Court issued its opinion, on the eve of the election season in which voters are to decide whether to amend their constitution, the Legislature and other Plaintiffs have filed an eleventh-hour lawsuit to stymie placement of the amendment on the ballot. Supporters of the citizen initiatives at great expense have already obtained the requisite signatures and defended against the prior legal challenge. Now the Legislature has launched a successive attempt to block the people's opportunity to weigh in on the way their congressional and legislative districts are drawn.

This gratuitous, second challenge, brought by parties who have or could have made their arguments when the Florida Supreme Court first analyzed these questions, unnecessarily inflates the cost of citizen-participation in our constitutional democracy. The Florida Constitution provides for judicial review of amendments proposed by citizen initiative in order to allow a determination of their "validity . . . *before* the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot." *Armstrong v. Harris*, 773 So.2d 7, 14 n.18 (Fla. 2000) (emphasis in original). Here, that determination has been made and proponents of the amendments have spent their time, sweat, and treasure in

obtaining the requisite signatures. Plaintiffs' redundant legal challenge poses an unnecessary, additional hurdle to the people's opportunity to express their voice.

Plaintiffs' challenge should fail for a number of reasons. Firstly, the Florida Supreme Court has exclusive jurisdiction to review a constitutional amendment proposed by initiative petition. *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) (citing Art. V, § 3(b)(10), Fla. Const.); *Advisory Op. to Att'y. Gen. re Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994). Consequently, jurisdiction does not lie in the circuit court, and this Court should dismiss Plaintiffs' complaint for lack of subject matter jurisdiction for that reason alone.

Further, Plaintiffs' complaints seek to relitigate issues already addressed by the Justices of the Florida Supreme Court in the *Legislative District Boundaries* case. The Florida Supreme Court in past decisions has expressed its strong disfavor for "relitigation of issues expressly addressed in an advisory opinion on a proposed amendment," an effort that "almost always will result" in the Court refusing to exercise jurisdiction. *Florida League of Cities v. Smith*, 607 So. 2d 397, 398–99 (Fla. 1992). Rather, the Supreme Court has made clear that "[r]enewed litigation" should be "entertained only in truly extraordinary cases, such as . . . where a vital issue was not addressed in the earlier opinion." *Id.* at 399. Where a party attempts to raise the same issue in a subsequent proceeding, the Florida Supreme Court has considered its prior advisory opinion "binding" on that issue and refused to "reconsider the issue and recede from [its] decision." *Ray v. Mortham*, 742 So.2d 1276, 1285 (Fla. 1999) (rejecting reassertion of a single-subject argument because it was "not new argument on an important issue not addressed in our earlier opinion").

Here, Plaintiffs assert ballot clarity and single-subject arguments, both of which were already adjudicated by the Florida Supreme Court. *Legislative District Boundaries*, 2 So. 3d at 184, 191. Accordingly, these issues should not be subject to further judicial review in a pre-election challenge. Viewed against the backdrop of this Supreme Court precedent, the weakness of Plaintiffs' case becomes crystal clear. Plaintiffs now seek relief in this Court—to address issues that either have already been addressed by the Florida Supreme Court (and thus dismissed by that Court) or related issues that the Supreme Court would choose not to address prior to ballot placement. Simply put, Plaintiffs have approached the wrong forum, with issues that would surely be dismissed by the right forum—the Florida Supreme Court.

The issues Plaintiffs seek this Court to adjudicate have either already been decided by the Florida Supreme Court or must not be decided prior to the election. Plaintiffs advance substantive arguments regarding the merits of Amendments 5 and 6 that are outside of the constitutionally limited scope of pre-election judicial review. Review of amendments proposed by petition initiative is "strictly limited" to "whether the proposed amendment comports with the single-subject requirement" and "whether the ballot title and summary are clear and unambiguous;" that review "does not include an evaluation of the merits or the wisdom of the proposed amendment." *Advisory Op. to Att'y Gen. ex rel. Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 367, 368–69 (Fla. 2000). Arguments regarding the "substance of the amendment" are not justiciable in the pre-election proceeding. *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla. 1982).

Plaintiffs assail the wisdom and merit of the proposed amendments and impugn its validity under federal and constitutional law. *See, e.g.*, Compl. of Florida Senate ¶¶ 14, 32, 38 (asserting the Amendments are "unworkable," "violate paramount federal law," and "violate the

separation of powers"). These are topics not cognizable at this stage of review. *See, e.g.*, *Advisory Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 801 n.1 (Fla. 1998) (declining to reach a federal constitutional issue because it was outside the Court's "limited" "jurisdiction" to review "proposed amendments based on citizen initiative petitions"); *Advisory Op. to Att'y Gen.—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226–27 (Fla. 1991) (declining to reach "various constitutional challenges" that were "not justiciable").

Some of these substantive and policy-oriented arguments are disguised as single-subject or ballot clarity issues. *See, e.g.*, Plaintiffs' Compl. ¶¶ 52–57 (arguing that, because the Amendments could violate the federal Voting Rights Act, the ballot summary is inaccurate); *see also id.* at ¶¶ 67, 73–78; (framing the argument that the Amendments would make legislative redistricting and judicial review unworkable as "misleading ballot summary" issues); Florida House of Representatives' Mot. to Intervene ¶¶ 26–32 (advancing the argument that Amendment 5 would make judicial review of redistricting more difficult as a single-subject and ballot summary issue). However, courts must decline to pass on the merits of amendments proposed for placement on the ballot—even when such arguments are nominally mischaracterized as single-subject and ballot clarity issues.

Judicial removal of "a constitutional amendment from the vote of the people" should be undertaken only with "extreme care, caution, and restraint." *In re Advisory Op. to Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient*, 880 So. 2d 659, 666 (Fla. 2004) ("*In re Physician Fee*") (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla.1982)). As it has the potential to infringe "on the people's right to vote on an amendment," pre-election review should be constrained to determining whether "the ballot language would clearly mislead the public concerning material elements of the proposed

amendment and its effect." *In re Physician Fee*, 880 So. 2d at 666; *Advisory Op. to Att'y Gen. re Extending Existing Sales Tax To Non-Taxed Services Where Exclusion Fails To Serve Public Purpose*, 953 So. 2d 471, 477 (Fla. 2007) (A court must "not address the merits or wisdom of the proposed amendment.").

Indeed, an amendment "may be the subject of future litigation, and it will not be until that occurs that the full and complete application may be absolutely known." *In re Physician Fee*, 880 So. 2d at 665. However, that fact should not preclude approval for placement on the ballot. *Id.* "The potential *practical* impact of the amendment is a matter for public debate by proponents and opponents of the measure as part of the political process." *Id.* at 667 (Pariente, J., concurring) ("Our role is not to pass on the merits of the measure or the wisdom of its inclusion in our state constitution . . . [and] the possibility that a proposed amendment could have 'broad ramifications' for the state does not render it infirm under chapter 101.161(1)") (emphasis in original); *see Grose v. Firestone*, 422 So.2d 303, 306 (Fla. 1982) (explaining such arguments "may be raised in an appropriate proceeding in due course when the issue is properly presented").

Plaintiffs' speculation about the future effects of Amendments 5 and 6 are wholly inappropriate in a proceeding to determine whether they should be placed on the ballot. *See Advisory Op. to Att'y Gen. English—The Official Language of Florida*, 520 So. 2d 11, 12–13 (Fla. 1988) (finding it "premature to speculate how the amendment might interact with other portions of the constitution as applied to a given factual situation," even though, "if passed, the amendment could have broad ramifications"); *Advisory Op. to Att'y Gen. re Ltd. Casinos*, 644 So. 2d 71, 74 (Fla. 1994) (rejecting challenges as "premature speculation"). By raising those issues here, Plaintiffs avoid debating these policy considerations in the forum of public opinion.

They seek to prematurely litigate what should be decided by the people when they are presented with the ballot. *Advisory Op. to Att'y Gen. ex rel. Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, 815 So.2d 597, 600 (Fla. 2002) (Pariente, J., concurring) ("[T]he merits or wisdom of the proposal is irrelevant to whether the proposed amendment may be placed on the ballot.").

The Florida Supreme Court has strongly expressed its reluctance to revisit the validity of a citizen initiative after issuing an advisory opinion, advising that it will hear a renewed challenge only in the very limited circumstances in which "a vital issue was not addressed in the earlier opinion." *Florida League of Cities*, 607 So. 2d at 399. This is certainly not one of those "truly extraordinary cases" in which "[r]enewed litigation" is warranted. *Id.* Rather, Plaintiffs seek to *relitigate* issues that *were relevant* when decided and to *pre-litigate* issues that are *irrelevant* to the ballot review process, serving only to thwart the people's constitutional right to propose and vote on amendments to their constitution. As such, this Court should dismiss Plaintiffs' claims.

Allowing Plaintiffs' suit to proceed in defiance of the constitutionally limited system of pre-election review would work an inequitable and undue hardship on the Defendant, proponents of the Amendments, and the people of Florida. After the Amendments' sponsor obtained ten percent of the required voter signatures for placement on the ballot, the Secretary of State submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court in the manner prescribed by article IV, section 10, and article V, section 3, of the Florida Constitution. This proceeding provided all parties ample opportunity to raise any concerns regarding the Amendments' validity. Nonetheless, sixteen months after the

Florida Supreme Court issued its opinion finding the Amendments valid, Plaintiffs mount an attack on the eve of the election season.

During those intervening months, the sponsor and interested citizens expended time, effort, and financial resources to obtain the remaining signatures—with no reason to anticipate that the Legislature and other parties would attempt a second challenge long after the Amendments were approved for placement on the ballot. Plaintiffs' unreasonable delay now costs the Defendant, the Amendments' sponsor, and the people of Florida additional expense to resolve a legal dispute on issues that were or could have been resolved during the advisory opinion stage. With this cost comes a corresponding reduction in time and resources to engage in the public debate that is central to our participatory democracy.

In sum, the Florida Supreme Court has already decided the only issues now relevant to Amendments 5 and 6: that they do not violate the single-subject rule and that the ballot title and summary adequately inform the voters of what they are being asked to decide. As such, "there is no prohibition upon placing th[e] proposed amendment[s] on the ballot." *In re Physician Fee*, 880 So. 2d at 666. This court lacks jurisdiction to entertain Plaintiffs' last-minute attempt to reassert those issues and throw up additional legal roadblocks to the citizen initiative process. Plaintiffs' unreasonable delay in bringing this challenge, and their disregard for the method of review prescribed by our constitution, pose unacceptable obstacles to the people's right to shape their government's defining document.

Conclusion

For the foregoing reasons, the Governor respectfully urges this court to dismiss the Plaintiffs' complaints.

Respectfully submitted,

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AND INTERVENING PLAINTIFFS' COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves to dismiss Plaintiffs' and Intervening Plaintiffs' respective complaints for lack of subject matter jurisdiction pursuant to Rule 1.140(b)(1), Florida Rules of Civil Procedure.

I. PRELIMINARY STATEMENT

As the State of Florida's chief elections officer, the Defendant is vitally interested in an orderly elections process, particularly an orderly process for pre-election judicial review of amendments to the Florida Constitution proposed by voter initiatives. *See* § 97.012, Fla. Stat.

To that end, the Florida Constitution and Florida Supreme Court precedent direct that the Supreme Court has exclusive jurisdiction over pre-election ballot summary challenges to voter initiative proposed amendments to the Florida Constitution such as those asserted against

Amendments 5 and 6 in this case.

Confining such review to the Supreme Court prevents the type of piecemeal and last-minute litigation over voter initiatives that this case represents.

Because the Plaintiffs and the Intervening Plaintiffs can only pursue the claims asserted here in the Florida Supreme Court, this case must be dismissed.

II. BACKGROUND

Proposed Amendments 5 and 6

On September 28, 2007, the Florida Department of State, Division of Elections, (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts"). [Plaintiffs' Complaint, ¶ 1; Senate Complaint, ¶ 12]

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Attorney General to request an advisory opinion from the Supreme Court as to whether the Amendments comply with the requirements of article XI, section 3 of the constitution and section 101.161, Florida Statutes (2008) (relating to ballot title and summary). *See Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 178-79 (Fla. 2009) (hereafter, "*Redistricting Standards*").

The Supreme Court consolidated its review of the Amendments and allowed all interested parties the opportunity to file briefs in support or opposition. FairDistricts filed its brief in

support of the Amendments, and the Legislature filed a brief in opposition and appeared at oral argument. *Redistricting Standards*, 2 So.3d at 178, 185-91. The Plaintiffs in this case, Corrine Brown and Mario Diaz-Balart, chose not to appear in the Supreme Court.

On January 29, 2009, the Supreme Court declared, "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Redistricting Standards*, 2 So. 3d at 191.

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010, general election. *Id.*

The Plaintiffs' Claims

The Supreme Court's decision notwithstanding, on May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major ramifications" posed by Amendment 6. [Complaint, ¶ 5]

The Plaintiffs' Complaint alleges eight separate claims, each entitled "Misleading Ballot Summary," and each claim asserts that the ballot summary of proposed Amendment 6 is misleading in some respect and therefore violates Florida law.

The House and Senate Claims

The Plaintiffs are joined in their challenge to Amendment 6 by Intervenors the Florida House of Representatives and the Florida Senate (together, "Intervening Plaintiffs").

In its operative pleading ("House Complaint"), the House: (1) adopts Counts I-VI of the Plaintiffs' Complaint, each of which alleges that the ballot summary of proposed Amendment 6

is misleading; (2) asserts the allegations in Counts I-VI of the Plaintiffs' Complaint against the ballot summary for proposed Amendment 5; and (3) asserts an additional claim against the Amendment 5 ballot summary (also on the basis that the summary is purportedly misleading).[1]

On June 14, 2010, the Senate filed its complaint ("Senate Complaint"), which adopts each of the claims raised by the Plaintiffs and by the House. In addition, the Senate asserts two claims seeking injunctive and declaratory relief on the basis that proposed Amendment 5 and Amendment 6 purportedly violate federal and Florida law.

Now, less than three months before the Supervisors of Elections must finalize the ballots for the general election – and after delaying more than sixteen months following the advisory opinion in *Redistricting Standards* – the Plaintiffs and Intervening Plaintiffs ask this Court to exceed its jurisdiction and set aside the reasoned opinion of the Florida Supreme Court, blocking the Amendments from appearing on the ballot.

III. ARGUMENT

A. The Florida Supreme Court has exclusive jurisdiction to consider pre-election challenges to voter initiative amendments to the Florida Constitution.

In 1984, the Florida Supreme Court decided *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), in which it affirmed the trial court's grant of an injunction striking a voter initiative amendment from the ballot on grounds that the amendment violated the single subject requirement of article XI, section 3, and that the ballot summary did not comply with section 101.161. *Evans*, 457 So. 2d at 1353-55.

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[1] On June 11, 2010, the Court entered its Order Granting Florida House of Representatives Motion to Intervene. In addition to permitting the House to intervene in this case, the Court accepted the allegations contained in the House's motion to intervene as the House's operative pleading.

Evans was the second opinion issued by the Supreme Court in 1984 in which the Court struck a voter initiative proposed amendment from the ballot due to violations of article XI, section 3[2] or section 101.161.[3] In his concurrence in *Evans*, Justice Overton observed: "the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." 457 So. 2d at 1356 (quotation omitted).

In 1986, the Legislature put forward just such a process when it proposed for adoption article IV, section 10 and article V, subsection 3(b)(10) of the constitution. These provisions established the Supreme Court's present mandatory and exclusive jurisdiction over pre-election challenges to voter initiative petitions to amend the Florida Constitution. The accompanying legislative staff summaries explained the purpose of these provisions: "This proposed amendment, together with the enacting language of PCS/HB 72, are designed to provide a method by which an initiative's proposal's compliance with constitutional and statutory requirements could be ascertained expeditiously." Staff of Fla.H.R.Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla.H.R.Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986).[4]

In *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the Supreme Court discussed the history and purpose behind article IV, section 10 and article V, subsection 3(b)(10) as follows:

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[2] *Evans*, 457 So. 2d at 1353-54; *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

[3] *Evans*, 457 So. 2d at 1353-54.

[4] *See Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (citing the staff analysis summaries to CS/HJR 71 and PCS/HJR 71 and noting that "[a]lthough the committee substitutes discussed in these summaries were not themselves adopted, they differ in no relevant way from House Joint Resolution 71, which ultimately was adopted, placed before the voters, and approved. *See* Fla. HJR 71, 1986 Fla. Laws 2281, 2281-83.").

> The constitution expressly authorizes judicial review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const.; *see generally* Art. V, § 3(10), Fla. Const.; Art XI, § 3, Fla. Const. (explaining that the sponsor of an initiative petition must obtain signatures of eight percent of electors statewide in order to place the amendment on the ballot); §§ 15.21 (explaining that judicial review may be sought when the sponsor has obtained one-tenth of the signatures necessary for placement on the ballot), 16.061, Fla. Stat. (1997). This provision was adopted in 1986 in response to the Court's striking of two initiative amendments from the ballot after the sponsors had obtained the requisite number of signatures for placement on the ballot. *See Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). **The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . .**

Armstrong, 773 So. 2d at 14 n.18 (emphasis added).

On at least two occasions, the Supreme Court has stated expressly that its jurisdiction to review voter initiative proposed amendments to the Florida Constitution, pre-election, is both mandatory **and exclusive**. *See Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994) ("The Attorney General of Florida has petitioned this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)); *Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) ("The Attorney General of Florida has requested this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. § 16.061, Fla.Stat. (1993). In response, we issued an order permitting interested parties to file briefs, and we heard oral arguments on the validity of the proposed amendment. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)).

Notably, in the more than two decades following the voters' adoption of article V, subsection 3(b)(10), there has not been a published opinion in which a Florida court, other than

the Supreme Court, has attempted to exercise jurisdiction over a pre-election suit seeking to invalidate a voter initiative to amend the constitution on the basis that the proposed amendment or ballot summary did not comply with article XI, section 3 or section 101.161.[5]

B. Constitutional amendments from resolutions of the Legislature are subject to different procedures than voter initiatives

A joint resolution of the Florida Legislature is the other principal means by which proposed constitutional amendments are placed on the ballot.[6]

Prior to the voters' approval of article IV, section 10 and article V, subsection 3(b)(10) in 1986, the method by which legislative joint resolutions and voter initiatives were reviewed by the Florida courts was identical; either could be reviewed through a declaratory action filed in

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[5] Plaintiffs' "Notice of Priority Status" cites the First District Court of Appeal's opinion in *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 558-59 (Fla. 1st DCA 2006) ("*Playing Field*"), for the proposition that the trial court's "refusal to expedite [a] challenge to a proposed constitutional amendment was in error." [Notice of Priority Status, ¶ 4] Defendant does not dispute that this case should be resolved on an expedited basis. However, to the extent that Plaintiffs rely on *Playing Field* in support of this Court exercising jurisdiction in this case, that opinion is entirely distinguishable. *Playing Field* involved a procedural challenge based on allegations that the initiative sponsor fraudulently obtained signatures on the initiative petition in violation of section 100.371, Florida Statutes. It did not address whether the amendment complied substantively with article XI, section 3 and section 101.161.

[6] There are five methods by which the Florida Constitution may be amended:
(i) Constitutional Convention – Florida voters may call a constitutional convention by collecting a designated amount of signatures and then gaining a majority of the vote to the question "Shall a constitutional convention be held?";
(ii) Constitutional Revision Commission – this commission meets every 20 years to examine the constitution of the state and propose the amendments deemed necessary;
(iii) Taxation and Budget Reform Commission – this commission also meets only every 20th year;
(iv) Legislative Joint Resolution – The Florida Legislature can pass a joint resolution supported by three-fifths of the membership of each house of the legislature; and
(v) Citizen Initiative – the method by which Amendments 5 and 6 were proposed here.
See art. XI, §§ 1-4, 6, Fla. Const.

the circuit courts or a mandamus petition filed in the Supreme Court.[7]

After article IV, section 10 and article V, subsection 3(b)(10) took effect, the Supreme Court has had original and exclusive jurisdiction over the pre-election review of voter initiative proposed amendments to the Constitution, for the reasons discussed above. By contrast, no basis for original and exclusive Supreme Court jurisdiction exists for review of proposed amendments by legislative joint resolution. *Armstrong*, 773 So. 2d at 14 n.18 ("The constitution expressly authorizes [Supreme Court] review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const. . . .").

Therefore, unlike voter initiative proposed amendments, the validity of joint resolution proposed amendments may still be reviewed by circuit courts pursuant to declaratory judgment actions.[8] *See e.g., Armstrong*, 773 So. 2d at 9 (pre-election declaratory judgment action filed in circuit court as to validity of constitutional amendment proposed by legislative resolution).

Thus, any authorities arising from proposed amendments by legislative resolution which may be relied upon here by the Plaintiffs and the Intervening Plaintiffs are entirely inapplicable.

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[7] *See Evans*, 457 So. 2d at 1352 (in which the Supreme Court reviewed a "a declaratory judgment rendered [in the circuit court] in which [that court] found the [citizen initiative] proposed amendment to the Florida Constitution . . . and its ballot summary were constitutionally valid."); *Askew v. Firestone*, 421 So. 2d 151, 152-53 (Fla. 1982) (Florida Supreme Court opinion reviewing declaratory judgment issued by a circuit court regarding validity of joint resolution proposed amendment to the Florida Constitution); *Fine*, 448 So. 2d 985-86 (Florida Supreme Court accepting discretionary mandamus jurisdiction to consider validity of citizen initiative proposed amendment to Florida Constitution).

[8] One reason for the Legislature's decision not to include pre-election review of joint resolution proposed amendments by the Supreme Court in the amendment resulting in article IV, section 10 in 1986 was posited by the *Armstrong* Court: "The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . . Obviously, no such provision is necessary for amendments originating from other sources." *Armstrong*, 773 So. 2d at 14 n.18.

C. Plaintiffs' reliance upon *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) is misplaced.

Plaintiffs' Complaint alleges that "[u]nder *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of [Amendment 6] in [*Redistricting Standards*] is no impediment to this challenge." [Plaintiffs' Complaint, ¶ 16]

Smith was decided pursuant to a petition for writ of mandamus originally filed in the Supreme Court. 607 So. 2d at 398 (citing art. 5, § 3(b)(8) ("The supreme court . . . [m]ay issue writs of mandamus and quo warranto to state officers and state agencies."). The Court had previously issued an advisory opinion pursuant to article IV, section 10 and article V, subsection 3(b)(10) as to the validity of the voter initiative amendment at issue in that case and, consequently, the *Smith* Court was faced with the question of:

> whether our earlier advisory proceeding precludes us from considering the present cause. It is true that article IV, section 10 and article V, subsection 3(b)(10) are silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction.

607 So. 2d at 398.

In its holding that a second challenge to the proposed amendment was permissible, the *Smith* Court noted that its advisory opinions "would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised." *Id.*[9] The Court stated that its holding that advisory opinions issued pursuant to article IV, section 10 and article V, subsection 3(b)(10) are non-binding was:

> entirely consistent with settled law holding that advisory opinions "are not binding judicial precedents, [although] they are frequently very persuasive and

[9] The Court relied in part on the legislative staff summaries considered by the Legislature prior to its submission of the proposed amendment resulting in voter approval of article IV, section 10, and article V, subsection 3(b)(10). 607 So. 2d at 399.

> usually adhered to" . . . as to issues they actually address, [but] not as to issues . . . that were not addressed at all in a prior advisory opinion.

Id. at 399 n.3 (quoting *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944)).

There is no ambiguity in *Smith* that in "extraordinary cases" an amendment opponent can advance a second challenge in the Supreme Court prior to an election. 607 So. 2d at 399. Yet the issue here is not whether the *Supreme Court* has jurisdiction to revisit issues previously decided. The issue here is whether *this* Court has such jurisdiction. As to that question, *Smith* provides no support for the Plaintiffs' contention that this Court may exercise original jurisdiction in this case. Indeed, in two respects, the *Smith* opinion indicates that jurisdiction lies only with the Supreme Court.

First, *Smith* was decided pursuant to a petition for writ of mandamus filed directly in the Supreme Court – not the circuit court. Thus, the procedure followed in that case is wholly consistent with subsequent statements of the Supreme Court that it has original and exclusive jurisdiction over the pre-election review of proposed initiative amendments pursuant to article V, section 3(b)(10). *Advisory Opinion*, 642 So. 2d at 725; *Advisory Opinion*, 661 So. 2d at 1205. Second, the manner in which the Supreme Court framed the issue before it demonstrates that Court's exclusive jurisdiction. As the Court stated, the issue there was "whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case." 607 So. 2d at 398 (emphasis added).

In short, nothing in *Smith* even hints that the petitioner/opponent of the proposed amendment could have gone to any other court with its pre-election challenge.

Likewise, the Supreme Court's decision in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), supports Defendant's position here. In *Ray*, a post-election amendment challenge, the Supreme Court revisited *Smith* to make clear that absent *extraordinary circumstances*, its decisions in an

advisory opinion are binding. As stated in *Ray*:

> relitigation of issues expressly addressed in an advisory opinion on a proposed amendment **is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction.** Renewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion. [A]lthough our advisory opinions are not strictly binding precedent in the most technical sense, only under **extraordinary circumstances** will we revisit an issue decided in our earlier advisory opinions.
>
> This case does not present such a circumstance. . . . Therefore, we conclude that our earlier [advisory opinion] decision . . . **is binding** on the single-subject issue and we find no reason to reconsider the issue and recede from that decision.

Ray, 742 So. 2d at 1285 (emphasis added; internal quotation omitted).

Thus, to the extent Plaintiffs or Intervening Plaintiffs wish to challenge Amendments 5 and 6 before the election, they, like the petitioner in *Smith*, must do so in the Florida Supreme Court and must show that *extraordinary circumstances* warrant that Court's exercise of mandamus jurisdiction.

D. This Court has no jurisdiction to consider a pre-election challenge to the validity of the Amendments with an expanded scope of review.

The Senate Complaint alleges as a basis for this Court's jurisdiction that:

> this Court has jurisdiction to enjoin the proposed constitutional amendments from being placed on the ballot as their contradictions with federal law will render them futile and incapable of being made operative under any circumstances. *See Gray v. Winthrop*, 115 Fla. 721 (1934).

[Senate Complaint, ¶ 8] Remarkably, this is the very argument Justice Overton made in his dissent – rejected by the majority – in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229-30 (Fla. 1991) (Overton, J., concurring in part and dissenting in part) (hereafter "*Limited Terms*"). In *Limited Terms*, Justice Overton argued that pursuant to *Gray v. Winthrop*, 156 So. 270 (Fla. 1934), *Gray v. Moss*, 156

So. 262 (Fla. 1934), and *Weber v. Smathers*, 338 So. 2d 819, 821 (Fla. 1976), the Supreme Court must strike an initiative proposed amendment to the constitution from the ballot if:

> "by its terms [it] specifically and necessarily violates a command or limitation of the Federal Constitution . . . in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances."

Limited Terms, 592 So. 2d at 229 (J. Overton, dissenting) (quoting *Winthrop*, 156 So. at 272). That argument was rejected by the majority, which held that "we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989)." 592 So. 2d at 227 & n.2 (citing *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla.1982) (question of whether proposed amendment violated due process not justiciable in challenge to ballot summary)).

Likewise, in *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (hereafter, "*Class Size*"), the Supreme Court reaffirmed its holding in *Limited Terms*, and once again rejected the argument made by Justice Overton in his dissent in *Limited Terms* – and by the Senate here. As stated in *Class Size*:

> In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment. Moreover, **other constitutional challenges are not justiciable in this type of proceeding.** [*Limited Political*], 592 So. 2d 225, 227 (Fla. 1991).

816 So. 2d 580, 582 (emphasis added, internal citation omitted in part). By "this type of proceeding," the Court meant a **pre-election proceeding**, over which, for the reasons previously discussed, the Supreme Court has original and exclusive jurisdiction.

In *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 804-05 (Fla. 1998) (hereafter, "*Term Limits*"), Justice Overton once again argued, this time in a

concurrence joined by no other Justice, that:

> it is a fraud on the public to indicate that this initiative provision could be properly placed on the ballot if the ballot summary was not misleading. I find this entire provision to be unconstitutional on its face under *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). I still adhere to the view that I expressed in [*Limited Terms*] that . . . in considering whether or not the proposed amendment to [the Florida] constitution meets constitutional requirements of validity under the Constitution of the United States. . . .

718 So. 2d at 804 (Overton, J., concurring in the result only) (citing in part Art. III, § 10, Fla. Const.; *Winthrop*, 156 So. 270; *Moss*, 156 So. 262). Once again, the majority of the Court rejected the argument. 718 So. 2d at 801 & n.1.

The Defendant does not dispute that if the voters approve the Amendments, the Senate may assert – post-election – the arguments it attempts to make in this Court.[10] But the pre-election scope of review of initiative proposed amendments is "limited to two legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary of the proposed amendment are misleading, in violation of section 101.161(1), Florida Statutes." *Term Limits*, 718 So. 2d at 801.[11]

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[10] *Ray* is an example of this procedure. There, the amendment opponents filed a post-election circuit court case to prevent enforcement of a voter-approved amendment to the Florida Constitution on the ground that the amendment was invalid under federal law. *Ray*, 742 So. 2d at 1277, 1278, 1280. This is precisely the claim the Florida Senate makes in this case.

[11] The Plaintiffs and Intervening Plaintiffs stated at the hearing on June 9 that their claims require a trial of factual issues. As discussed above, the appropriate scope of pre-election review is limited to the issues under Article XI, section 3, of the constitution and section 101.161, Florida Statutes, *i.e.*, whether the language of an amendment conforms to the single subject rule and whether the ballot title and summary conform to the requirements of the statute. If there are factual issues the Attorney General believes are necessary to enable the Supreme Court to render an advisory opinion, he must specifically enumerate those. *See* § 16.061, Fla. Stat. There were no factual issues so enumerated by the Attorney General as to Amendments 5 and 6. *See Redistricting Standards*.
(Continued ...)

The rationale for this limitation is simple and compelling; as stated in *Advisory Opinion to the Attorney General Re: Tax Limitation*, 644 So. 2d 486 (Fla. 1994) (hereafter, "*Tax Limitation*"):

> This Court's role in these matters is strictly limited to the legal issues presented by the constitution and relevant statutes. **This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments, and we have not done so. Infringing on the people's right to vote** on an amendment is a power this Court should use only where the record shows the constitutional single-subject requirement has been violated or the record establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment and its effect on the present constitution.

Id. at 489 (emphasis added).

Even as to the two narrow issues which the Supreme Court does consider in a pre-election advisory opinion, "'[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.'" *Advisory Opinion to Attorney General Re: 1.35% Property Tax Cap*, 2 So. 3d 968, 971 (Fla. 2009) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). "[W]here voter initiatives are concerned, the Court has no authority to inject itself in the process, unless the laws governing the process [i.e., article XI, section 3 and section 101.161] have been clearly and conclusively violated." *Id.* (internal quotation and citation omitted).

As aptly put by the Third District Court of Appeal:

> The law is well-settled that a court of equity as a general rule will not restrain the holding of an election because a free election in a democracy is a political matter to be determined by the electorate and not the courts. Limited exceptions to this rule have been recognized but only on the narrowest of grounds. One such exception is where the election is being held in violation of an applicable

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Any other issues for which evidence may be necessary for Plaintiffs to support their claims are assertable only in a post-election proceeding as discussed above. Consequently, a trial is neither necessary nor proper in this case.

> legislative enactment. Another is where the ballot question on a referendum is misleading and deprives the voter of an opportunity to know and to be on notice as to the proposition on which he is to cast his vote.

Metropolitan Dade County v. Shiver, 365 So. 2d 210, 212 (Fla. 3d DCA 1978), *affirmed*, 394 So. 2d 981 (Fla. 1981) (internal citation omitted).

In sum, the Supreme Court has applied its limited authority to review initiative proposed amendments to infringe as little as possible on the people's right to vote. Allowing an amendment opponent to simply sidestep the Supreme Court and seek broader review in a pre-election challenge in a Florida circuit court would render that limited scope of review meaningless.

In this case, the Plaintiffs and Intervening Plaintiffs plainly seek to do just that.

IV. CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction to decide this case. If the Plaintiffs and the Intervening Plaintiffs wish to challenge Amendments 5 and 6 prior to the November 2010 general election, they must seek review through the Supreme Court's exclusive jurisdiction.

Accordingly, the Defendant respectfully asks this Court to dismiss the Plaintiffs' and Intervening Plaintiffs' claims in this case for lack of subject matter jurisdiction.

Dated this 22nd day of June, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), pursuant to Rule 1.110, Fla.R.Civ.P., responds, in seriatim, to the separately-numbered paragraphs of the Complaint for Declaratory and Injunctive Relief (the "Complaint") filed by Plaintiffs Corrine Brown and Mario Diaz-Balart as follows:

1. Defendant admits that on September 28, 2007, the Florida Department of State, Division of Elections approved an initiative petition prepared by FairDistrictsFlorida.org for circulation. Defendant further admits that this petition has since obtained the necessary number of signatures and has been certified for placement on the ballot for the November 2010 general election. Defendant is otherwise without knowledge as to the allegations contained in paragraph 1 of the Complaint and therefore denies the remaining allegations.

2. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 2 of the Complaint and therefore denies the remaining allegations.

3. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 3 of the Complaint and therefore denies the remaining allegations.

4. Defendant admits that *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009) speaks for itself. Defendant otherwise admits the allegations contained in paragraph 4 of the Complaint.

5. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 5 of the Complaint and therefore denies the remaining allegations.

6. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 6 of the Complaint and therefore denies the remaining allegations.

7. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 7 of the Complaint and therefore denies the remaining allegations.

8. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 8 of the Complaint and therefore denies the remaining allegations.

9. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 9 of the Complaint and therefore denies the remaining allegations.

10. Defendant is without knowledge as to the allegations contained in paragraph 10 of the Complaint and therefore denies the allegations.

11. Defendant is without knowledge as to the allegations contained in paragraph 11 of the Complaint and therefore denies the allegations.

12. Defendant admits the allegations contained in paragraph 12 of the Complaint.

Jurisdiction and Venue

13. Defendant admits that §26.012, Fla. Stat. speaks for itself. Defendant specifically denies that the circuit court has jurisdiction to enter relief in this case. Defendant otherwise denies the remaining allegations contained in paragraph 13 of the Complaint.

14. Defendant denies the allegations contained in paragraph 14 of the Complaint.

15. Defendant admits that §§ 26.012 and 86.011, Fla. Stat. speak for themselves. Defendant specifically denies that the circuit court has jurisdiction to enter relief in this case. Defendant otherwise denies the remaining allegations contained in paragraph 15 of the Complaint.

16. Defendant admits that *Florida League of Cities v. Smith,* 607 So. 2d 397 (Fla. 1992) speaks for itself. Defendant otherwise denies the remaining allegations contained in paragraph 16 of the Complaint.

General Allegations

17. Defendant admits that § 101.161, Fla. Stat. speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 17 of the Complaint and therefore denies the remaining allegations.

18. Defendant admits that Art. XI, §3, Fla. Const., Art. XI, §5, Fla. Const., and §101.161, Fla. Stat. (2009) speak for themselves. Defendant is otherwise without knowledge as to allegations contained in paragraph 18 of the Complaint and therefore denies the remaining allegations.

19. Defendant admits that *In re Adv. Op. to Att'y Gen.-Restricts Laws Related to Discrimination,* 632 So. 2d 1018 (Fla. 1994) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 19 of the Complaint and therefore denies the remaining allegations.

COUNT I

20. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

21. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" and *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 21 of the Complaint and therefore denies the remaining allegations.

22. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 22 of the Complaint and therefore denies the remaining allegations.

23. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 23 of the Complaint and therefore denies the remaining allegations.

24. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 24 of the Complaint and therefore denies the remaining allegations.

25. Defendant is without knowledge as to the allegations contained in paragraph 25 of the Complaint and therefore denies the allegations.

26. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 26 of the Complaint and therefore denies the remaining allegations.

27. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 27 of the Complaint and therefore denies the remaining allegations.

28. Defendant admits that *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009) and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 28 of the Complaint and therefore denies the remaining allegations.

29. Defendant admits that the Voting Rights Act of 1965 (42 U.S.C. § 1971, *et seq.*) (the "Voting Rights Act") and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 29 of the Complaint and therefore denies the remaining allegations.

30. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 30 of the Complaint and therefore denies the remaining allegations.

31. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 31 of the Complaint and therefore denies the remaining allegations.

COUNT II

32. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

33. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to

the allegations contained in paragraph 33 of the Complaint and therefore denies the remaining allegations.

34. Defendant is without knowledge, and therefore denies, the allegations contained in paragraph 34 of the Complaint.

35. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 35 of the Complaint and therefore denies the remaining allegations.

36. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 36 of the Complaint and therefore denies the remaining allegations.

37. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 37 of the Complaint and therefore denies the remaining allegations.

38. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 38 of the Complaint and therefore denies the remaining allegations.

COUNT III

39. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

40. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 40 of the Complaint and therefore denies the remaining allegations.

41. Defendant admits that *Reynolds v. Sims*, 377 U.S. 533 (1964) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 41 of the Complaint and therefore denies the remaining allegations.

42. Defendant is without knowledge as to the allegations contained in paragraph 42 of the Complaint and therefore denies the allegations.

43. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 43 of the Complaint and therefore denies the remaining allegations.

COUNT IV

44. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

45. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 45 of the Complaint and therefore denies the remaining allegations.

46. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to

the allegations contained in paragraph 46 of the Complaint and therefore denies the remaining allegations.

47. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 47 of the Complaint and therefore denies the remaining allegations.

48. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 48 of the Complaint and therefore denies the remaining allegations.

49. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 49 of the Complaint and therefore denies the remaining allegations.

50. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 50 of the Complaint and therefore denies the remaining allegations.

COUNT V

51. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

52. Defendant admits that the Voting Rights Act and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is

otherwise without knowledge as to the allegations contained in paragraph 52 of the Complaint and therefore denies the remaining allegations.

53. Defendant admits that *Georgia v. Ashcroft*, 539 U.S. 461 (2003) and the Voting Rights Act speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 53 of the Complaint and therefore denies the remaining allegations.

54. Defendant admits that *Georgia v. Ashcroft*, 539 U.S. 461 (2003) and the Voting Rights Act speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 54 of the Complaint and therefore denies the remaining allegations.

55. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 55 of the Complaint and therefore denies the remaining allegations.

56. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 56 of the Complaint and therefore denies the remaining allegations.

57. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 57 of the Complaint and therefore denies the remaining allegations.

COUNT VI

58. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

59. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 59 of the Complaint and therefore denies the remaining allegations.

60. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 60 of the Complaint and therefore denies the remaining allegations.

61. Defendant is without knowledge as to the allegations contained in paragraph 61 of the Complaint and therefore denies the allegations.

62. Defendant admits that *See How Will the FairDistrictFlorida.org Amendments Work?,* Sponsor's Advertisement (March 5, 2009), *Stop Protecting Politicians,* TCPalm (Nov. 26, 2008) *Leaning Republican, Again,* Florida Trend (September 1, 2008), and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 62 of the Complaint and therefore denies the remaining allegations.

63. Defendant admits that *Bartlett v. Strickland,* 129 S. Ct. 1231 (2009), *Plan to Redraw State Districts Called Unfair*, Tampa Tribune (Jan. 12, 2010), *Race Enters Debate Over Redrawing Florida Political Districts,* Florida Times-Union (Dec. 14, 2009), *Two Ballot Proposals Stir Fears*, Sarasota Herald-Tribune (Nov. 27, 2009), and *Initiative Prompts*

Questions of Racial Fairness, Daytona Times (Nov. 19, 2009) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 63 of the Complaint and therefore denies the remaining allegations.

64. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 64 of the Complaint and therefore denies the remaining allegations.

65. Defendant is without knowledge as to the allegations contained in paragraph 65 of the Complaint and therefore denies the allegations.

COUNT VII

66. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

67. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 67 of the Complaint and therefore denies the remaining allegations.

68. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 68 of the Complaint and therefore denies the remaining allegations.

69. Defendant admits that *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), the Voting Rights Act, and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for

themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 69 of the Complaint and therefore denies the remaining allegations.

70. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 70 of the Complaint and therefore denies the remaining allegations.

71. Defendant is without knowledge as to the allegations contained in paragraph 71 of the Complaint and therefore denies the allegations.

COUNT VIII

72. Defendant realleges and incorporates her responses to paragraphs 1 through 19 of the Complaint, as if fully set forth herein.

73. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 73 of the Complaint and therefore denies the remaining allegations.

74. Defendant admits that the 2010 Census questionnaire contains 10 questions. Defendant is otherwise without knowledge as to the allegations contained in paragraph 74 of the Complaint and therefore denies the remaining allegations.

75. Defendant is without knowledge as to the allegations contained in paragraph 75 of the Complaint and therefore denies the allegations.

76. Defendant admits that the "2010 Census Constituent FAQs" located at http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf speaks for itself. Defendant is

otherwise without knowledge as to the allegations contained in paragraph 76 of the Complaint and therefore denies the remaining allegations.

77. Defendant is without knowledge as to the allegations contained in paragraph 77 of the Complaint and therefore denies the remaining allegations.

78. Defendant is without knowledge as to the allegations contained in paragraph 78 of the Complaint and therefore denies the remaining allegations.

All allegations contained in the Complaint that are not specifically addressed are hereby denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

79. Each count of Plaintiffs' Complaint fails to state a cause of action for declaratory relief due to Plaintiffs' failure to allege ultimate facts demonstrating its right to such relief. In particular, Plaintiffs fail to allege that their rights, powers, or privileges are dependant upon the law applicable to the facts of this case or that the declaration sought by them deals with a present or ascertainable set of facts as opposed to speculation about the possible impact the proposed constitutional amendments may have in the future. Further, the allegations of the Complaint do not demonstrate a bona fide, actual need for a declaration; rather, they simply allege, at best, disagreement with the Florida Supreme Court's determination that the ballot summary for proposed Amendment 6 is clear, unambiguous, and limited to a single subject. Finally, the allegations contained in the Complaint demonstrate that the Plaintiffs are simply seeking a second legal opinion as to whether proposed Amendment 6's ballot summary complies with Florida law.

Second Affirmative Defense

80. Each count of Plaintiffs' Complaint fails to state a cause of action for injunctive relief inasmuch as the Complaint lacks allegations regarding the Plaintiffs' likelihood of irreparable harm, unavailability of an adequate remedy at law, or substantial likelihood of success on the merits.

Third Affirmative Defense

81. Each count of Plaintiffs' Complaint fails to state a cause of action because the proposed Constitutional Amendment Petition form attached as Exhibit A to the Complaint, including the proposed ballot summary, complies in all respects with the requirements of Florida law.

Fourth Affirmative Defense

82. The Florida Supreme Court has mandatory and exclusive jurisdiction to consider pre-election challenges to proposed constitutional amendments and ballot summaries, including those at issue in this case. As such, this Court lacks subject matter jurisdiction over the issues raised in Plaintiffs' Complaint.

Fifth Affirmative Defenses

83. Plaintiffs' claims are barred by the doctrine of ripeness. On January 29, 2009, the Florida Supreme Court rendered its opinion holding that the ballot summary at issue complies with Florida law and is clear, unambiguous, and limited to a single subject. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009). The Plaintiffs, who declined to participate in the advisory opinion proceedings, may not now seek to block the proposed amendment from appearing on the ballot; rather, Plaintiffs' proper remedy is to seek to void the result of the election should Amendment 6 become law. Thus, because the

citizens of Florida have yet to vote on and approve proposed Amendment 6, the claims asserted in Plaintiffs' Complaint are not yet ripe for judicial determination.

Sixth Affirmative Defense

84. Plaintiffs' Complaint is barred by the doctrine of laches inasmuch as the Plaintiffs have unreasonably delayed asserting the claims alleged therein. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), setting forth its findings. Plaintiffs were aware of these advisory opinion proceedings regarding the challenges to proposed Amendment 6 and its ballot summary, yet chose not to participate in these proceedings. Instead, Plaintiffs delayed sixteen months before filing the present case in which they assert eight causes of action, all of which challenge the ballot summary of proposed Amendment 6. Because each of the causes of action asserted by Plaintiffs have been, or could have been, brought in the advisory opinion proceedings, Defendant will experience undue prejudice in now being forced to defend a suit which has been, or could have been, resolved by the Florida Supreme Court over a year ago.

Seventh Affirmative Defense

85. Plaintiffs' claims are barred by the doctrine of waiver. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist.*

Boundaries, 2 So. 3d 175 (Fla. 2009), setting forth its findings. Plaintiffs' were aware of these prior advisory opinion proceedings regarding the challenges to proposed Amendment 6 and its ballot summary, yet chose not to participate in these proceedings. Because each of Plaintiffs' alleged causes of action could have, and should have, been asserted in the prior proceedings before the Florida Supreme Court, Plaintiffs have waived their right to bring a separate action seeking a determination that the ballot summary of proposed Amendment 6 does not comply with Florida law.

Dated this 22nd day of June, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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00017658

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

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendant,

and

BOB GRAHAM,

Intervening Defendant.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Corrine Brown and Mario Diaz-Balart, sue Defendant, Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida, and FairDistrictsFlorida.org and allege:

1. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by Defendant FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional

Petition has since obtained the necessary number of signatures and has been certified for placement on the November 2010 general election ballot.

2. The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Exhibit A attached hereto.

3. The ballot title and summary for the proposed Congressional Amendment is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Id.

4. Pursuant to Article IV, section 10, Florida Constitution, the Florida Supreme Court reviewed the Petitions and rendered an advisory opinion that their summaries are clear and unambiguous and that the proposed amendments are limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

5. The Congressional Amendment's ballot summary violates the strict standard for ballot clarity. Because the ballot summary misrepresents the legal effect and major ramifications of the Congressional Amendment, the Congressional Amendment must be withheld from the 2010 General Election Ballot.

6. The ballot summary overstates the protections afforded to minorities. The summary states that districts shall not be drawn to deny minorities the equal opportunity to elect representatives of their choice. In fact, the Congressional Amendment guarantees only that minorities' ability to elect representatives of their choice — whether equal or unequal — will not be diminished.

7. The ballot summary also misleads by omission. It gives no hint that the Congressional Amendment's compactness and political and geographical boundary requirements will constrain the Legislature's ability to promote minority rights.

8. The ballot summary also purports to require that districts be as nearly equal in population as practicable. But the United States Constitution already imposes this requirement, and all of Florida's congressional districts comply with it. The negative implication that this requirement does not exist, or that Florida's Congressional districts are not as nearly equal in population as practicable, is false and misrepresents the legal impact of the Congressional Amendment.

9. The ballot summary is loaded with vague and ambiguous terms which even their sponsor of the Congressional Amendment is unable or unwilling to define. As a result, the courts will draw the districts, and voters will have no say. To the extent the sponsor has attempted to clarify the Congressional Amendment's unworkable criteria, its statements have been evasive and contradictory.

The Parties

10. Plaintiff Corrine Brown is a citizen of the State of Florida and is registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3.

11. Plaintiff Mario Diaz-Balart is a citizen of the State of Florida and is registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than 60 percent of the voting-age population in Congressional District 25.

12. Defendant Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida (the "Secretary"), is the chief elections officer of the State. It is her duty under Florida law to certify the items, including proposed constitutional amendments, that will be included on the statewide, general election ballot.

13. Defendant FairDistrictsFlorida.Org, Inc. (the "Sponsor") is a Florida corporation and the political committee that sponsored the Congressional Amendment.

Jurisdiction and Venue

14. This Court has jurisdiction pursuant to section 26.012(2), Florida Statutes.

15. Venue is proper in this Court because the Secretary is headquartered in Leon County, Florida.

16. This Court has authority to grant declaratory and injunctive relief pursuant to sections 26.012(3) and 86.011, Florida Statutes.

17. Under *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of the Congressional Amendment, *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009), is no impediment this challenge.

General Allegations

18. All petitions to amend the Florida Constitution must be accompanied by a clear and unambiguous summary of the proposed amendment. § 101.161(1), Fla. Stat. (2009). The summary may not exceed 75 words. *Id.* The text of a proposed amendment will not appear on the ballot — only the title and summary of the amendment are placed on the ballot. *Id.* It is the responsibility of the sponsor to prepare a clear and unambiguous summary. *Id.* § 101.161(2).

19. An initiative petition can only be submitted to the voters if the proposed amendment concerns a single subject and matter directly connected therewith, *see* Art. XI, § 3, Fla. Const., and the ballot summary is clear and unambiguous, *see* Art. XI, § 5(a), Fla. Const.; § 101.161(1), Fla. Stat. (2009). A proposed amendment involves multiple subjects if, without disclosure to the voters, it substantially affects preexisting constitutional provisions or multiple branches of government. A ballot summary is not clear and unambiguous if it is misleading.

20. A ballot summary that omits material information and thus precludes the voters from casting their ballots intelligently violates the accuracy requirement. *In re Adv. Op. to Att'y Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

COUNT I – MISLEADING BALLOT SUMMARY

21. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

22. The Congressional Amendment contains two, distinct requirements that relate to the voting rights of racial and language minorities:

- Districts shall not be drawn with the intent or result of denying or abridging the **equal opportunity** of minorities **to participate in the political process**; and
- Districts shall not be drawn to **diminish the ability** of minorities **to elect representatives of their choice**.

The guarantee of an "equal opportunity" applies only to minorities' participation in the political process—not to the ability of minorities to elect representatives of their choice. The Florida Supreme Court has made clear that these are two separate and distinct requirements. *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d at 188-89.

23. The ballot summary mischaracterizes the second of these requirements (the "Non-Diminishment Provision"). The actual text of the Congressional Amendment provides:

> Districts shall not be drawn . . . to **diminish [the] ability** [of racial and language minorities] to elect representatives of their choice.

But the ballot summary describes the Non-Diminishment Provision as follows:

> Districts shall not be drawn to **deny racial or language minorities the equal opportunity** to . . . elect representatives of their choice.

24. The summary is misleading. The Congressional Amendment does not guarantee minorities an equal opportunity to elect representatives of their choice. It provides only that minorities' ability to elect representatives of their choice — equal or unequal — will not be diminished.

25. There is a material difference between a guarantee of equality and a mere protection against diminishment. A guarantee of equality would require the practical attainment of an objective ideal. A protection against diminishment only guards against a worsening in the existing ability of minorities to elect representatives of their choice. In its promise of equality, the summary grandly overstates the actual — and less protective — effect of the Congressional Amendment.

26. In a series of statements made to a committee of the Florida House of Representatives, the Sponsor repeatedly asserted that the Non-Diminishment Provision merely prevents future "harm" to the present ability of minorities to elect representatives of their choice:

> That last phrase prohibits the drawing of any district or plan that will ***reduce*** the ability of minorities to elect minority representatives. Plain and simple.
>
> Minorities' ability, the ability of minority voters to elect representatives of their choice is not going to be ***diminished*** with this amendment.
>
> What I do know is that these amendments will very clearly by their language forbid any legislator or any Legislature I should say, to adopt any plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.
>
> The . . . language says that districts cannot be drawn or plans cannot be drawn to ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> However, given that and given the language that is in our amendment, you cannot ***diminish*** the ability of . . . minority voters to elect representatives of their choice. So that is a protection that will be in the Florida Constitution. You will be violating the Constitution if you ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> What our language says is that you cannot . . . make districts or create a plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.

> What our amendments say is that . . . with regard to ability to elect representatives of choice, the Legislature cannot do anything to ***diminish*** that ability.
>
> And we want to make sure that in doing all that there is ***no harm done*** and ***no diminution*** of . . . the rights of minority voters.
>
> The language of the amendment says that you can't draw districts to ***diminish*** the ability to elect representatives of choice and that is—***that is the prohibition.***
>
> In fact, that is the reason that the language is in there to ensure that . . . the ability of minority voters to elect representatives of their choice will not be ***diminished.***

Emphasis added.

27. Conceptually and practically, non-diminishment is different from equality. Contrary to the promise of the ballot summary, the Congressional Amendment does not require that the ability of minorities to elect representatives of their choice be affirmatively enhanced until equality is achieved. They merely prevent backsliding in relation to the status quo—equal or unequal.

28. The Congressional Amendment's sentence construction makes clear that minorities are not ensured an equal opportunity to elect representatives of their choice. The Congressional Amendment does ensure an "equal opportunity . . . to participate in the political process," and the drafter might have completed the sentence: "and to elect representatives of their choice." "Equal opportunity" would then have applied to the ability to elect the representatives of choice. This was not done.

29. As the Florida Supreme Court explained, "the negative verb 'shall not be drawn' in the proposed amendment[] modifies both clauses 'with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political

process' and 'to diminish their ability to elect representatives of their choice.'" *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d at 189. The phrase "equal opportunity" does not modify both clauses—except in the erroneous ballot summary.

30. The Sponsor has stated that the Non-Diminishment Provision is "somewhat similar to what is in Section 5" of the federal Voting Rights Act. Where it applies, Section 5 ensures that no voting change "has the purpose or will have the effect of diminishing the ability of any citizen of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section 5 does not guarantee equality, but merely prevents backsliding, or "retrogression." The benchmark for comparison is the status quo, and not the ideal of equality.

31. Like Section 5 of the VRA, the Congressional Amendment's Non-Diminishment Provision prohibits backward steps. It prohibits the undoing or reversal of gains already achieved by minorities. It does not, however, ensure an "equal opportunity . . . to elect representatives of their choice." Thus, a redistricting plan that neither diminishes the ability of minorities to elect representatives of their choice, nor accords minorities an equal opportunity to elect representatives of their choice, would not violate the Non-Diminishment Provision.

32. In stating that the Congressional Amendment guarantees minorities the "equal opportunity to . . . elect representatives of their choice," the ballot summary misrepresents the legal impact of the Congressional Amendment and gives voters a wrong and materially misleading impression.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be

placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT II – MISLEADING BALLOT SUMMARY

33. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

34. The ballot summary is deceptive and misleading because it does not tell voters that the Congressional Amendment, through its compactness and political and geographical boundaries requirements, restrains the Legislature's ability to draw districts in which minority voters will have the ability to elect representatives of their choice.

35. Currently, the Equal Protection Clauses of the United States and Florida Constitutions are the only legal constraints that act as a ceiling on the Legislature's discretion to draw districts in which minority voters will have the ability to elect candidates of their choice.

36. If the Congressional Amendment is enacted, the Legislature will be subject to two new legal constraints: the requirements that districts be compact and that districts, where feasible, utilize existing political and geographical boundaries.

37. To avoid these new requirements, the Legislature would have to show that they conflict with the following, superior standard, which is also contained in the Congressional Amendment: "Districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

38. Except to the extent necessary to comply with this requirement and the federal Voting Rights Act, the Legislature's discretion to create districts that promote minority

representation will be subject to the limitation that districts be compact and follow political and geographical boundaries.

39. The ballot summary does nothing to inform voters of the Congressional Amendment's significant effect on the Legislature's discretion under current law to promote minority representation.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT III – MISLEADING BALLOT SUMMARY

40. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

41. The ballot summary states that, under the Congressional Amendment, districts must be "as equal in population as feasible." Thus, the summary suggests that current law does not already require districts to consist of populations as nearly equal as practicable, or that districts in Florida in fact consist of unequal populations. Both of the inferences that flow from the summary are false.

42. Federal law already requires that congressional districts be as nearly equal in population as practicable. *Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

43. Florida's current congressional plan, adopted in 2002, has a total deviation of one person. Twenty-two of the State's twenty-five congressional districts have zero deviation and the other three districts only deviate by a single resident.

44. The ballot summary, therefore, misleads voters about the existing requirements applicable to the redistricting process and the legal effect of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT IV – MISLEADING BALLOT SUMMARY

45. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

46. The ballot summary confuses and misleads voters because the summary uses the same phrase—"*drawn to*" —inconsistently to mean no fewer than three different things.

47. **First**, the ballot summary provides that districts may not be "drawn to" favor or disfavor an incumbent or political party. In this case, the phrase "drawn to" means that districts may not be drawn with the *intent* to favor or disfavor an incumbent of political party.

48. **Second**, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to participate in the political process. In this case, the phrase "drawn to" means that districts may not be drawn with either the *intent* or *result* of denying the equal opportunity of minorities to participate in the political process.

49. **Third**, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to elect representatives of their choice. In this case, the phrase

"drawn to" means that districts may not be drawn with the *result* of diminishing the ability of racial or language minorities to elect representatives of their choice.

50. Thus, the phrase "drawn to" has three different meanings in the summary: (i) *intent*, as applied to the prohibition against favoring or disfavoring incumbents or political parties; (ii) *intent* or *result*, as applied to the prohibition against denying minorities an equal opportunity to participate in the political process; and (iii) *result*, as applied to the prohibition against diminishing the ability of minorities to elect representatives of their choice.

51. The inconsistent use of terminology within the ballot summary is misleading. The summary fails to inform the voters, clearly and unambiguously, whether the Congressional Amendment prohibits an intent, a result, or both, in the three instances to which the phrase "drawn to" applies. In using the identical phrase to denote three different and clearly distinguishable legal standards, the ballot summary confuses and dissembles the true legal impact of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT V – MISLEADING BALLOT SUMMARY

52. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

53. The ballot summary suggests that the Legislature will be required to ignore incumbency. Under the VRA, it cannot do so. The Legislature must consider incumbency —

and may favor an incumbent — to protect minority rights. By suggesting that the Congressional Amendment prohibits an intent to favor incumbents, the summary promises more than can be delivered.

54. Section 5 of the VRA, which applies to changes in electoral practices and procedures in five Florida counties (Collier, Hardy, Hendry, Hillsborough, and Monroe), prohibits changes that "lead to retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Whether a change will result in retrogression "depends on an examination of all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479.

55. One component of the opportunity to participate in the political process is the preservation of minority incumbents in positions of legislative influence and leadership. *Id.* at 483. Thus, the VRA requires the Legislature to weigh incumbency when it assesses compliance with Section 5, and permits it to favor minority incumbents as one means of compliance.

56. The Congressional Amendment, however, purports to deprive the Legislature of this important mechanism to ensure compliance with the VRA. Because it is foreseeable that the Legislature will intend to favor minority incumbents to ensure compliance with the VRA, the summaries' unqualified representation that an intent to favor incumbents is prohibited is inaccurate.

57. For the same reason, the Congressional Amendment itself contains an internal contradiction. The Congressional Amendment requires that districts not be drawn to deny or abridge "the equal opportunity of racial or language minorities to participate in the political process." The preservation of minority incumbents in positions of power is relevant to the

requirement that districts maintain the equal opportunity of racial minorities to participate in the political process. This requirement thus conflicts with the prohibition against favoring incumbents.

58. The Legislature cannot fully assess and protect racial minorities' opportunity to participate in the political process unless it assesses and protects the achievements of minority incumbents. Because the conflicting requirements in subsection (1) claim equal dignity in the hierarchy of requirements, the Congressional Amendment creates an irreconcilable contradiction. This internal conflict will prevent full compliance with all requirements contained in the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VI – MISLEADING BALLOT SUMMARY

59. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

60. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would

enable courts to construe and enforce their requirements coherently, objectively, and predictably. The Congressional Amendment expresses broad and subjective concepts in undefined terms — terms which voters can reasonably construe in an endless number of differing, conflicting ways.

61. The Congressional Amendment does not define "compact" or enable voters to distinguish between compact and non-compact districts. The Congressional Amendment does not define "political and geographical boundaries" or explain when it is "feasible" and when it is not "feasible" to utilize them. The Congressional Amendment prescribes no standard by which courts can determine the "intent" of a legislative body and of the Governor.

62. Events subsequent to the Florida Supreme Court's initial, advisory review prove that the Amendment flies under false colors. Despite confusion about the Congressional Amendment, the Sponsor has refused to answer specific questions or provide voters needed clarification.

63. In fact, the Sponsor's public statements have, if possible, only created more uncertainty. Notwithstanding differences in wording between the Congressional Amendment and the VRA, the Sponsor initially informed the public that the Congressional Amendment's voting-rights provisions are "identical" to and would "enshrine" in the Florida Constitution the protections in the VRA. *See How Will the FairDistrictsFlorida.org Amendments Work?*, Sponsor's Advertisement (Mar. 5, 2009); *Stop Protecting Politicians*, TCPalm (Nov. 26, 2008); *Leaning Republican, Again*, Florida Trend (Sep. 1, 2008).

64. But after *Bartlett*, the Sponsor reversed course, suggesting that the Amendment affords minorities "enhanced" rights and "greater protection than exists today in federal law." *See Plan to Redraw State Districts Called Unfair*, Tampa Tribune (Jan. 12, 2010); *Race Enters Debate Over Redrawing Florida Political Districts*, Florida Times-Union (Dec. 14,

2009); *Two Ballot Proposals Stir Fears*, Sarasota Herald-Tribune (Nov. 27, 2009); *Initiative Prompts Questions of Racial Fairness*, Daytona Times (Nov. 19, 2009).

65. At the committee meeting on February 11, 2010, Ellen Freidin, the Chairwoman of Fair Districts Florida noted that the language of the Amendment and the VRA is not identical, while she refused to state that the language of the Congressional Amendment and the VRA are not identical in legal effect. She stated simply that the Legislature must use all possible means at its disposal to ensure that the ability of minorities to elect representatives of their choice is not diminished, but it refused to identify any measure of the "ability" of groups to elect their preferred representatives. Nor did Ms. Freidin explain how the Legislature should measure the "opportunity of racial or language minorities to participate in the political process."

66. The meaning of the Congressional Amendment is pure conjecture. The ballot summary for the Congressional Amendment itself offers the voters no clarity and does not enable voters to cast an informed and well-advised ballot. And the recent public statements of the Chairwoman of the Congressional Amendment's sponsor have only increased voter confusion.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VII – MISLEADING BALLOT SUMMARY

67. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

68. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, predictably, and systematically.

69. The Congressional Amendment expresses broad and subjective concepts in undefined terms—terms which the voters can reasonably construe in an endless number of differing and conflicting ways. The Congressional Amendment does not define "language minorities," or state how large a group would have to be in order to qualify as a language minority, and thus does not identify the groups that will benefit from the new voting rights created by the Congressional Amendment.

70. On February 11, 2010, at a joint meeting of the Senate Committee on Reapportionment and the House Select Policy Council on Strategic and Economic Planning, FDF refused to provide guidance. And, asked to define "language minorities," officers of the Sponsor referenced the VRA, which defines "language minorities" to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 42 U.S.C. § 1973*l*(c)(3), but then stated that "language minorities" only means "Hispanics," contrary both to the VRA and to the definition espoused by three Justices of the Florida Supreme Court. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

71. The ballot summary's use of the phrase "language minorities" in the plural will cause voters to believe that more than a single language minority group is intended to be protected by the Congressional Amendment.

72. If the intent of the Congressional Amendment was to merely protect those persons who are Spanish speakers, then the ballot summary could have been written to state that directly.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VIII – MISLEADING BALLOT SUMMARY

73. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

74. The ballot language also leads voters to believe that Legislature will be able to determine with certainty where members of language minorities reside and to take that into consideration when crafting districts.

75. The questionnaire sent out during the 2010 Census to every Florida household only asks 10 questions: (1) the number of people living in the dwelling; (2) additional people staying in the dwelling as of April 1, 2010 who were not counted in answer to question (1); (3) whether the dwelling is owned, rented, or occupied without paying rent; (4) the dwelling's telephone number; (5) the names of persons who occupy the dwelling; (6) the sex of persons occupying the dwelling; (7) the age and date of birth of persons occupying the dwelling; (8)

whether any person occupying the dwelling is of "Hispanic, Latino, or Spanish origin" and, if so, whether they are "Mexican, Puerto Rican, Cuban, or other Hispanic origin"; (9) the race of the persons occupying the dwelling; and (10) whether any occupant occasionally stays elsewhere. There are no questions on the form about language, nor is any required by United States Public Law 94-171, the enactment that directs the Census Bureau to make Census data available to the states for purpose of redistricting and reapportionment.

76. Accordingly, there will be no bloc-level count of language use available at the time the Legislature draws the legislative and congressional districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that language minorities will have an "equal opportunity to participate in the political process and elect representatives of their choice."

77. The Census Bureau will no longer send a long-form to 1 out of 6 households asking about languages. See "2010 Census Constituent FAQs", Census Bureau, http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf. Accordingly, there will be no Census block level count containing data on language available at the time the Legislature draws the Congressional Districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that they will have "the equal opportunity to participate in the political process and elect representatives of their choice" as stated in the proposed Congressional Amendment.

78. In lieu of the long Census form, the Census Bureau will be using its American Community Survey ("ACS"). Like a political poll, the ACS will use a random sample of U.S. residents. The annual results of the ACS will be available for all areas with populations of

65,000 or more. Areas with populations less than 65,000 require the use of multiyear estimates to reach an appropriate sample size for data publication.

79. However, the sample size will not permit disaggregating the Census data down to the level of a Census block, the lowest geographic level used in redistricting. For instance, the 2006 ACS only surveyed 152,155 of Florida's estimated population of 18,328,340. With such a small sample size it will be impossible for the Legislature to precisely determine how many minority language speakers are spread throughout the hundreds of thousands of Census blocks, block groups, and tracts in the State of Florida.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed to Michael G. Tanner, Esq., Tanner Bishop, 1 Independent Drive, Suite 1700 Jacksonville, FL 32202, mtanner@tanne rbishoplaw .com; George N. Meros, Jr., Esq., GrayRobinson, P .A., Post Office Box 11189, Tallahassee, Florida 32302-3189, gmeros@gray-robinson.com Allen C. Winsor, Esq., awinsor@gray-robinson .com, Andy Bardos, Esq., abardos@gray-robinson .com; James A. Scott, Esq., Tripp Scott, P.A,, 110 Southeast Sixth Street, 15th Floor Fort Lauderdale, Florida 33301, jas@trippscott.com. Edward J. Pozzuouli, Esq., ejp@rrippscott .com, Stephanie Alexander, sda@rrippscott.com, Brady J.Cobb, Esq., bjc@trippscott .com; Mark Herron, Esq. Messer, Caparello & Self, P.A., Post Office Box 15579,

Tallahassee , FL 32317-5579, mherron@lawfla .com and Robert J. Telfer III, Esq., rtelfer@lawfla.com; and Ronald G. Meyer, Esq., Meyer, Brooks, Demma and Blohm, PA, Post Office Box 1547, Tallahassee, FL 32302, rmeyer@meyerbrookslaw.com, Jennifer S. Blohm, Esq., jblohm@meyerbrookslaw .com, Lynn C. Hearn, Esq., lhearn@meyerbrookslaw .com this June 23, 2010.

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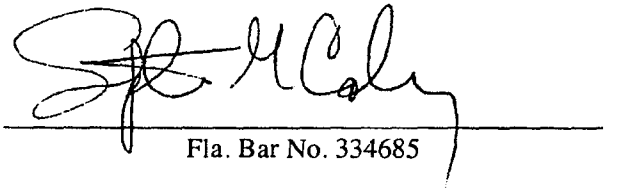

Fla. Bar No. 334685

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE, Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant, and

BOB GRAHAM, Intervening Defendant.
_____/

ORDER GRANTING FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO AMEND COMPLAINT

This cause came before the Court on June 23, 2010, on the Florida House of Representatives' *ore tenus* Motion to Amend Complaint to sue FairDistrictsFlorida.org, Inc. as a party defendant. The Court considered the motion and heard argument of counsel, and being otherwise fully advised, it is

ORDERED AND ADJUDGED that the Florida House of Representatives' Motion to Amend Complaint is **GRANTED** and Plaintiffs may amend their complaints to sue FairDistrictsFlorida.org, Inc. as a party defendant.

DONE AND ORDERED this 23rd day of June, 2010, at Tallahassee, Leon County, Florida.

JACKIE L. FULFORD
Circuit Judge

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Copies to:
Stephen M. Cody (representing Plaintiffs)
Michael G. Tanner (representing Defendant)
James A. Scott (representing Florida Senate)
George N. Meros, Jr. (representing Florida House)
Ronald G. Meyer (representing Graham)
Mark Herron (representing Graham)

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

GRAHAM'S MOTION FOR STAY OF DISCOVERY

Intervening Defendant BOB GRAHAM, pursuant to Rule 1.280(c) of the Florida Rules of Civil Procedure, moves for an order staying discovery in this case pending resolution of the Defendant and Intervening Defendants' Motion to Dismiss For Lack of Subject Matter Jurisdiction. In support, Graham adopts in full "Defendant's Motion for Stay of Discovery" filed by Defendant Secretary of State. This motion is attached and incorporated herein by reference.

WHEREFORE, Bob Graham respectfully requests that this Court enter an order staying discovery in this matter pending resolution of the Defendant and Intervening Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

Lynn C. Hearn

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On Behalf of Counsel for Bob Graham:

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I HEREBY CERTIFY that a copy has been provided to the following by United States Postal Service and by electronic mail on this 24th day of June, 2010 to:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING MOTION OF BOB GRAHAM TO INTERVENE AS A DEFENDANT

This cause came before the Court on the Motion of Bob Graham to Intervene as a Defendant. Upon consideration of the motion, the responses and reply, having heard argument of counsel and being otherwise fully advised, the Court orders as follows:

The Motion of Bob Graham to Intervene as a Defendant is **GRANTED**.

DONE and ORDERED this 23rd day of June, 2010, in Leon County, Florida.

Jackie L. Fulford
Circuit Judge

Copies to Counsel of Record

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

GRAHAM'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION AND
MOTION TO EXPEDITE DISPOSITION

Intervening Defendant BOB GRAHAM, pursuant to Rule 1.140(b)(1) of the Florida Rules of Civil Procedure, moves to dismiss this action due to lack of subject matter jurisdiction, and moves to expedite disposition of this motion. In support, Graham adopts in full "Defendant's Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction," and "Defendant's Motion

for Expedited Disposition," both filed by Defendant Secretary of State. These motions are attached and incorporated herein by reference.

In addition to the authorities cited by the Secretary of State, Graham respectfully notes the authorities holding that a trial court must resolve a threshold jurisdictional question timely, *see Berens v. Cobb*, 539 So. 2d 24 (Fla. 2d DCA 1989), and that it may not conduct any further proceedings in a case over which it lacks subject matter jurisdiction, *see City of Sanibel v. Maxwell*, 925 So. 2d 486 (Fla. 2d DCA 2006) (granting writ of prohibition directing trial court to dismiss case due to lack of subject matter jurisdiction) and *Walker v. Garrison*, 610 So. 2d 716 (Fla. 4th DCA 1992) (same).

WHEREFORE, Bob Graham respectfully requests that this Court expedite consideration of, and, upon consideration, grant, his Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

Lynn C. Hearn

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On Behalf of Counsel for Bob Graham:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' AMENDED MOTION TO INTERVENE

Pursuant to Florida Rule of Civil Procedure 1.230, the Florida House of Representatives, through its Speaker, Larry Cretul, moves the Court for an order permitting it to intervene as a Plaintiff in this action.

1. The Florida Department of State has certified two proposed constitutional amendments for placement on the November ballot.[1] Both proposals would inject ambiguous, contradictory, and misleading requirements into the redistricting process. If implemented, they would dramatically and detrimentally impact the Legislature's ability to carry out its

[1] Copies of the proposed amendments and their ballot summaries are attached to this Motion.

constitutional duty to create districting plans openly, fairly, and accountably. And they would substantially curtail the Legislature's ability to protect the interests of racial minorities, whose ability to elect members of their choice has significantly improved over the past two decades. Worse still, the amendments' impacts are deliberately hidden from the electorate asked to approve them. The Florida House of Representatives has a duty to protect the interests of voters, who are entitled to "receive[] fair and actual notice of the proposal's purpose and effect." *Harris v. Moore*, 752 So. 2d 1241, 1242 (Fla. 4th DCA 2000). The Florida House of Representatives likewise has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980).

2. The two proposals are substantially identical, except one (Amendment 5) applies exclusively to state legislative districts and the other (Amendment 6) applies exclusively to congressional districts. The amendments say some things but would do others. The proposals mislead, obfuscate, hide the ball, and fly under false colors. They do so by design. Their proponents carefully crafted the amendments and their ballot summaries to secure passage by confusing and misleading the public. Absent judicial intervention, Amendments 5 and 6 will appear on the ballot accompanied by summaries as deliberately false and misleading as the name of their political sponsor: "FairDistrictsFlorida."

3. The proponents of Amendments 5 and 6 suggest that the amendments will improve the redistricting process, making it more "fair" by removing legislative discretion and political considerations. Their website boasts an intent to "restore true democracy to Florida." *See* http://www.fairdistrictsflorida.org/home.php (last visited May 26, 2010). But what they truly seek is to remove democracy from the redistricting process, putting inherently political

decisions in the hands of the Florida Supreme Court rather than the hands of politically accountable elected officials.

4. Redistricting is, and always has been, a "highly political task." *Growe v. Emison*, 507 U.S. 25, 33 (1993). As the United States Supreme Court has recognized, "extirpating politics from what are the essentially political processes of the sovereign States" constitutes "an impossible task." *Gaffney v. Cummings,* 412 U.S. 735, 754 (1973); *see also Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (finding nothing invidious in politically drawn district lines). The Florida Constitution commits the critical task of redistricting to the Legislature because courts "are inherently ill-equipped" to "make decisions based on highly political judgments" relating to redistricting issues, *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244 (2009) (plurality opinion) (marks omitted).

5. As the amendments' proponents are well aware, Amendments 5 and 6 will ultimately remove this process from the Legislature and deliver it to the Florida Supreme Court. This is their true effect and purpose. Rather than explicitly so stating, "FairDistrictsFlorida" hopes to implement ambiguous, contradictory, and misleading "standards," which the Legislature must follow in redistricting. Satisfying all the "standards"—many of which lie in the eye of the beholder—is impossible. As a result, each legislatively enacted plan would be subject to endless challenge, and the courts will ultimately be called upon to handle the highly political and time-sensitive task of redistricting:

- Districts that neatly follow non-compact municipal boundaries would be challenged as not being "compact."
- Compact districts crossing municipal boundaries would be challenged for not following municipal boundaries.
- A district that traditionally elects Democrats would be challenged as favoring a Democratic incumbent.

- The same district if redrawn as a Republican district would be challenged as disfavoring the Democratic incumbent.

- And any number of districts would be challenged for "denying or abridging the equal opportunity of racial or language minorities to participate in the political process or [] diminish[ing] their ability to elect representatives of their choice," however that language is ultimately interpreted by an empowered, reviewing court.[2]

6. Rather than guide the Legislature, the amendments do little more than provide endless avenues for judicial attacks on redistricting plans. No plan would be immune from challenge. And no plan could possibly satisfy all interested groups. Litigation—and the public expense of defending the Legislature's work product—would be endless. "Inviting attack on minor departures from some supposed norm [in redistricting review] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely *unless the express or tacit goal is to effect its removal from legislative halls*." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (emphasis added). The amendments' tacit goal and certain effect *is* to transfer redistricting from the Legislature to the courts.[3]

7. By design, the amendments' tacit goal is not disclosed to the voters. Instead, the amendments hide their true purpose and fly under false colors. They thus violate the accuracy

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[2] The amendments' only requirements not vulnerable to countless subjective challenges mandate that districts be contiguous and consist of populations as nearly equal as possible. But these requirements do not change existing law and practice. *See Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

[3] The proponents' earlier attempt to remove political accountability from the redistricting process was overt. In 2006, a proposed amendment would have expressly removed redistricting from the Legislature and delivered it to a "nonpartisan commission." *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1221 (Fla. 2006). The Florida Supreme Court struck that attempt from the ballot because, despite the proponents' marketing the commission as "nonpartisan," "the method of selecting the commission members is decidedly partisan." *Id.* at 1228-29. The Court therefore found the ballot summary misleading. *Id.* (It also found single-subject violations.) That amendment never appeared on the ballot, in part because its proponents settled on this deceptive alternative.

requirement, which "functions as a kind of 'truth in packaging' law for the ballot." *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1227 (Fla. 2006); *accord Adv. Op. to Att'y Gen. re Add'l Homestead Tax Exemption*, 880 So. 2d 646, 653-54 (Fla. 2004) ("The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based only on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution.") (citation omitted).

8. Because they lack accurate ballot summaries, the amendments are invalid. Amendment 5 suffers an additional infirmity: it violates the single-subject rule. Neither amendment should appear on the ballot this November. The Florida House of Representatives seeks to intervene in this case, to join in Plaintiffs' challenge, and to ensure that Florida voters are not presented with amendments flying under false colors.

THE EXISTING CLAIMS

9. Plaintiffs Corrine Brown and Mario Diaz-Balart, both members of Congress, initiated this action on May 24, 2010. Their Amended Complaint comprises eight counts, each of which alleges that the ballot summary for Amendment 6 is misleading. They sue the interim Secretary of State, whose duty it is to certify proposed constitutional amendments for ballot placement (Am. Compl. ¶ 12), and FairDistrictsFlorida.org, the political committee that sponsored and continues to finance and publicly promote Amendments 5 and 6 (Am. Compl. ¶ 13).

10. The Congresspersons' Amended Complaint challenges only Amendment 6, which relates to congressional districts. Amendment 5, which is substantially identical to Amendment 6 but applies only to state legislative districts, is not implicated in the Amended Complaint.

INTERVENTION OF THE FLORIDA HOUSE OF REPRESENTATIVES IS PROPER

11. Under Florida House of Representatives Rule 2.6, "[t]he Speaker may initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House . . . when the Speaker determines that such suit is of significant interest to the House."

12. Intervention is governed by Florida Rule of Civil Procedure 1.230, which provides: "Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." "Consistent with the policies which the Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County,* 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992); *accord Nat'l Wildlife Fed. Inc. v. Glisson*, 531 So. 2d 996, 998 (Fla. 1st DCA 1988) ("Intervention should be liberally allowed.").

13. Whether to allow intervention is committed to the discretion of the Court, but intervention should be permitted when a proposed intervenor's interest is already at issue in the litigation and is "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Union Cent. Life Ins. Co. v. Carlisle,* 593 So. 2d 505, 507 (Fla. 1992) (quoting *Morgareidge v. Howey*, 78 So. 14, 15 (1918)). The Florida House of Representatives satisfies these criteria. Its interest is in protecting the electorate by keeping misleading Amendments 5 and 6 off the ballot. And to that end, it would plainly gain if this Court were to enter a judgment granting that requested relief.

14. The existing Plaintiffs represent their own unique interests. Both represent congressional districts with a majority (or near-majority) of minority voters. (Am. Compl. ¶¶ 10, 11.) Amendment 6 will have a negative impact on the ability of minorities to elect representatives of their choice, so the amendment will necessarily impact the Plaintiffs and their congressional constituents. The Florida House of Representatives shares an interest in protecting minority communities. And it also has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980). Thus, the Florida House of Representatives has interests related to—but broader than—the interests of the existing Plaintiffs.

15. The Florida House of Representatives seeks to join in the Plaintiffs' existing challenge to Amendment 6. Although the Plaintiffs do not challenge Amendment 5, their challenges are equally applicable to both amendments, which have substantially identical language. The Florida House of Representatives seeks to present most of those same challenges with respect to Amendment 5, as well as Amendment 6. In addition, the Florida House of Representatives seeks to present one further challenge to Amendment 5.

The Florida House of Representatives' Proposed Claims

16. If permitted to intervene as a Plaintiff, the Florida House of Representatives would assert most of the claims already presented by the Plaintiffs. Specifically, as alleged in Counts I though VI of the Amended Complaint, the ballot summaries are misleading for numerous reasons. The Florida House of Representatives therefore seeks to adopt the claims presented in Counts I through VI in full.

17. In addition, each of those Counts is equally applicable to Amendment 5. The Florida House of Representatives, therefore, seeks to apply each of those claims to both amendments.

18. Furthermore, the Florida House of Representatives asserts that the ballot summaries for both amendments are false, deceptive, and misleading because the true purpose of the amendments is to remove the redistricting process from the Legislature and deliver it to the Florida Supreme Court, as discussed in paragraphs 1 through 8, above. The amendments therefore fly under false colors and should be removed from the ballot.

19. Finally, the Florida House of Representatives seeks to present one additional claim that is applicable to Amendment 5 only:

20. Amendment 5 would create Article III, Section 21 of the Florida Constitution, imposing complex, intensely fact-specific criteria on state legislative redistricting. But its summary never informs voters of its inevitable and dramatic effect on the Florida Supreme Court's mandatory review of state legislative redistricting plans under Article III, Section 16(c), Florida Constitution.

21. The Florida Constitution establishes a carefully constructed, time-sensitive process for the decennial reapportionment of state legislative districts. Art. III, § 16, Fla. Const. The constitutional framework is designed to ensure that a redistricting plan is adopted by the Legislature and approved by the Florida Supreme Court in sufficient time to allow candidates to qualify and voters to elect their representatives at the next election. Under this process, the Legislature must redraw state legislative districts at its 2012 regular session. Art. III, § 16(a), Fla. Const. Within fifteen days after adoption of a redistricting plan, the Attorney General must petition the Florida Supreme Court to determine the validity of the plan. Art. III, § 16(c), Fla.

Const. Historically, the Attorney General has petitioned the Court in early to mid-April, during or after the session in which the Legislature takes up redistricting.

22. The Supreme Court must review any redistricting plan, permit opposing parties to present their views, and determine the validity of the plan—all within thirty days. *Id.* The Court's judgment is "binding upon all the citizens of the state." Art. III, § 16(d), Fla. Const. As a result of the 30-Day Rule and existing constitutional standards, the scope of review has historically been extremely limited. The framework established by the Florida Constitution does not "allow for a fact-intensive review within [the] thirty-day window." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002).

23. Under the 30-Day Rule, the Court has traditionally rendered a decision by mid-May, only weeks before candidates began to qualify for office in the newly drawn districts. In 2012, candidate qualifying is scheduled to commence on June 18th. §§ 99.061(1), (9), 100.031, 100.061, Fla. Stat. (2009). The primary and general elections are scheduled to follow in short order, on August 28th and November 6th, respectively. *Id.* §§ 100.061, 100.031.

24. The constitutional framework affords little time to remedy any invalidity in a redistricting plan. If the Court invalidates a plan, the Governor must convene the Legislature for an extraordinary session of no more than fifteen days. Art. III, § 16(d), Fla. Const. Again, the Attorney General must petition for review or, if no plan is adopted, must report that fact to the Court. Art. III, § 16(e), Fla. Const. If the Court strikes the new plan, or if none was adopted, the Court, in the last resort, makes an emergency apportionment. Art. III, § 16(f), Fla. Const.

25. The 30-Day Rule has never impeded the Court's review of a plan's compliance with the Florida Constitution, because the criteria presently imposed by the Constitution are few and simple. State House districts must be between 80 and 120 in number, while State Senate

districts must be between 30 and 40 in number. Art. III, § 16(a), Fla. Const. Districts must be numbered consecutively and consist of contiguous, overlapping, or identical territory. *Id.* Compliance with these criteria can readily be determined from the face of any redistricting plan. Thus, the Court has never found it difficult to reconcile the 30-Day Rule with its obligation to assess the validity of a plan under criteria contained in the Florida Constitution.

26. Amendment 5 would substantially affect the Florida Supreme Court's automatic, binding review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It would create new, fact-intensive criteria that would inevitably spawn a range of legal challenges to individual districts and the plan as a whole—challenges the Court cannot review within the limited time allotted by the Constitution. The amendment would generate fact-intensive inquiries about every district. The Florida Supreme Court would have to determine whether legislators subjectively intended to favor or disfavor political parties or incumbents. It would have to engage in a circumstantial analysis of the opportunity of racial and language minorities to participate in the political process—and the Legislature's intent in this regard—and the ability of minority voters to elect representatives of their choice. It would have to scrutinize the compactness or non-compactness of every district, and the feasibility of utilizing local political and geographical boundaries.

27. The Florida Supreme Court itself has deemed it impossible to conduct a fact-specific review in thirty days. The Court has refused to adjudicate VRA claims—claims that are less complex than those which the amendment's criteria would engender—explaining that "article III, section 16(c) did not envision the development of the highly complex federal claims. The juxtaposition of these claims on this Court's article III, section 16(c) review is highly problematic." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 829 n.13.

28. If the Florida Supreme Court attempts the impossible, it must perform an inadequate review that deprives parties of any opportunity to conduct discovery and present evidence, and therefore denies their due process rights. The Court's decision, though unsupported by record evidence, would bind all citizens of the state and extinguish their right to raise future challenges. Any such review of fact-intensive criteria will fundamentally reshape the Court's review process, which, by the Court's own precedents, has hitherto been limited to simple, facial challenges. On the other hand, if the Court declined to review the plan's compliance with the criteria ordained by Amendment 5, it would violate its constitutional responsibility to determine the validity of redistricting plans under the Florida Constitution. The Court has never declined to assess the validity of a state legislative redistricting plan under any criteria set forth in the Florida Constitution. To do so in this instance would thus substantially alter the Court's review process.

29. If the Court ignores the 30-Day Rule and engages in a more lengthy review, it will frustrate the timely completion of the redistricting process and subvert the right to vote of all Florida citizens. A thoughtful and deliberate evaluation of complex criteria cannot be completed prior to candidate qualifying, or even before the first general election after reapportionment.

30. In Alaska, the state constitution contains detailed redistricting criteria. In 2001, redistricting spawned nine lawsuits. The parties engaged in extensive discovery, and about 160 witnesses were deposed. The court conducted a three-week trial and issued a 121-page opinion seven months after the cases were filed. The Alaska Supreme Court commended the trial court for its thorough review under "extreme time pressures." *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 n.1 (Alaska 2002).

31. The imposition of multiple, complex, fact-intensive criteria on the existing timelines in Article III, Section 16(c) would force the Florida Supreme Court either to ignore its constitutional duty to promptly determine the validity of redistricting plans, or, contrary to the restraint observed in its own precedents, to perform a desperate, slapdash review of fact-intensive claims which, under constitutional time pressures, will amount to mere guesswork and deny adversary interests due process and meaningful access to the courts. Amendment 5 not only imposes a collection of fact-intensive standards, but it also fundamentally alters the Florida Supreme Court's review of state legislative plans. Because it radically alters—but does not explain—its effect upon existing provisions of the Florida Constitution, Amendment 5 embraces multiple subjects.

32. The ballot summary does not inform voters of Amendment 5's inevitable and substantial effect on the Court's review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It hides the ball as to the amendment's true effect, and fails to inform voters of the monumental change it makes to existing constitutional processes. A proposed amendment that works substantial changes to established constitutional processes, and does so without informing the voters, is inaccurate and misleading by omission. Amendment 5 is therefore invalid.

This Court Should Permit the Addition of the New Claims

33. Although intervening parties typically must "take cases as they find them," the court may order otherwise in its discretion. *Litvak v. Scylla Props., LLC*, 946 So. 2d 1165, 1175 (Fla. 1st DCA 2006) (citing Fla. R. Civ. P. 1.230); *accord Smith v. Atl. Boat Builder Co.*, 356 So. 2d 359, 362 (Fla. 1st DCA 1978) ("We note, however, that Fla. R. Civ. P. 1.230 while providing that intervention 'shall be in subordination to, and in recognition of, the propriety of the main

proceeding' concludes with the qualifying clause 'unless otherwise ordered by the court in its discretion.'"). Moreover, while "the intervenor may not assert matters extraneous to his own interests . . . he may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties." *Williams v. Nussbaum*, 419 So. 2d 715, 717 n.1 (Fla. 1st DCA 1982).

34. In this case, the Florida House of Representatives could file its own complaint to assert its interests. But it would benefit all parties—and serve judicial efficiency—to have the existing claims and the Florida House of Representatives' claims presented in the same case. Intervention promotes judicial efficiency, and "[c]onsistent with the policies which the [intervention] Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County,* 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992).

35. The Florida House of Representatives seeks to join in Counts I through VI of the Plaintiffs' Amended Complaint, and to extend them to Amendment 5. These challenges are equally applicable to both substantively identical amendments, as will be any defenses. And the additional challenge presented to Amendment 5 is closely related. These challenges are appropriately considered together. The alternative to intervention would be the Florida House of Representatives' filing its own action, asserting overlapping claims, and potentially burdening two judges with similar or identical issues. This inefficient alternative would offer no benefits to offset its many burdens, including duplicative proceedings and the potential for inconsistent judgments.

36. The proposed intervention would not prejudice any party. This Motion is filed immediately after the case was initiated, and the intervention will not delay or prolong the case.

37. Upon intervention, the Florida House of Representatives will assert the claims presented in this Motion.[4]

WHEREFORE, the Florida House of Representatives respectfully seeks entry of an order (i) granting this Motion, (ii) designating the Florida House of Representatives as an intervening Plaintiff, (iii) accepting this Motion as the Florida House of Representatives' pleading, and (iv) granting such further relief as the Court finds appropriate.

Respectfully submitted,

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[4] The entirety of the Florida House of Representatives' claims is presented in this Motion as if presented in an independent complaint. Should the Court order it, the Florida House of Representatives will present its claims in a separately filed complaint. Given the need for expedited relief, the relative positions of the parties, and the nature of the case, the House respectfully suggests such additional pleading is unnecessary, and that this Motion should be accepted as the pleading of the House. *Cf. Wogisch v. Tiger*, 193 So. 2d 187, 188 (Fla. 4th DCA 1966) ("When intervention is permitted upon sufficient showing of interest . . . , the intervenor may, by proper pleading, make his petition for leave to intervene suffice as his complaint.").

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail this twenty-fourth day of June 2010, to the following:

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Attorneys for Intervening Defendant, Florida House of Representatives

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS:

_____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: / / **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new Section 21 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

BALLOT SUMMARY: Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new Section 21 to Article III

Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:
(1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-16

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS:

_____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: ___/___/___ **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-15

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

CORRINE BROWN AND **MARIO DIAZ-BALART**,

PLAINTIFFS, AND

FLORIDA HOUSE OF REPRESENTATIVES,
AND **FLORIDA SENATE**, INTERVENING PLAINTIFFS,

V. CASE NO.: 2010 CA 001824

DAWN K. ROBERTS, IN HER CAPACITY AS
INTERIM SECRETARY OF STATE OF THE STATE OF
FLORIDA, AND **FAIRDISTRICTSFLORIDA.ORG, INC.**,
A FLORIDA NOT-FOR-PROFIT CORPORATION,

DEFENDANTS, AND

BOB GRAHAM, INTERVENING DEFENDANT.
_____/

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS *DUCES TECUM*

TO: All Counsel of Record

PLEASE TAKE NOTICE that beginning at 9:00 a.m. on July 13, 2010, the undersigned will take the videotaped depositions of the following people:

NAME: BOB GRAHAM *(not duces tecum)*
TIME: 9:00 a.m.
LOCATION: GrayRobinson, P.A. Great Room
1221 Brickell Avenue, Suite 1600
Miami, Florida 33131

NAME: ELLEN FREIDIN
TIME: 11:00 a.m. or immediately following Graham deposition
LOCATION: GrayRobinson, P.A. Great Room
1221 Brickell Avenue, Suite 1600
Miami, Florida 33131

Such videotaped examinations will take place before Veritext Reporting or any other Notary Public or Officer authorized by law to take depositions in the State of Florida. These depositions will be taken by a court reporter who is not of counsel to the parties or interested in the event or cause, upon oral examination for discovery, for use at hearing or trial, or for any other purpose under the Florida Rules of Civil Procedure.

The taking of these depositions shall be recorded by stenographic means and shall continue from day to day until completed.

The Deponent, Ellen Freidin, is required to bring with her at said time and place the following documents:

All communications including, but not limited to, emails, letters, memoranda, text messages, or other documents to or from Bob Graham relating to his participation in this case.

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I certify that a true and correct copy of the foregoing has been furnished as indicated below this 15th day of June, 2010, to the following:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

**FLORIDA HOUSE OF REPRESENTATIVES'
RESPONSE TO DEFENDANTS' MOTIONS FOR
STAY OF DISCOVERY AND FOR EXPEDITED DISPOSITION**

On June 22, 2010, Defendant Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida (the "Secretary"), filed a Motion for Stay of Discovery and Motion for Expedited Disposition. On June 24, 2010, Intervening Defendant Bob Graham ("Graham"), filed (i) a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition, and (ii) a Motion for Stay of Discovery. This Court should deny all of these. Intervening Plaintiff, the Florida House of Representatives, files this response to these motions.[1]

[1] This Response addresses the requests for expedited treatment and a stay of discovery only. No later than the July 21, 2010 stipulated deadline for response to dispositive motions, the

1. Two weeks ago, on June 9, 2010, all parties agreed to a litigation schedule in the presence of the Court. On the following day, the parties continued to negotiate a proposed Scheduling Order. All parties agreed, and the proposed order was submitted to the Court on a stipulated basis. Now, the Secretary asks the Court to revise its Scheduling Order. The Court should not adjust the litigation schedule entered on the parties' unanimous agreement.

2. Nor should the Court grant Graham's request to alter the schedule. This Court exercised its discretion by permitting Graham's appearance as an intervening party. An intervening party should not be permitted, immediately after intervention is granted, to disrupt the schedule in place when it joined the case. "[T]he intervention shall be *in subordination to, and in recognition of, the propriety of the main proceeding*, unless otherwise ordered by the court in its discretion." Fla. R. Civ. P. 1.230 (emphasis added).

3. Neither the Secretary nor Graham offers any compelling reason to rearrange the litigation schedule agreed to by the parties and approved by the Court. While a court obviously must determine its jurisdiction, there is no need for this Court to hold essentially an emergency hearing, rather than hear argument on the jurisdictional issue, as intended, on July 23 or July 26, 2010. There is no emergency, and the matter can be addressed consistent with the availability of the Court.

4. Discovery cannot be postponed. If postponed, there will be no opportunity to conduct discovery later because of the time constraints imposed by the impending election. The Supervisors of Elections will begin to print general election ballots around September 1, 2010. The discovery schedule was negotiated by the parties and entered by the Court in appreciation of these constraints. To postpone discovery would be a denial of the right to discovery altogether.

Florida House of Representatives will respond separately to Graham's request for dismissal based on subject matter jurisdiction.

5. The Secretary expresses concern about burdens of discovery, but the Secretary and Bob Graham have indicated that the Secretary's interest is in the jurisdictional issue—not the merits. (*See* Graham's Reply to Plaintiffs' Responses to Graham's Motion to Intervene at 5-6; Secretary's Response to Motion of Bob Graham to Intervene at 1-2.) Discovery on the merits—which is unlikely to be directed to the Secretary anyway—will not burden the Secretary. In fact, it is most probable that the Secretary will have no direct involvement in discovery at all. And Graham is in no position to argue about the burdens discovery might impose on him, having voluntarily made himself a party to this action over the objection of others.

6. The Secretary cites Florida Rule of Judicial Administration 2.215(g) in support of the request for expedited treatment of dispositive motions. The purpose of this Rule, however, is to ensure the final resolution of election cases prior to the election. It does not require expedited treatment of every motion within the case, but it certainly counsels against a stay of discovery. And the Secretary's reliance on *Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282 (Fla. 1992), in support of her stay request is misplaced. *Gleneagle* relates to discovery against non-resident defendants who have challenged a Florida court's assertion of *personal* jurisdiction.

7. Graham's additional authorities likewise do not support the requested relief. The Court in *Berens v. Cobb*, 539 So. 2d 24 (Fla. 2d DCA 1989), directed a trial court to consider a motion to dismiss based on *personal* jurisdiction before the court proceeded to trial. *Id.* at 25 ("Where, as here, the judge refuses to rule on a motion challenging personal jurisdiction, it is appropriate to issue the writ."). Neither of Graham's other cases are better. *City of Sanibel v. Maxwell*, 925 So. 2d 486 (Fla. 2d DCA 2006) held simply that once a trial court ends its judicial labor in a case—by dismissal or otherwise—it lacks subject matter jurisdiction to proceed further. *Id.* And in *Walker v. Garrison*, 610 So. 2d 716 (Fla. 4th DCA 1992), the trial court had

wrongly refused to dismiss a claim over which it lacked subject matter jurisdiction. *Id.* None of these cases supports a proposition that any party's mere *mention* of a jurisdictional challenge must stay the case. That is not the law.

8. The Secretary agreed to the litigation schedule now in place, and this Court should not disturb it just days later. And Graham should not be heard to object to the schedule, having voluntarily injected himself into this case with full knowledge of the schedule. The stipulated schedule will not unfairly burden the Secretary or Graham.

WHEREFORE, the Florida House of Representatives respectfully requests that the Court deny Defendant's Motion for Stay of Discovery and Motion for Expedited Disposition.

Respectfully submitted,

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FAIRDISTRICTSFLORIDA.ORG, INC.'S MOTION FOR STAY OF DISCOVERY

Defendant FAIRDISTRICTSFLORIDA.ORG, Inc. ("Fair Districts"), pursuant to Rule 1.280(c) of the Florida Rules of Civil Procedure, moves for an order staying discovery in this case pending resolution of the Defendants' and Intervening Defendant's Motions to Dismiss For Lack of Subject Matter Jurisdiction. In support, Fair Districts adopts in full "Defendant's Motion for Stay of Discovery" filed by Defendant Secretary of State and "Graham's Motion for Stay of Discovery" filed by

Intervening Defendant Bob Graham. These motions are attached and incorporated herein by reference.

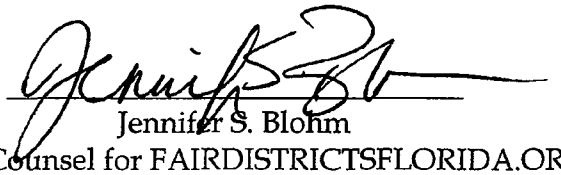
In addition, although the Florida House of Representatives, in its response to the motions filed by the Secretary of State and Graham, attempts to distinguish *Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282 (Fla. 1992) and *Berens v. Cobb*, 539 So. 2d 24 (Fla. 2d DCA 1989) on the basis that they involve personal jurisdiction, this attempt fails in light of *Seminole Tribe of Florida v. McCor*, 903 So. 2d 353 (Fla. 2nd DCA 2005). In *McCor*, the Court held that "[a] motion to dismiss for lack of subject matter jurisdiction is analogous to a motion to dismiss for lack of personal jurisdiction." 903 So. 2d at 357. Thus, the cases cited by the Secretary of State and Graham are clearly relevant to this matter.

Addressing the motions to dismiss forthwith may result in no discovery being necessary. Subject matter jurisdiction is a threshold issue, and its determination is crucial to further proceedings in this case. For instance, without subject matter jurisdiction, this Court will be unable to rule on any discovery disputes. Ruling on the motions to dismiss will advance the orderly procession of this case, not hinder it. Federal and state courts recognize this fact and the necessity of timely addressing jurisdictional issues. *See, e.g., Chudasama v. Mazda Motor Corporation*, 123 F. 3d 1353, 1367 (11th Cir. 1997)(holding that "neither the parties nor the court have any need for discovery before the court rules on the motion [to dismiss]" and noting that ruling on the motion to dismiss relieves the parties of unnecessary discovery costs); *84 Lumber Co. v. Cooper*, 656 So. 2d 1297, 1300 (Fla. 2nd DCA 1994)(noting that an attorney has an

ethical obligation to immediately bring jurisdictional issues to the court's attention in order to avoid "unnecessary expenditure of precious client and judicial resources").

WHEREFORE, Fair Districts respectfully requests that this Court enter an order staying discovery in this matter pending resolution of the Defendants' and Intervening Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs.

Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

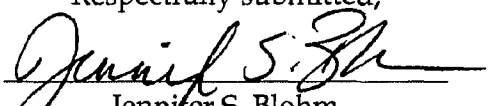
FAIRDISTRICTSFLORIDA.ORG, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO EXPEDITE DISPOSITION

Defendant FAIRDISTRICTSFLORIDA.ORG, Inc. ("Fair Districts"), pursuant to Rule 1.140(b)(1) of the Florida Rules of Civil Procedure, moves to dismiss this action due to lack of subject matter jurisdiction, and moves to expedite disposition of this motion. In support, Fair Districts adopts in full "Defendant's Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction," and "Defendant's Motion for Expedited Disposition," both filed by

Defendant Secretary of State as well as Intervening Defendant Bob Graham's "Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition." These motions are attached and incorporated herein by reference.

WHEREFORE, Fair Districts respectfully requests that this Court expedite consideration of, and, upon consideration, grant, its Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
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CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AND INTERVENING PLAINTIFFS' COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves to dismiss Plaintiffs' and Intervening Plaintiffs' respective complaints for lack of subject matter jurisdiction pursuant to Rule 1.140(b)(1), Florida Rules of Civil Procedure.

I. PRELIMINARY STATEMENT

As the State of Florida's chief elections officer, the Defendant is vitally interested in an orderly elections process, particularly an orderly process for pre-election judicial review of amendments to the Florida Constitution proposed by voter initiatives. *See* § 97.012, Fla. Stat.

To that end, the Florida Constitution and Florida Supreme Court precedent direct that the Supreme Court has exclusive jurisdiction over pre-election ballot summary challenges to voter initiative proposed amendments to the Florida Constitution such as those asserted against

Amendments 5 and 6 in this case.

Confining such review to the Supreme Court prevents the type of piecemeal and last-minute litigation over voter initiatives that this case represents.

Because the Plaintiffs and the Intervening Plaintiffs can only pursue the claims asserted here in the Florida Supreme Court, this case must be dismissed.

II. BACKGROUND

Proposed Amendments 5 and 6

On September 28, 2007, the Florida Department of State, Division of Elections, (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts"). [Plaintiffs' Complaint, ¶ 1; Senate Complaint, ¶ 12]

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Attorney General to request an advisory opinion from the Supreme Court as to whether the Amendments comply with the requirements of article XI, section 3 of the constitution and section 101.161, Florida Statutes (2008) (relating to ballot title and summary). *See Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 178-79 (Fla. 2009) (hereafter, "*Redistricting Standards*").

The Supreme Court consolidated its review of the Amendments and allowed all interested parties the opportunity to file briefs in support or opposition. FairDistricts filed its brief in

support of the Amendments, and the Legislature filed a brief in opposition and appeared at oral argument. *Redistricting Standards*, 2 So.3d at 178, 185-91. The Plaintiffs in this case, Corrine Brown and Mario Diaz-Balart, chose not to appear in the Supreme Court.

On January 29, 2009, the Supreme Court declared, "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Redistricting Standards*, 2 So. 3d at 191.

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010, general election. *Id.*

The Plaintiffs' Claims

The Supreme Court's decision notwithstanding, on May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major ramifications" posed by Amendment 6. [Complaint, ¶ 5]

The Plaintiffs' Complaint alleges eight separate claims, each entitled "Misleading Ballot Summary," and each claim asserts that the ballot summary of proposed Amendment 6 is misleading in some respect and therefore violates Florida law.

The House and Senate Claims

The Plaintiffs are joined in their challenge to Amendment 6 by Intervenors the Florida House of Representatives and the Florida Senate (together, "Intervening Plaintiffs").

In its operative pleading ("House Complaint"), the House: (1) adopts Counts I-VI of the Plaintiffs' Complaint, each of which alleges that the ballot summary of proposed Amendment 6

is misleading; (2) asserts the allegations in Counts I-VI of the Plaintiffs' Complaint against the ballot summary for proposed Amendment 5; and (3) asserts an additional claim against the Amendment 5 ballot summary (also on the basis that the summary is purportedly misleading).[1]

On June 14, 2010, the Senate filed its complaint ("Senate Complaint"), which adopts each of the claims raised by the Plaintiffs and by the House. In addition, the Senate asserts two claims seeking injunctive and declaratory relief on the basis that proposed Amendment 5 and Amendment 6 purportedly violate federal and Florida law.

Now, less than three months before the Supervisors of Elections must finalize the ballots for the general election – and after delaying more than sixteen months following the advisory opinion in *Redistricting Standards* – the Plaintiffs and Intervening Plaintiffs ask this Court to exceed its jurisdiction and set aside the reasoned opinion of the Florida Supreme Court, blocking the Amendments from appearing on the ballot.

III. ARGUMENT

A. The Florida Supreme Court has exclusive jurisdiction to consider pre-election challenges to voter initiative amendments to the Florida Constitution.

In 1984, the Florida Supreme Court decided *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), in which it affirmed the trial court's grant of an injunction striking a voter initiative amendment from the ballot on grounds that the amendment violated the single subject requirement of article XI, section 3, and that the ballot summary did not comply with section 101.161. *Evans*, 457 So. 2d at 1353-55.

---

[1] On June 11, 2010, the Court entered its Order Granting Florida House of Representatives Motion to Intervene. In addition to permitting the House to intervene in this case, the Court accepted the allegations contained in the House's motion to intervene as the House's operative pleading.

Evans was the second opinion issued by the Supreme Court in 1984 in which the Court struck a voter initiative proposed amendment from the ballot due to violations of article XI, section 3[2] or section 101.161.[3] In his concurrence in *Evans*, Justice Overton observed: "the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." 457 So. 2d at 1356 (quotation omitted).

In 1986, the Legislature put forward just such a process when it proposed for adoption article IV, section 10 and article V, subsection 3(b)(10) of the constitution. These provisions established the Supreme Court's present mandatory and exclusive jurisdiction over pre-election challenges to voter initiative petitions to amend the Florida Constitution. The accompanying legislative staff summaries explained the purpose of these provisions: "This proposed amendment, together with the enacting language of PCS/HB 72, are designed to provide a method by which an initiative's proposal's compliance with constitutional and statutory requirements could be ascertained expedititously." Staff of Fla.H.R.Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla.H.R.Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986).[4]

In *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the Supreme Court discussed the history and purpose behind article IV, section 10 and article V, subsection 3(b)(10) as follows:

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[2] *Evans*, 457 So. 2d at 1353-54; *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

[3] *Evans*, 457 So. 2d at 1353-54.

[4] *See Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (citing the staff analysis summaries to CS/HJR 71 and PCS/HJR 71 and noting that "[a]lthough the committee substitutes discussed in these summaries were not themselves adopted, they differ in no relevant way from House Joint Resolution 71, which ultimately was adopted, placed before the voters, and approved. *See* Fla. HJR 71, 1986 Fla. Laws 2281, 2281-83.").

> The constitution expressly authorizes judicial review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const.; *see generally* Art. V, § 3(10), Fla. Const.; Art XI, § 3, Fla. Const. (explaining that the sponsor of an initiative petition must obtain signatures of eight percent of electors statewide in order to place the amendment on the ballot); §§ 15.21 (explaining that judicial review may be sought when the sponsor has obtained one-tenth of the signatures necessary for placement on the ballot), 16.061, Fla. Stat. (1997). This provision was adopted in 1986 in response to the Court's striking of two initiative amendments from the ballot after the sponsors had obtained the requisite number of signatures for placement on the ballot. *See Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). **The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . .**

Armstrong, 773 So. 2d at 14 n.18 (emphasis added).

On at least two occasions, the Supreme Court has stated expressly that its jurisdiction to review voter initiative proposed amendments to the Florida Constitution, pre-election, is both mandatory **and exclusive.** *See Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994) ("The Attorney General of Florida has petitioned this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)); *Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) ("The Attorney General of Florida has requested this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. § 16.061, Fla.Stat. (1993). In response, we issued an order permitting interested parties to file briefs, and we heard oral arguments on the validity of the proposed amendment. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)).

Notably, in the more than two decades following the voters' adoption of article V, subsection 3(b)(10), there has not been a published opinion in which a Florida court, other than

the Supreme Court, has attempted to exercise jurisdiction over a pre-election suit seeking to invalidate a voter initiative to amend the constitution on the basis that the proposed amendment or ballot summary did not comply with article XI, section 3 or section 101.161.[5]

B. Constitutional amendments from resolutions of the Legislature are subject to different procedures than voter initiatives

A joint resolution of the Florida Legislature is the other principal means by which proposed constitutional amendments are placed on the ballot.[6]

Prior to the voters' approval of article IV, section 10 and article V, subsection 3(b)(10) in 1986, the method by which legislative joint resolutions and voter initiatives were reviewed by the Florida courts was identical; either could be reviewed through a declaratory action filed in

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[5] Plaintiffs' "Notice of Priority Status" cites the First District Court of Appeal's opinion in *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 558-59 (Fla. 1st DCA 2006) ("*Playing Field*"), for the proposition that the trial court's "refusal to expedite [a] challenge to a proposed constitutional amendment was in error." [Notice of Priority Status, ¶ 4] Defendant does not dispute that this case should be resolved on an expedited basis. However, to the extent that Plaintiffs rely on *Playing Field* in support of this Court exercising jurisdiction in this case, that opinion is entirely distinguishable. *Playing Field* involved a procedural challenge based on allegations that the initiative sponsor fraudulently obtained signatures on the initiative petition in violation of section 100.371, Florida Statutes. It did not address whether the amendment complied substantively with article XI, section 3 and section 101.161.

[6] There are five methods by which the Florida Constitution may be amended:
(i) Constitutional Convention – Florida voters may call a constitutional convention by collecting a designated amount of signatures and then gaining a majority of the vote to the question "Shall a constitutional convention be held?";
(ii) Constitutional Revision Commission – this commission meets every 20 years to examine the constitution of the state and propose the amendments deemed necessary;
(iii) Taxation and Budget Reform Commission – this commission also meets only every 20th year;
(iv) Legislative Joint Resolution – The Florida Legislature can pass a joint resolution supported by three-fifths of the membership of each house of the legislature; and
(v) Citizen Initiative – the method by which Amendments 5 and 6 were proposed here.
See art. XI, §§ 1-4, 6, Fla. Const.

the circuit courts or a mandamus petition filed in the Supreme Court.[7]

After article IV, section 10 and article V, subsection 3(b)(10) took effect, the Supreme Court has had original and exclusive jurisdiction over the pre-election review of voter initiative proposed amendments to the Constitution, for the reasons discussed above. By contrast, no basis for original and exclusive Supreme Court jurisdiction exists for review of proposed amendments by legislative joint resolution. *Armstrong*, 773 So. 2d at 14 n.18 ("The constitution expressly authorizes [Supreme Court] review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const. . . .").

Therefore, unlike voter initiative proposed amendments, the validity of joint resolution proposed amendments may still be reviewed by circuit courts pursuant to declaratory judgment actions.[8] *See e.g., Armstrong*, 773 So. 2d at 9 (pre-election declaratory judgment action filed in circuit court as to validity of constitutional amendment proposed by legislative resolution).

Thus, any authorities arising from proposed amendments by legislative resolution which may be relied upon here by the Plaintiffs and the Intervening Plaintiffs are entirely inapplicable.

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[7] *See Evans*, 457 So. 2d at 1352 (in which the Supreme Court reviewed a "a declaratory judgment rendered [in the circuit court] in which [that court] found the [citizen initiative] proposed amendment to the Florida Constitution . . . and its ballot summary were constitutionally valid."); *Askew v. Firestone*, 421 So. 2d 151, 152-53 (Fla. 1982) (Florida Supreme Court opinion reviewing declaratory judgment issued by a circuit court regarding validity of joint resolution proposed amendment to the Florida Constitution); *Fine*, 448 So. 2d 985-86 (Florida Supreme Court accepting discretionary mandamus jurisdiction to consider validity of citizen initiative proposed amendment to Florida Constitution).

[8] One reason for the Legislature's decision not to include pre-election review of joint resolution proposed amendments by the Supreme Court in the amendment resulting in article IV, section 10 in 1986 was posited by the *Armstrong* Court: "The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . . Obviously, no such provision is necessary for amendments originating from other sources." *Armstrong*, 773 So. 2d at 14 n.18.

C. **Plaintiffs' reliance upon *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) is misplaced.**

Plaintiffs' Complaint alleges that "[u]nder *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of [Amendment 6] in [*Redistricting Standards*] is no impediment to this challenge." [Plaintiffs' Complaint, ¶ 16]

Smith was decided pursuant to a petition for writ of mandamus originally filed in the Supreme Court. 607 So. 2d at 398 (citing art. 5, § 3(b)(8) ("The supreme court . . . [m]ay issue writs of mandamus and quo warranto to state officers and state agencies."). The Court had previously issued an advisory opinion pursuant to article IV, section 10 and article V, subsection 3(b)(10) as to the validity of the voter initiative amendment at issue in that case and, consequently, the *Smith* Court was faced with the question of:

> whether our earlier advisory proceeding precludes us from considering the present cause. It is true that article IV, section 10 and article V, subsection 3(b)(10) are silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction.

607 So. 2d at 398.

In its holding that a second challenge to the proposed amendment was permissible, the *Smith* Court noted that its advisory opinions "would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised." *Id.*[9] The Court stated that its holding that advisory opinions issued pursuant to article IV, section 10 and article V, subsection 3(b)(10) are non-binding was:

> entirely consistent with settled law holding that advisory opinions "are not binding judicial precedents, [although] they are frequently very persuasive and

[9] The Court relied in part on the legislative staff summaries considered by the Legislature prior to its submission of the proposed amendment resulting in voter approval of article IV, section 10, and article V, subsection 3(b)(10). 607 So. 2d at 399.

> usually adhered to" . . . as to issues they actually address, [but] not as to issues . . . that were not addressed at all in a prior advisory opinion.

Id. at 399 n.3 (quoting *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944)).

There is no ambiguity in *Smith* that in "extraordinary cases" an amendment opponent can advance a second challenge in the Supreme Court prior to an election. 607 So. 2d at 399. Yet the issue here is not whether the *Supreme Court* has jurisdiction to revisit issues previously decided. The issue here is whether *this* Court has such jurisdiction. As to that question, *Smith* provides no support for the Plaintiffs' contention that this Court may exercise original jurisdiction in this case. Indeed, in two respects, the *Smith* opinion indicates that jurisdiction lies only with the Supreme Court.

First, *Smith* was decided pursuant to a petition for writ of mandamus filed directly in the Supreme Court – not the circuit court. Thus, the procedure followed in that case is wholly consistent with subsequent statements of the Supreme Court that it has original and exclusive jurisdiction over the pre-election review of proposed initiative amendments pursuant to article V, section 3(b)(10). *Advisory Opinion*, 642 So. 2d at 725; *Advisory Opinion*, 661 So. 2d at 1205. Second, the manner in which the Supreme Court framed the issue before it demonstrates that Court's exclusive jurisdiction. As the Court stated, the issue there was "whether the advisory proceeding raises a procedural bar or otherwise deprives **this Court** of jurisdiction over the present case." 607 So. 2d at 398 (emphasis added).

In short, nothing in *Smith* even hints that the petitioner/opponent of the proposed amendment could have gone to any other court with its pre-election challenge.

Likewise, the Supreme Court's decision in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), supports Defendant's position here. In *Ray*, a post-election amendment challenge, the Supreme Court revisited *Smith* to make clear that absent *extraordinary circumstances*, its decisions in an

advisory opinion are binding. As stated in *Ray*:

> relitigation of issues expressly addressed in an advisory opinion on a proposed amendment **is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction.** Renewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion. [A]lthough our advisory opinions are not strictly binding precedent in the most technical sense, only under **extraordinary circumstances** will we revisit an issue decided in our earlier advisory opinions.
>
> This case does not present such a circumstance. . . . Therefore, we conclude that our earlier [advisory opinion] decision . . . **is binding** on the single-subject issue and we find no reason to reconsider the issue and recede from that decision.

Ray, 742 So. 2d at 1285 (emphasis added; internal quotation omitted).

Thus, to the extent Plaintiffs or Intervening Plaintiffs wish to challenge Amendments 5 and 6 before the election, they, like the petitioner in *Smith*, must do so in the Florida Supreme Court and must show that *extraordinary circumstances* warrant that Court's exercise of mandamus jurisdiction.

D. This Court has no jurisdiction to consider a pre-election challenge to the validity of the Amendments with an expanded scope of review.

The Senate Complaint alleges as a basis for this Court's jurisdiction that:

> this Court has jurisdiction to enjoin the proposed constitutional amendments from being placed on the ballot as their contradictions with federal law will render them futile and incapable of being made operative under any circumstances. *See Gray v. Winthrop*, 115 Fla. 721 (1934).

[Senate Complaint, ¶ 8] Remarkably, this is the very argument Justice Overton made in his dissent – rejected by the majority – in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229-30 (Fla. 1991) (Overton, J., concurring in part and dissenting in part) (hereafter "*Limited Terms*"). In *Limited Terms*, Justice Overton argued that pursuant to *Gray v. Winthrop*, 156 So. 270 (Fla. 1934), *Gray v. Moss*, 156

So. 262 (Fla. 1934), and *Weber v. Smathers*, 338 So. 2d 819, 821 (Fla. 1976), the Supreme Court must strike an initiative proposed amendment to the constitution from the ballot if:

> "by its terms [it] specifically and necessarily violates a command or limitation of the Federal Constitution . . . in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances."

Limited Terms, 592 So. 2d at 229 (J. Overton, dissenting) (quoting *Winthrop*, 156 So. at 272). That argument was rejected by the majority, which held that "we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989)." 592 So. 2d at 227 & n.2 (citing *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla.1982) (question of whether proposed amendment violated due process not justiciable in challenge to ballot summary)).

Likewise, in *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (hereafter, "*Class Size*"), the Supreme Court reaffirmed its holding in *Limited Terms*, and once again rejected the argument made by Justice Overton in his dissent in *Limited Terms* – and by the Senate here. As stated in *Class Size*:

> In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment. Moreover, **other constitutional challenges are not justiciable in this type of proceeding.** [*Limited Political*], 592 So. 2d 225, 227 (Fla. 1991).

816 So. 2d 580, 582 (emphasis added, internal citation omitted in part). By "this type of proceeding," the Court meant a **pre-election proceeding**, over which, for the reasons previously discussed, the Supreme Court has original and exclusive jurisdiction.

In *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 804-05 (Fla. 1998) (hereafter, "*Term Limits*"), Justice Overton once again argued, this time in a

concurrence joined by no other Justice, that:

> it is a fraud on the public to indicate that this initiative provision could be properly placed on the ballot if the ballot summary was not misleading. I find this entire provision to be unconstitutional on its face under *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). I still adhere to the view that I expressed in [*Limited Terms*] that . . . in considering whether or not the proposed amendment to [the Florida] constitution meets constitutional requirements of validity under the Constitution of the United States. . . .

718 So. 2d at 804 (Overton, J., concurring in the result only) (citing in part Art. III, § 10, Fla. Const.; *Winthrop*, 156 So. 270; *Moss*, 156 So. 262). Once again, the majority of the Court rejected the argument. 718 So. 2d at 801 & n.1.

The Defendant does not dispute that if the voters approve the Amendments, the Senate may assert – post-election – the arguments it attempts to make in this Court.[10] But the pre-election scope of review of initiative proposed amendments is "limited to two legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary of the proposed amendment are misleading, in violation of section 101.161(1), Florida Statutes." *Term Limits*, 718 So. 2d at 801.[11]

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[10] *Ray* is an example of this procedure. There, the amendment opponents filed a post-election circuit court case to prevent enforcement of a voter-approved amendment to the Florida Constitution on the ground that the amendment was invalid under federal law. *Ray*, 742 So. 2d at 1277, 1278, 1280. This is precisely the claim the Florida Senate makes in this case.

[11] The Plaintiffs and Intervening Plaintiffs stated at the hearing on June 9 that their claims require a trial of factual issues. As discussed above, the appropriate scope of pre-election review is limited to the issues under Article XI, section 3, of the constitution and section 101.161, Florida Statutes, *i.e.*, whether the language of an amendment conforms to the single subject rule and whether the ballot title and summary conform to the requirements of the statute. If there are factual issues the Attorney General believes are necessary to enable the Supreme Court to render an advisory opinion, he must specifically enumerate those. *See* § 16.061, Fla. Stat. There were no factual issues so enumerated by the Attorney General as to Amendments 5 and 6. *See Redistricting Standards*.

(Continued ...)

The rationale for this limitation is simple and compelling; as stated in *Advisory Opinion to the Attorney General Re: Tax Limitation*, 644 So. 2d 486 (Fla. 1994) (hereafter, "*Tax Limitation*"):

> This Court's role in these matters is strictly limited to the legal issues presented by the constitution and relevant statutes. **This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments, and we have not done so. Infringing on the people's right to vote** on an amendment is a power this Court should use only where the record shows the constitutional single-subject requirement has been violated or the record establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment and its effect on the present constitution.

Id. at 489 (emphasis added).

Even as to the two narrow issues which the Supreme Court does consider in a pre-election advisory opinion, "'[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.'" *Advisory Opinion to Attorney General Re: 1.35% Property Tax Cap*, 2 So. 3d 968, 971 (Fla. 2009) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). "[W]here voter initiatives are concerned, the Court has no authority to inject itself in the process, unless the laws governing the process [i.e., article XI, section 3 and section 101.161] have been clearly and conclusively violated." *Id.* (internal quotation and citation omitted).

As aptly put by the Third District Court of Appeal:

> The law is well-settled that a court of equity as a general rule will not restrain the holding of an election because a free election in a democracy is a political matter to be determined by the electorate and not the courts. Limited exceptions to this rule have been recognized but only on the narrowest of grounds. One such exception is where the election is being held in violation of an applicable

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Any other issues for which evidence may be necessary for Plaintiffs to support their claims are assertable only in a post-election proceeding as discussed above. Consequently, a trial is neither necessary nor proper in this case.

> legislative enactment. Another is where the ballot question on a referendum is misleading and deprives the voter of an opportunity to know and to be on notice as to the proposition on which he is to cast his vote.

Metropolitan Dade County v. Shiver, 365 So. 2d 210, 212 (Fla. 3d DCA 1978), *affirmed*, 394 So. 2d 981 (Fla. 1981) (internal citation omitted).

In sum, the Supreme Court has applied its limited authority to review initiative proposed amendments to infringe as little as possible on the people's right to vote. Allowing an amendment opponent to simply sidestep the Supreme Court and seek broader review in a pre-election challenge in a Florida circuit court would render that limited scope of review meaningless.

In this case, the Plaintiffs and Intervening Plaintiffs plainly seek to do just that.

IV. CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction to decide this case. If the Plaintiffs and the Intervening Plaintiffs wish to challenge Amendments 5 and 6 prior to the November 2010 general election, they must seek review through the Supreme Court's exclusive jurisdiction.

Accordingly, the Defendant respectfully asks this Court to dismiss the Plaintiffs' and Intervening Plaintiffs' claims in this case for lack of subject matter jurisdiction.

Dated this 22nd day of June, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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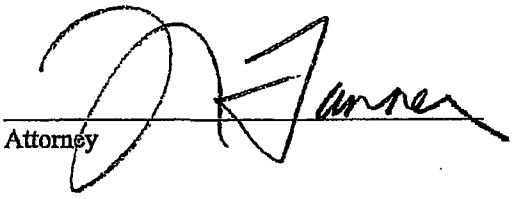

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION FOR EXPEDITED DISPOSITION

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves the Court to expedite disposition of the issues raised by (i) Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss") and (ii) Defendant's Motion for Stay of Discovery (the "Motion for Stay"), filed on even date.

I. PRELIMINARY STATEMENT

When subject matter jurisdiction is in doubt, the Court must promptly address and resolve the question – *sua sponte* if necessary – before allowing the case to proceed.

And while jurisdiction remains in doubt, discovery should be stayed in order to conserve the time and resources of the Court and the litigants. This is especially so here where three of the litigants are public bodies expending public resources in this case.

II. BACKGROUND

On September 28, 2007 the Florida Department of State, Division of Elections (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States Congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, the "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts").

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (relating to ballot title and summary).

The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued its opinion holding "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010 general election. *Id.*

On May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major

ramifications" posed by Amendment 6. [Complaint, ¶ 5] Plaintiffs were joined in their challenge to Amendment 6 by Intervenors The Florida House of Representatives on May 26, 2010, and by The Florida Senate on May 27, 2010 (together, the "Intervening Plaintiffs"). The Intervening Plaintiffs also challenge Amendment 5 on various grounds.

At the time they filed their Complaint, the Plaintiffs filed a Notice of Priority Status requesting an expedited disposition schedule for this case pursuant to Rules 2.215(g) and 2.545(c)(1), Florida Rules of Judicial Administration (the "Priority Notice"). The Plaintiffs asserted that various deadlines attendant to ballot preparation for the 2010 general election necessitate expedited consideration of their claims. [Priority Notice, ¶¶ 2-5]

Following a hearing on June 9, 2010, the Court entered a Scheduling Order for this case which directs the parties to exchange witness lists, exhibit lists, and expert disclosures on an expedited basis (all to be completed by July 12) and directs that discovery must be completed by July 21, 2010. [Scheduling Order, ¶¶ 1-5] The Scheduling Order sets the case for non-jury trial beginning on July 26. [*Id.* ¶ 6]

In conjunction with this Motion, Defendant has filed the Motion to Dismiss and the Motion for Stay. The Motion to Dismiss demonstrates that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs in this case. The Motion for Stay seeks a stay of all discovery pending the Court's resolution of the Motion to Dismiss.

This Motion asks the Court, pursuant to its inherent authority to manage cases before it, to expedite its consideration and disposition of the issues raised in Defendant's Motion to Dismiss and Motion for Stay to ensure a speedy resolution of the vital, threshold questions addressed therein.

III. ARGUMENT

The Court is authorized to expedite its resolution of the Motions

The Florida Rules of Civil Procedure and the Florida Rules of Judicial Administration equip trial courts with the authority to insure the just and expeditious disposition of cases. *See* Fla. R. Civ. P. 1.010 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."); Fla. R. Jud. Admin. 2.215(g) ("Particular attention shall be given to . . . challenges involving elections and proposed constitutional amendments.").

As Plaintiffs acknowledged in their Priority Notice, cases such as this are particularly appropriate for expedited disposition. [Priority Notice, ¶ 5]

The Court should expedite resolution of the Motion to Dismiss

The Motion to Dismiss asserts that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs because the Florida Supreme Court has the exclusive jurisdiction to determine whether a proposed amendment to the Florida Constitution may appear on the ballot.

Challenges to the Court's subject matter jurisdiction must be resolved as promptly as possible.

It is well-settled in Florida law that "[i]f [a] court is without jurisdiction, it is powerless to act in the case." *Roberts v. Seaboard Sur. Co.*, 29 So. 2d 743, 748 (Fla. 1947) (internal citation omitted). Thus, "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997). "The limits of a court's jurisdiction are of 'primary concern,' requiring the court to

address the issue 'sua sponte when any doubt exists.'" *Id.* (quoting *Mapoles v. Wilson*, 122 So. 2d 249, 251 (Fla. 1st DCA 1960)).

The Scheduling Order requires dispositive motion briefing to be completed by July 21, 2010 [Scheduling Order, ¶ 3] but it does not restrict the Court's earlier consideration of the jurisdictional challenge raised in the Motion to Dismiss. In keeping with the expedited relief requested here, the Scheduling Order allows dispositive motions to be heard "before trial at a time to be determined." [Scheduling Order, ¶ 6]

Notably, expediting disposition of the Motion to Dismiss will eliminate the expense associated with discovery and trial – concerns which are especially acute in this case where three of the litigants are public bodies, litigating with scarce public funds.

The Court should expedite resolution of the Motion for Stay

Defendant's Motion for Stay argues that a stay of discovery is proper because the Court lacks subject matter jurisdiction in this case.

The Court is authorized to order a stay because the discovery rules invest trial courts with "broad discretion . . . to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (quoting Fla. R. Civ. P. 1.280(c)). Public policy can "support[] the denial of discovery, after a proper balancing of the competing interests to be served by granting discovery or by denying it." *Sugarmill Woods Civic Ass'n, Inc. v. S. States Util.*, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997) (citations omitted).

As discussed in the Motion for Stay, the Defendant should not be subjected to the burden of discovery in this case when *bona fide* questions as to the court's subject matter jurisdiction are present.

IV. CONCLUSION

For these reasons, the Defendant respectfully asks the Court to hear the Motion to Dismiss and the Motion for Stay at the earliest available date on the Court's calendar and thereafter to rule on the motions as promptly as possible.

Dated this 22nd day of June, 2010.

TANNER BISHOP

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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/h

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

CORRINE BROWN and MARIO DIAZ-BALART,
Plaintiffs, and FLORIDA HOUSE OF
REPRESENTATIVES and FLORIDA SENATE,
Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, Defendant,
and BOB GRAHAM, Intervening Defendant.
_____/

NOTICE OF HEARING

PLEASE TAKE NOTICE that the undersigned will bring on for hearing before the Honorable Jackie Fulford, Circuit Court Judge, in Room 365-D at the Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida, on **Wednesday, June 30, 2010**, beginning at **7:30 a.m.**, or as soon thereafter as counsel may be heard, the following motions: Defendant's Motion for Stay of Discovery; Graham's Motion for Stay of Discovery; and FairDistrictFlorida.org, Inc.'s Motion for Stay of Discovery.

At this time the Court will also entertain discussion of the Defendant's Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction; Graham's Motion to Dismiss for Lack of Subject Matter Jurisdiction; and FairDistrictFlorida.org, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction.

One half hour has been reserved for this hearing.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Respectfully submitted this 29th day of June 2010 by:

Lynn C. Hearn

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided to the following by electronic mail and United States Postal Service on this 29th day of June, 2010 to:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as the Interim Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

This cause was considered upon review of Motion for Leave to Appear as Amicus Curiae in Support of Defendant's Motion to Dismiss, dated June 22, 2010. The court having reviewed the file and being advised in the premises, it is:

ORDERED AND ADJUDGED that Governor Charlie Crist's Motion for Leave to Appear as Amicus Curiae in Support of Defendant's Motion to Dismiss is granted.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida this 30th day of June, 2010.

Honorable Jackie L. Fulford

Confirmed copies furnished to:

Stephen M. Cody
C.B. Upton
James A. Scott
Mark Herron
Miguel DeGrandy
Michael G. Tanner
George N. Meros, Jr.
Ronald G. Meyer

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF SERVING INTERROGATORIES TO
DEFENDANT, FAIRDISTRICTSFLORIDA.ORG, INC.,

Pursuant to Florida Rule of Civil Procedure 1.340, Intervening Plaintiff, Florida House of Representatives, serves the following interrogatories upon Defendant, FairDistrictsFlorida.org, Inc., to be answered fully, in writing and under oath, no later than July 21, 2010.

When answering these interrogatories, please refer to the attached Schedule.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by United States Mail and electronic transmission this first day of July, 2010, to the following:

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SCHEDULE TO INTERROGATORIES

These instructions and definitions pertain to the following Interrogatories that immediately follow.

1. **"Identify,"** when used with respect to a person, means:

   A. State the full name, present address, and telephone number of said person;

   B. State the full name, address and telephone number of each of his or her employers, and each entity in which he or she is a principal.

2. **"You"** means FairDistrictsFlorida.org, Inc., its attorneys, representatives, officers, directors, contractors, managers, employees, agents, and any person under its control.

3. If the answer to all or any part of the Interrogatory is not presently known or available, include a statement to that effect and furnish the information known or available and in response to the entire Interrogatory by supplemental answer in writing, and under oath, within three (3) days from the time the entire answer becomes known or available.

4. If it is claimed that any of the information covered by these Interrogatories is privileged or otherwise not subject to discovery pursuant to the Florida Rules of Civil Procedure, identify such information by description and a statement as to the nature of the claim of privilege or the basis for claiming that such information is not subject to discovery, in order that the Court may, if necessary, rule upon such matters.

5. If all the information furnished in answer to all or any part of an interrogatory is not within the personal knowledge of the affiant, identify each person to whom all or any part of the information furnished is a matter of personal knowledge, and each person who communicated to the affiant any part of the information furnished.

INTERROGATORIES

1. In drafting Amendments 5 and 6, did you intend that the provision quoted below have the same legal effect and meaning as the federal Voting Rights Act?

> districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

RESPONSE:

2. If the answer to Interrogatory No. 1 is not "yes," explain how the legal effect and meaning of the provision quoted in Interrogatory No. 1 was intended to differ from the legal effect and meaning of the federal Voting Rights Act?

RESPONSE:

3. Do you agree with the responses provided by Jenner & Block LLP to Questions 7 and 8 in the attached opinion letter, dated December 7, 2009? If not, please state in detail the points of disagreement.

RESPONSE:

4. Will the compactness and political-boundary requirements of Amendments 5 and 6 limit or hinder in any way the Legislature's ability to promote the interests of minority voters? If not, why not?

RESPONSE:

5. Would minority representation be harmed by Amendments 5 and 6? If not, please explain fully.

RESPONSE:

6. Identify each person who drafted or assisted in drafting Amendments 5 and 6, and describe each person's role in the drafting of Amendments 5 and 6.

RESPONSE:

7. What criteria or factors did you intend the Legislature to consider in its assessment of the "opportunity of racial or language minorities to participate in the political process"?

RESPONSE:

8. Is there a difference between (i) a standard that affords an "equal" ability or opportunity, and (ii) a standard that ensures that an ability or opportunity will not "diminish"? Please explain fully.

RESPONSE:

By: _____

Date: _____

STATE OF _____
COUNTY OF _____

Before me, the undersigned authority, personally appeared _____, who swears or affirms that he or she has read the foregoing Answers to Interrogatories and that the same are true and correct to the best of his or her knowledge and belief, and who is personally known to me or has produced _____ as identification.

SWORN TO OR AFFIRMED before me this ____ day of _____, 2010.

_____
Signature of Notary

_____
Print, Type, or Stamp Name of Notary

December 7, 2009

JENNER&BLOCK

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State Senator
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Honorable Perry Thurston
State Representative
410 House Office Building
402 S. Monroe Street
Tallahassee, FL 32399

Re: Florida Redistricting Initiative

Dear Senator Smith and Representative Thurston,

As you requested, we have reviewed the letter recently sent by United States Representatives Corrine Brown and Mario Diaz-Balart to Dean Cannon, the Speaker of the Florida House of Representatives. In their letter, Reps. Brown and Diaz-Balart listed eighteen questions about the Congressional and Legislative redistricting initiatives that will be on the Florida ballot in 2010. Answers to all eighteen questions are provided below. As is evident from the answers, the initiatives are fully compliant with both the U.S. Constitution and the Voting Rights Act. If enacted, they would dramatically improve the redistricting process in Florida and make Florida's elections fairer for all political parties and candidates. They would also protect, and indeed enhance, the ability of minorities to participate in the political process and elect representatives of their choice. Please feel free to call on us if you have further questions.

1. *The Voting Rights Act requires that a racial minority's opportunity to elect its representatives of choice not be diluted by a plan. How can this be done without the use of political vote histories, which appear to be prohibited by the amendments' requirement that "no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent"?*

As the Florida Supreme Court has suggested in its opinion concerning the validity of the summary of the ballot measure, nothing in the amendments bars the use of "political vote histories," registration data, or historical election results. What is prohibited is drawing a plan "with the *intent* to favor or disfavor a political party or an incumbent." As long as such information is used for *other* purposes – e.g., compliance with the Voting Rights Act – it is in no way restricted by the amendments. In fact, the use of such information to enable minorities to elect representatives of their choice is perfectly *consistent* with the amendments, which bar

"denying or abridging the equal opportunity of racial or language minorities to participate in the political process" and "diminish[ing] their ability to elect representatives of their choice."

There is no conflict between (1) using political vote histories to ensure compliance with the Voting Rights Act and (2) not drawing districts with the intent to favor or disfavor a political party or an incumbent. Under the amendments, political vote histories and other similar data may validly be used for some purposes, but not in order to help or harm a party or candidate.

2. *The amendments prohibit plans that favor or disfavor an incumbent. Drawing districts that comply with the Voting Rights Act will inevitably include most of the geographical area from an existing district in which members of the minority community live, since they form a politically cohesive and, in some cases, compact community. But how will the amendments deal with this contradiction since such districts by definition will also favor the incumbent legislator who already represents that area, which is prohibited by Subsection 1?*

There is no contradiction here. It is true that the incumbent legislator may fare well in a district that is drawn, consistent with the Voting Rights Act, so that it includes a minority community that is compact and politically cohesive. In this case, however, the purpose behind the district's formation will *not* be to favor that incumbent. The goal, rather, will be to comply with the Voting Rights Act as well as the amendments' mandate that minorities be able to elect representatives of their choice. Notably, the amendments do not prohibit redistricting plans that produce favorable *results* for incumbents – only plans that *intend* to favor incumbents.

3. *If anyone elected from a majority-minority district[] presents to the Legislature information regarding the political makeup and communities of interest in that district, can the Legislature act on that information to ensure that the district (and other majority-minority districts) are protected? If an incumbent who is also African-American or Hispanic presents this relevant and important information to the Legislature or uses it while drawing [a] plan, does he or she jeopardize that district or the overall plan since the amendments require that no district be drawn to "favor or disfavor . . . an incumbent"?*

It is perfectly acceptable, under the amendments, for the Legislature to use "information regarding the political makeup and communities of interest" in order to comply with the Voting Rights Act and the amendments' requirement that minorities be able to elect representatives of their choice. If such "relevant and important information" is presented to the Legislature, even by an incumbent legislator, it can certainly be employed for these purposes. What is prohibited is using the data in order to favor incumbent legislators rather than to protect minorities' voting rights.

4. *How can the Legislature ensure compliance with Section 2 of the VRA, which requires protection of geographically compact minority groups that are politically cohesive, if it cannot consider registration and performance data in the redistricting process?*

The Legislature *can* consider "registration and performance data" in order to ensure compliance with the Voting Rights Act as well as the amendments' requirement that minorities be able to elect representatives of their choice. The Legislature cannot consider such data in order to help or harm a party or candidate.

5. *When a plan is challenged under the amendments on the grounds that it "denies or abridges the equal opportunity of racial or language minorities" to participate or elect representatives of their choice, the court will certainly have to look at relevant political, racial, and performance data to judge the merits of the claim. How can the Legislature be expected to enact a plan to satisfy judicial review if it cannot rely on the same data courts will use for review?*

As discussed above, the Legislature *can* look at "relevant political, racial, and performance data" in order to comply with the amendments' ban on plans that diminish minorities' ability to elect representatives of their choice. Courts will therefore not have access to any data that the Legislature itself cannot also consult for these purposes.

6. *If the VRA does not compel the creation [of] majority/minority districts, would the amendments prohibit the Legislature from creating [them]? If the amendments had been in place in 2000, would the current majority/minority districts be legal, or would our constituents have been divvied up across more than one district? Please also answer for the congressional seats currently represented by African-Americans or Hispanics, as well as those in the Florida Legislature.*

The amendments do not bar the creation of majority-minority districts. Such districts are permissible as long as they are not created for the purpose of favoring or disfavoring any political party or favoring incumbents. In some cases, in fact, majority-minority districts may be necessary so that minorities are able to elect representatives of their choice. In other cases, minorities will be able to elect representatives of their choice even if they do not constitute a numerical majority of the district. But the amendments would not necessarily prohibit their preservation, depending on the reason.

Unfortunately, it is not possible to assess whether current majority/minority districts would be valid had the amendments been in place in 2000. If those districts were drawn to enable minorities to elect representatives of their choice, then they would be permissible. But if they were drawn to favor or disfavor any political party or protect incumbents, then they would be invalid.

7. *How do the amendments coexist with the U.S. Supreme Court ruling in* Bartlett v. Strickland, *129 S. Ct. 1231 (2009), which held Section 2 of the Voting Rights Act requires the drawing of an effective minority district only if the minority group is more than 50 percent of [the] district's voting age population? Since the amendments were drafted before this decision, will the amendments pass constitutional muster given their requirement that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice,"*

when that will clearly be the result of this U.S. Supreme Court ruling if the amendments pass?

While the amendments echo the language of Section 2 of the Voting Rights Act, they are not identical to it, particularly as it has been interpreted by the Supreme Court. It is true that, under *Bartlett*, there can be a Section 2 "effects" violation only if a minority makes up more than 50 percent of a potential district's voting age population. Under the amendments, in contrast, what is crucial is that a plan not "diminish [minorities'] ability to elect representatives of their choice." Under certain circumstances, a minority group will be able to elect representatives of its choice even if it does not constitute a numerical majority of the district. For example, different minority groups may join into a coalition that is reliably able to win a majority of the district's votes. Alternatively, the minority group may be able to persuade a sufficient number of majority voters to "cross over" for it to elect the representative of its choice. The amendments would take these circumstances into account even though, under *Bartlett*, they cannot give rise to Section 2 "effects" violations.

Bartlett, of course, involved only issues of statutory interpretation. Thus, nothing in the decision can possibly cause the amendments not to "pass *constitutional* muster." The timing of the amendments' drafting is also irrelevant to their validity. If enacted, they would simply apply alongside Section 2 of the Voting Rights Act, as interpreted in *Bartlett*. There could be Section 2 "effects" violations only where a minority makes up more than 50 percent of a potential district's voting age population. But, under the amendments, minorities' ability to elect representatives of their choice would be respected even where there was no Section 2 violation. In other words, the amendments seemingly give protection to minority voters even in those districts (*e.g.*, districts less than 50% minority that elect a minority-preferred candidate) that *Bartlett* does not.

8. *The amendments say that districts cannot be drawn to "diminish [minorities'] ability to elect representatives of their choice," but what is the baseline for comparison?*

The amendments' language is quite similar to that of Section 2 of the Voting Rights Act. Their use of the term "diminish" also evokes the anti-retrogression standard of Section 5.

Under Section 5 (which itself applies to part of Florida), redistricting plans are invalid if they would result in a retrogression in the electoral position of racial minorities. By analogy, the amendments would require, at least, that minorities not be made worse off by any plan in terms of their ability to elect representatives of their choice. Under Section 2, conversely, the Supreme Court has held that the *maximization* of majority-minority districts is not required. Similarly, the amendments would not require the maximum possible number of districts in which minorities are able to elect representatives of their choice. Within these two bounds, the Legislature would have substantial discretion. It would be able to – but would not *have* to – formulate a plan under which minorities would be able to elect more representatives of their choice compared to the stats quo.

9. *If compact districts are mandatory except where the racial component of Subsection (1) permits the creation of irregularly shaped districts, wouldn't any irregularly shaped*

district violate Equal Protection, since race would be the sole factor motivating the decision?

It is *not* the case that deviations from compactness are permissible only in order to protect the ability of minorities to elect representatives of their choice. Rather, under the amendments, such deviations are also permissible in order to (1) ensure that districts are not drawn with the intent to favor or disfavor a political party or an incumbent; (2) comply with federal law (e.g., Sections 2 and 5 of the Voting Rights Act); (3) comply with the requirement of equal population for all districts; and (4) to the extent feasible, respect existing political and geographical boundaries. Therefore, it certainly would not be possible to conclude that any irregularly shaped district was primarily motivated by the amendments' prohibition of diminishing minorities' ability to elect representatives of their choice, let alone by bare racial considerations. Instead, any of the above factors could (and likely would) explain the district's lack of compactness.

10. *If compact districts are mandatory except where the racial component of Subsection (1) permits the creation of irregularly shaped districts, how can the abutting districts which don't qualify under Subsection 1 be permissible under the amendments when they too will have to be non-compact simply because they must fit next to non-compact but permissible districts?*

Deviations from compactness are *not* only permissible in order to protect the ability of minorities to elect representatives of their choice. As also discussed above, the protection of minorities' ability to elect representatives of their choice would be unlikely to result in irregularly shaped, non-compact districts. The scenario envisioned by this question – a non-compact, majority-controlled district abutting a non-compact district in which a minority can elect the representative of its choice – would therefore be extremely rare. In any event, under such a scenario, the same factors that justified the creation of the minority-controlled district would also shield the majority-controlled district from attack. In other words, the non-compact, majority-controlled district would be an inevitable (and permissible) byproduct of the protection of minorities' ability to elect representatives of their choice.

11. *The sponsors of the amendments indicate that if the amendments had been in place in 2002, the plan proposed in litigation by opponents of the Legislature's plan would have found strong support. How many districts where racial or language minorities would have had the opportunity to elect representatives of their choice would that plan have created. Please answer also if the ruling of* Bartlett v. Strickland *had been in place at that time.*

It is difficult to say exactly how many districts in which minorities are able to elect representatives of their choice would have been created by any given alternative 2002 plan. More than seven years have passed since such plans were proposed and, of course, none was never actually implemented. But it is clear that there were alternatives presented at that time that maintained a comparable ability of minorities to elect candidates of choice while avoiding some of the other ills, like undue non-compactness, that are among the targets of the amendments.

The Supreme Court's *Bartlett v. Strickland* decision has no bearing on this analysis. As discussed above, *Bartlett* held that there can be a Section 2 "effects" violation only if a minority makes up more than 50 percent of a potential district's voting age population. But *Bartlett* said nothing at all about how states may draw districts in which minorities are able to elect representatives of their choice in circumstances where there is *not* a Section 2 violation. *Bartlett* certainly did not say that minority-controlled districts may be drawn only when there *is* a Section 2 violation. *Bartlett* should therefore have very little impact on Florida's future redistricting decisions. The decision means that Florida's potential exposure to Section 2 liability is somewhat reduced, but it in no way restricts Florida in drawing districts in which minorities are able to elect representatives of their choice.

12. *If the Legislature fails to use registration data to redraw a district which is well-known historically to have a Democratic majority of 55%, and as a result of redrawing the district the Democrats are reduced to 42%, won't the failure to use registration data be evidence of intent to disfavor Democrats and/or an incumbent? If the district is currently represented by a racial or language minority group member, wouldn't that be a violation of the amendments' other provision that those districts be preserved? How must the Legislature resolve this conflict if the amendments pass?*

Registration data *can* be used to protect the ability of minorities to elect representatives of their choice, but cannot be used with the intent of helping or harming a party or candidate. Standing alone, then, changes in the political composition of a redrawn district would not be proof that the redrawing was aimed at helping or hurting a party or candidate. In fact, that the redrawing was carried out without reference to registration data would suggest that it was motivated by other, legitimate considerations, *e.g.*, improving compactness or respecting existing political and geographical boundaries. Put another way, changes in districts' political composition can be a *side effect* of redistricting, but they cannot be its *goal*.

If the district in question is represented by a minority group member, or is one where a minority group could potentially elect the representative of its choice, then there would be no problem with the Legislature's consideration of demographic and political data. The Legislature would therefore be able to avoid this question's scenario – a minority-controlled district being redrawn so that the minority is no longer able to elect the representative of its choice – by taking into account the implications of its actions for minorities. If, however, the Legislature *did* redraw a district and thereby destroy a minority group's current ability to elect the representative of its choice, then that could indeed be a violation of the amendments.

13. *If the Legislature uses registration data to redraw that same district to keep it at 55% (and thus avoid an intent to disfavor the Democratic Party) isn't that use evidence of an intent to favor the Democrat incumbent?*

Assuming that the district is *not* one in which a minority group could potentially elect the representative of its choice, then the use of registration data in order to preserve one party's advantage could be evidence of political motivations that are improper under the amendments. However, if the district is one in which a minority group could potentially elect the

representative of its choice, then the use of registration data would not be done to favor an incumbent or political party, but would instead be evidence of an intent to preserve the right of minority voters to elect their preferred candidate. Furthermore, the amendments would likely be interpreted as allowing consideration of political data for various districts as part of an effort to produce an overall plan that is politically balanced and does not disfavor any political party.

14. *If the Legislature fails to use registration or performance data to draw a district in an area of high minority population, and as a result fractures a politically cohesive minority community of interest, isn't that failure clear evidence of "diminish[ing the minority's] ability to elect representati[ves] of their choice"?*

As noted above, the amendments do not prohibit use of registration or performance data in drawing districts. The amendments prohibit minorities being made worse off in terms of their ability to elect representatives of their choice. The amendments also do not require the *maximization* of districts in which minorities are able to elect representatives of their choice, a point which is entirely consistent with current federal law. In the abstract, the fracturing of a politically cohesive community of interest, therefore, would not *necessarily* violate the amendments or any provision of the Voting Rights Act. If the minority had also been fractured under the previous plan, then its ability to elect the representative of its choice would not have been *"diminish[ed]"* by the new plan. In addition, if the minority is not numerous enough to elect the representative of its choice under *any* plan, then its fracturing would likely not give rise to a violation of the amendments or a violation of the federal Voting Rights Act.

However, if a minority is sufficiently numerous to elect the representative of its choice, and if the previous plan enabled the minority to do so, then its fracturing would indeed violate the amendments. It is precisely to avoid this scenario that the Legislature may consult demographic and political data. Armed with such data, the Legislature can draw districts in such a way that minorities that were previously able to elect representatives of their choice can continue to have the ability to do so.

15. *If the Legislature fails to use registration or performance data to draw a district in an area of high minority population, and as a result does not include non-racial or language minority voters who are needed to elect the minority candidate, isn't that failure clear evidence of "diminish[ing the minority's] ability to elect representati[ves] of their choice"?*

This is essentially the same as the previous question, as there is no appreciable difference between fracturing a minority group among more than one district, and excluding certain members of that group from a district. In both cases, assuming sufficient numbers, a minority group that *could* elect the representative of its choice is denied the ability to do so. If that minority group had previously been able to elect the representative of its choice, then the amendments would be violated. Nothing hinges on whether the issue is framed as the "fracturing" of the minority group or the "exclusion" of certain members of that group.

16. Florida's congressional districts have withstood every legal challenge, and they incorporate like-minded communities of interest. Are the framers of this petition correct when they assert that some of Florida's districts are "presumptively unconstitutional"?

Under the U.S. Constitution, electoral districts can be unconstitutional either because they (1) violate the equipopulation requirement; (2) were drawn with race as the predominant factor; or (3) are partisan gerrymanders. However, while the entire Supreme Court agrees that partisan gerrymanders are unconstitutional, the Court has been unable to agree on the appropriate *standard* for determining when gerrymanders cross the line into unconstitutionality.

The framers of the amendments do not contend that Florida's congressional districts violate the equipopulation requirement. Perhaps it has been suggested that some individual districts were drawn with race playing too large a role. There is a stronger argument, however, that some of the existing districts may be unconstitutional because they are partisan gerrymanders. That courts have upheld those districts does not mean that they are constitutionally valid since, as noted above, there is currently no operational standard for determining when partisan gerrymanders are unconstitutional. Notably, a federal court in Florida concluded in 2002 that the "overriding goal" of the Legislature's plan was to "maximize the number of districts likely to perform for" one particular party.

The amendments would ensure that Florida's future districts are not unconstitutional partisan gerrymanders. If districts cannot be drawn "with the intent to favor or disfavor a political party or an incumbent," partisan gerrymandering becomes essentially impossible to carry out. The two main goals of partisan gerrymandering – advancing one party's interests at the expense of another's, and protecting incumbents from challenges – are precisely what is prohibited by the amendments.

17. If the sponsors of this amendment are correct that subsection one incorporates the Voting Rights Act into Florida law, isn't it unconstitutional to say in subsection (3) that the incumbency standard is on equal footing with the VRA standards?

The amendments' provisions regarding minority voting rights are similar, but not identical, to Section 2 of the Voting Rights Act. The Voting Rights Act is not, therefore, incorporated into Florida law. All that is incorporated is the principle that minorities should have an equal opportunity to participate in the political process, with no diminishment of their ability to elect representatives of their choice.

Even if the amendments were identical to the Voting Rights Act, no constitutional problems would ensue. As a binding federal law, the Voting Rights Act, of course, *already* applies to Florida elections and redistricting. There is also no tension between the Voting Rights Act and the amendments' requirement that redistricting not have the intent to help or harm a party or incumbent. The Voting Rights Act aims to safeguard minority voting rights. It certainly does not seek to protect incumbents or to allow one party to exploit the other during redistricting. Lastly, the amendments do not raise any Supremacy Clause issue. They involve only state constitutional law, and thus do not (and could not) somehow subordinate the Voting Rights Act to the amendments' incumbency standard.

18. Is it a violation of the U.S. Constitution for an initiative petition to impose standards on the Florida Legislature in creating congressional districts?

Absolutely not. It is clear that there is nothing problematic about there being standards for congressional redistricting. Almost all states, including Florida, currently have in place some such standards. It is also clear that it is irrelevant whether those standards are imposed by legislative action or popular initiative. In several states, in fact – *e.g.*, Arizona, Arkansas, California, Colorado – popular initiatives not only imposed standards on redistricting, but also took away the state legislatures' responsibility for redistricting and gave it to new independent commissions. No court has ever found such an initiative – let alone a more limited one like Florida's – unconstitutional.

Sincerely,

Paul M. Smith Michael B. DeSanctis

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendants,

and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF REASSERTING ANSWER TO THE FLORIDA HOUSE OF REPRESENTATIVES' AMENDED MOTION TO INTERVENE

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), reasserts and realleges each of the responses and affirmative defenses contained in Defendant's Answer and Affirmative Defenses to the Florida House of Representatives' Complaint for Declaratory and Injunctive Relief filed on June 22, 2010 (the "Answer"), in response to the separately-numbered paragraphs of the Florida House of Representatives' Amended Motion to Intervene (the "Amended Complaint"). In accordance with the Florida Rules of Civil Procedure, Defendant states that each of the responses and affirmative defenses

contained in the Answer shall constitute Defendant's responsive pleading to the Amended Complaint.

Dated this 29th day of June, 2010.

TANNER BISHOP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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00017868

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendants,

and

BOB GRAHAM,

Intervening Defendant.
_____/

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), pursuant to Rule 1.110, Fla.R.Civ.P., responds, in seriatim, to the separately-numbered paragraphs of the Amended Complaint for Declaratory and Injunctive Relief (the "Complaint") filed by Plaintiffs Corrine Brown and Mario Diaz-Balart as follows:

1. Defendant admits that on September 28, 2007, the Florida Department of State, Division of Elections approved an initiative petition prepared by FairDistrictsFlorida.org for circulation. Defendant further admits that this petition has since obtained the necessary number

of signatures and has been certified for placement on the ballot for the November 2010 general election. Defendant is otherwise without knowledge as to the allegations contained in paragraph 1 of the Complaint and therefore denies the remaining allegations.

2. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 2 of the Complaint and therefore denies the remaining allegations.

3. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 3 of the Complaint and therefore denies the remaining allegations.

4. Defendant admits that *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009) speaks for itself. Defendant otherwise admits the allegations contained in paragraph 4 of the Complaint.

5. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 5 of the Complaint and therefore denies the remaining allegations.

6. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 6 of the Complaint and therefore denies the remaining allegations.

7. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 7 of the Complaint and therefore denies the remaining allegations.

8. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 8 of the Complaint and therefore denies the remaining allegations.

9. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 9 of the Complaint and therefore denies the remaining allegations.

10. Defendant is without knowledge as to the allegations contained in paragraph 10 of the Complaint and therefore denies the allegations.

11. Defendant is without knowledge as to the allegations contained in paragraph 11 of the Complaint and therefore denies the allegations.

12. Defendant admits the allegations contained in paragraph 12 of the Complaint.

13. Defendant admits that FairDistrictsFlorida.org, Inc. sponsored the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A." Defendant is otherwise without knowledge as to the allegations contained in paragraph 13 of the Complaint and therefore denies the remaining allegations.

Jurisdiction and Venue

14. Defendant admits that § 26.012, Fla. Stat., speaks for itself. Defendant specifically denies that the circuit court has jurisdiction to enter relief in this case. Defendant otherwise denies the remaining allegations contained in paragraph 14 of the Complaint.

15. Defendant denies the allegations contained in paragraph 15 of the Complaint.

16. Defendant admits that §§ 26.012 and 86.011, Fla. Stat., speak for themselves. Defendant specifically denies that the circuit court has jurisdiction to enter relief in this case. Defendant otherwise denies the remaining allegations contained in paragraph 16 of the Complaint.

17. Defendant admits that *Florida League of Cities v. Smith,* 607 So. 2d 397 (Fla. 1992) speaks for itself. Defendant otherwise denies the remaining allegations contained in paragraph 17 of the Complaint.

General Allegations

18. Defendant admits that §101.161, Fla. Stat., speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 18 of the Complaint and therefore denies the remaining allegations.

19. Defendant admits that Art. XI, §3, Fla. Const., Art. XI, §5, Fla. Const., and §101.161, Fla. Stat. (2009), speak for themselves. Defendant is otherwise without knowledge as to allegations contained in paragraph 19 of the Complaint and therefore denies the remaining allegations.

20. Defendant admits that *In re Adv. Op. to Att'y Gen.-Restricts Laws Related to Discrimination,* 632 So. 2d 1018 (Fla. 1994) speaks for itself. Defendant is otherwise without

knowledge as to the allegations contained in paragraph 20 of the Complaint and therefore denies the remaining allegations.

COUNT I

21. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

22. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" and *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 22 of the Complaint and therefore denies the remaining allegations.

23. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 23 of the Complaint and therefore denies the remaining allegations.

24. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 24 of the Complaint and therefore denies the remaining allegations.

25. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 25 of the Complaint and therefore denies the remaining allegations.

26. Defendant is without knowledge as to the allegations contained in paragraph 26 of the Complaint and therefore denies the allegations.

27. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 27 of the Complaint and therefore denies the remaining allegations.

28. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 28 of the Complaint and therefore denies the remaining allegations.

29. Defendant admits that *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009) and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 29 of the Complaint and therefore denies the remaining allegations.

30. Defendant admits that the Voting Rights Act of 1965 (42 U.S.C. § 1971, *et seq.*) (the "Voting Rights Act") and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 30 of the Complaint and therefore denies the remaining allegations.

31. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to

the allegations contained in paragraph 31 of the Complaint and therefore denies the remaining allegations.

32. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 32 of the Complaint and therefore denies the remaining allegations.

COUNT II

33. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

34. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 34 of the Complaint and therefore denies the remaining allegations.

35. Defendant is without knowledge, and therefore denies, the allegations contained in paragraph 35 of the Complaint.

36. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 36 of the Complaint and therefore denies the remaining allegations.

37. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 37 of the Complaint and therefore denies the remaining allegations.

38. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 38 of the Complaint and therefore denies the remaining allegations.

39. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 39 of the Complaint and therefore denies the remaining allegations.

COUNT III

40. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

41. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 41 of the Complaint and therefore denies the remaining allegations.

42. Defendant admits that *Reynolds v. Sims*, 377 U.S. 533 (1964) speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 42 of the Complaint and therefore denies the remaining allegations.

43. Defendant is without knowledge as to the allegations contained in paragraph 43 of the Complaint and therefore denies the allegations.

44. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to

the allegations contained in paragraph 44 of the Complaint and therefore denies the remaining allegations.

COUNT IV

45. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

46. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 46 of the Complaint and therefore denies the remaining allegations.

47. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 47 of the Complaint and therefore denies the remaining allegations.

48. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 48 of the Complaint and therefore denies the remaining allegations.

49. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 49 of the Complaint and therefore denies the remaining allegations.

50. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to

the allegations contained in paragraph 50 of the Complaint and therefore denies the remaining allegations.

51. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 51 of the Complaint and therefore denies the remaining allegations.

COUNT V

52. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

53. Defendant admits that the Voting Rights Act and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 53 of the Complaint and therefore denies the remaining allegations.

54. Defendant admits that *Georgia v. Ashcroft*, 539 U.S. 461 (2003) and the Voting Rights Act speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 54 of the Complaint and therefore denies the remaining allegations.

55. Defendant admits that *Georgia v. Ashcroft*, 539 U.S. 461 (2003) and the Voting Rights Act speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 55 of the Complaint and therefore denies the remaining allegations.

56. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to

the allegations contained in paragraph 56 of the Complaint and therefore denies the remaining allegations.

57. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 57 of the Complaint and therefore denies the remaining allegations.

58. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 58 of the Complaint and therefore denies the remaining allegations.

COUNT VI

59. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

60. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 60 of the Complaint and therefore denies the remaining allegations.

61. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 61 of the Complaint and therefore denies the remaining allegations.

62. Defendant is without knowledge as to the allegations contained in paragraph 62 of the Complaint and therefore denies the allegations.

63. Defendant admits that *See How Will the FairDistrictFlorida.org Amendments Work?*, Sponsor's Advertisement (March 5, 2009), *Stop Protecting Politicians,* TCPalm (Nov. 26, 2008) *Leaning Republican, Again,* Florida Trend (September 1, 2008), and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 63 of the Complaint and therefore denies the remaining allegations.

64. Defendant admits that *Bartlett v. Strickland,* 129 S. Ct. 1231 (2009), *Plan to Redraw State Districts Called Unfair*, Tampa Tribune (Jan. 12, 2010), *Race Enters Debate Over Redrawing Florida Political Districts,* Florida Times-Union (Dec. 14, 2009), *Two Ballot Proposals Stir Fears*, Sarasota Herald-Tribune (Nov. 27, 2009), and *Initiative Prompts Questions of Racial Fairness,* Daytona Times (Nov. 19, 2009) speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 64 of the Complaint and therefore denies the remaining allegations.

65. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 65 of the Complaint and therefore denies the remaining allegations.

66. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 66 of the Complaint and therefore denies the remaining allegations.

COUNT VII

67. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

68. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 68 of the Complaint and therefore denies the remaining allegations.

69. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 69 of the Complaint and therefore denies the remaining allegations.

70. Defendant admits that *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), the Voting Rights Act, and the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speak for themselves. Defendant is otherwise without knowledge as to the allegations contained in paragraph 70 of the Complaint and therefore denies the remaining allegations.

71. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 71 of the Complaint and therefore denies the remaining allegations.

72. Defendant is without knowledge as to the allegations contained in paragraph 72 of the Complaint and therefore denies the allegations.

COUNT VIII

73. Defendant realleges and incorporates her responses to paragraphs 1 through 20 of the Complaint, as if fully set forth herein.

74. Defendant admits that the Constitutional Amendment Petition form attached to the Complaint as Exhibit "A" speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 74 of the Complaint and therefore denies the remaining allegations.

75. Defendant admits that the 2010 Census questionnaire contains 10 questions. Defendant is otherwise without knowledge as to the allegations contained in paragraph 75 of the Complaint and therefore denies the remaining allegations.

76. Defendant is without knowledge as to the allegations contained in paragraph 76 of the Complaint and therefore denies the allegations.

77. Defendant admits that the "2010 Census Constituent FAQs" located at http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf speaks for itself. Defendant is otherwise without knowledge as to the allegations contained in paragraph 77 of the Complaint and therefore denies the remaining allegations.

78. Defendant is without knowledge as to the allegations contained in paragraph 78 of the Complaint and therefore denies the remaining allegations.

79. Defendant is without knowledge as to the allegations contained in paragraph 79 of the Complaint and therefore denies the remaining allegations.

All allegations contained in the Complaint that are not specifically addressed are hereby denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

80. Each count of Plaintiffs' Complaint fails to state a cause of action for declaratory relief due to Plaintiffs' failure to allege ultimate facts demonstrating its right to such relief. In particular, Plaintiffs fail to allege that their rights, powers, or privileges are dependant upon the law applicable to the facts of this case or that the declaration sought by them deals with a present or ascertainable set of facts as opposed to speculation about the possible impact the proposed constitutional amendments may have in the future. Further, the allegations of the Complaint do not demonstrate a bona fide, actual need for a declaration; rather, they simply allege, at best, disagreement with the Florida Supreme Court's determination that the ballot summary for proposed Amendment 6 is clear, unambiguous, and limited to a single subject. Finally, the allegations contained in the Complaint demonstrate that the Plaintiffs are simply seeking a second legal opinion as to whether proposed Amendment 6's ballot summary complies with Florida law.

Second Affirmative Defense

81. Each count of Plaintiffs' Complaint fails to state a cause of action for injunctive relief inasmuch as the Complaint lacks allegations regarding the Plaintiffs' likelihood of irreparable harm, unavailability of an adequate remedy at law, or substantial likelihood of success on the merits.

Third Affirmative Defense

82. Each count of Plaintiffs' Complaint fails to state a cause of action because the proposed Constitutional Amendment Petition form attached as Exhibit A to the Complaint,

including the proposed ballot summary, complies in all respects with the requirements of Florida law.

Fourth Affirmative Defense

83. The Florida Supreme Court has mandatory and exclusive jurisdiction to consider pre-election challenges to proposed constitutional amendments and ballot summaries, including those at issue in this case. As such, this Court lacks subject matter jurisdiction over the issues raised in Plaintiffs' Complaint.

Fifth Affirmative Defenses

84. Plaintiffs' claims are barred by the doctrine of ripeness. On January 29, 2009, the Florida Supreme Court rendered its opinion holding that the ballot summary at issue complies with Florida law and is clear, unambiguous, and limited to a single subject. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009). The Plaintiffs, who declined to participate in the advisory opinion proceedings, may not now seek to block the proposed amendment from appearing on the ballot; rather, Plaintiffs' proper remedy is to seek to void the result of the election should Amendment 6 become law. Thus, because the citizens of Florida have yet to vote on and approve proposed Amendment 6, the claims asserted in Plaintiffs' Complaint are not yet ripe for judicial determination.

Sixth Affirmative Defense

85. Plaintiffs' Complaint is barred by the doctrine of laches inasmuch as the Plaintiffs have unreasonably delayed asserting the claims alleged therein. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion,

Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175 (Fla. 2009), setting forth its findings. Plaintiffs were aware of these advisory opinion proceedings regarding the challenges to proposed Amendment 6 and its ballot summary, yet chose not to participate in these proceedings. Instead, Plaintiffs delayed sixteen months before filing the present case in which they assert eight causes of action, all of which challenge the ballot summary of proposed Amendment 6. Because each of the causes of action asserted by Plaintiffs have been, or could have been, brought in the advisory opinion proceedings, Defendant will experience undue prejudice in now being forced to defend a suit which has been, or could have been, resolved by the Florida Supreme Court over a year ago.

Seventh Affirmative Defense

86. Plaintiffs' claims are barred by the doctrine of waiver. In January 2009, the Florida Supreme Court: (1) reviewed proposed constitutional Amendments 5 and 6; (2) determined that the ballot summary of each amendment is clear, unambiguous, and limited to a single subject, thereby complying with Florida statutory requirements; and (3) rendered an advisory opinion, *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009), setting forth its findings. Plaintiffs' were aware of these prior advisory opinion proceedings regarding the challenges to proposed Amendment 6 and its ballot summary, yet chose not to participate in these proceedings. Because each of Plaintiffs' alleged causes of action could have, and should have, been asserted in the prior proceedings before the Florida Supreme Court, Plaintiffs have waived their right to bring a separate action seeking a determination that the ballot summary of proposed Amendment 6 does not comply with Florida law.

Dated this 29th day of June, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES'
RESPONSE TO THE SECRETARY'S MOTION TO DISMISS

Intervening Plaintiff, Florida House of Representatives (the "House"), responds to the Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction filed by Defendant, Dawn K. Roberts, as Interim Secretary of State of the State of Florida (the "Secretary"), on June 22, 2010. Because the Motions to Dismiss for Lack of Subject Matter Jurisdiction filed by Bob Graham and by Defendant, FairDistrictsFlorida.org, Inc., merely adopt the Secretary's argument, this response also addresses their positions.

Introduction

The Motion to Dismiss fails for three compelling reasons.

First: The Secretary confuses the Supreme Court's exclusive jurisdiction to render advisory opinions with jurisdiction generally. Circuit Courts have long been recognized to possess general jurisdiction over challenges to initiative petitions. Nothing in the Florida Constitution or Florida Statutes—not a word—deprives this Court of jurisdiction in this matter.

Second: The Supreme Court advisory proceeding under Article V, Section 3(b)(10) of the Florida Constitution is just that—advisory and non-binding. It is an abbreviated, facial look at initiative petitions, intended to save the sponsor time and money if a petition is obviously deficient. Nothing in the Constitution or statutes even hints at the notion that aggrieved voters—in this case, two voters who serve in Congress on behalf of well over one million constituents—have been deprived of traditional adjudicatory rights to prove that, in fact, an initiative petition violates the accuracy requirement set forth in Section 101.161(1), Florida Statutes.

Third: The Supreme Court has determined that "[d]eception of the voting public is intolerable," *Armstrong v. Harris*, 773 So. 2d 7, 20 (Fla. 2000), and Plaintiffs will prove with real facts that these petitions mislead. The ballot summaries promise the protection of minority voting rights when, in reality, those rights will be lost. They proclaim that incumbents will not be favored, but omit the fact that *some* incumbents will have to be favored. Perhaps worst of all, they fail to reveal that, in the Supreme Court's own words, it will be "impossible" to conduct the constitutionally required review of state legislative redistricting plans in the short time provided, casting the process into disarray and likely depriving interested persons of due process.

The Secretary cannot point to any clear constitutional or statutory deprivation of the Circuit Court's plenary jurisdiction over this case. The Motion to Dismiss must be denied.

Background

The Florida Constitution authorizes the issuance of advisory opinions in two circumstances. First, since 1868, the Constitution has directed the Supreme Court, on the request of the Governor, to issue advisory opinions regarding the Governor's constitutional duties and powers. Art. IV, § 1(c), Fla. Const.; *see also* Art. V, § 16, Fla. Const. of 1868.

Since 1986, the Constitution has also required the Attorney General to "request the opinion of the justices . . . as to the validity of any initiative petition" to amend the Constitution. Art. IV, § 10, Fla. Const.[1] The Constitution directs the Court to "render an advisory opinion of the justices, addressing issues as provided by general law." Art. V, § 3(b)(10), Fla. Const.

In advisory opinions to the Attorney General, the Court considers whether the ballot title and summary of the initiative petition are clear and unambiguous, as required by Section 101.161(1), Florida Statutes, and whether the proposal is limited to a single subject, as required by Article XI, Section 3, Florida Constitution. *See* § 16.061(1), Fla. Stat. (2009). It does not consider other challenges against the amendments, including attacks on their merits or wisdom, *Adv. Opinion to Att'y Gen. re Fla. Marriage Protection Amend.*, 926 So. 2d 1229, 1233 (Fla. 2006), or their constitutionality under provisions such as due process, *Adv. Opinion to the Att'y Gen.–Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226-27 (Fla. 1991).

[1] To propose a constitutional amendment by initiative petition, the sponsor must collect a number of signatures equal to eight percent of the number of votes cast in the last presidential election, both statewide and within one half of Florida's congressional districts. Art. XI, § 3, Fla. Const. Once the sponsor has collected ten percent of the needed signatures, the Secretary must submit the proposed amendment to the Attorney General, § 15.21, Fla. Stat. (2009), who, within thirty days, must submit the proposal to the Court for an advisory opinion, *id.* § 16.061(1).

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Memorandum of Law

The Secretary's position defies binding precedent. The Florida Supreme Court has recognized that Circuit Courts have jurisdiction over all matters, except in those rare instances where jurisdiction is expressly denied by the Constitution or Florida Statutes. And consistent with this principle, the Court has held that the creation of the advisory opinion process did not restrict the right to challenge initiative petitions according to precedent—precedent that includes not only challenges in the Supreme Court, but declaratory judgment actions in Circuit Court.

I. Circuit Courts Have Jurisdiction Unless Jurisdiction Is Expressly Denied.

"Florida's circuit courts are tribunals of plenary jurisdiction. Art. V, § 5, Fla. Const. They have authority over any matter not ***expressly*** denied them by the constitution or applicable statutes." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (emphasis added); *accord Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 895 (Fla. 2003); *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 854 (Fla. 1992) ("[C]ircuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which *clearly* and *specially* appears so to be." (quoting *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977))).

The opinion in *Wardell v. State*, 944 So. 2d 1089 (Fla. 5th DCA 2006), illustrates this principle. In *Wardell*, a defendant was charged with crimes in different Circuit Courts. In one, the defendant was found incompetent and was hospitalized. *Id.* at 1090. When the other court convicted him, the defendant argued lack of jurisdiction, citing a statute directing the committing court to retain jurisdiction. *Id.* at 1091. The Court disagreed. It noted that Circuit Courts have jurisdiction in *all* matters except those "expressly denied them by the Constitution or applicable statutes," and that the statute did not "expressly state" that jurisdiction was "exclusive." *Id.*

By contrast, in *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373 (Fla. 1991), the Court held that, once a proceeding to validate bonds approved

by referendum was brought in one court, all other courts were deprived of jurisdiction. There, the applicable statute contained the express statement that "*exclusive* jurisdiction to determine the legality of such referendum . . . shall be vested in the court hearing and determining the validation proceedings." *Id.* at 1377 (quoting § 100.321, Fla. Stat. (1989)) (emphasis added).[2]

Neither the Constitution nor Florida Statutes come close to expressly denying Circuit Courts subject-matter jurisdiction over challenges to initiative petitions. The Constitution gives the Supreme Court power to issue an "*advisory opinion.*" Art. V, § 3(b)(10), Fla. Const. It does this to give the petition sponsor an opportunity to seek advice and instruction from the Supreme Court before the sponsor incurs considerable expenditures of time and resources. *See* Frederick O. Goddard, *et al.*, Analysis: Florida Constitutional Amendments to be on Ballot November 4, 1986.[3] But the Florida Constitution does not expressly state—or even imply—that the Supreme Court has exclusive subject-matter jurisdiction over challenges to initiative petitions.

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[2] Perhaps the most obvious example of an express exception to the jurisdiction of Circuit Courts is contained in Article V, Section 5(b) of the Florida Constitution, which expressly denies Circuit Courts subject-matter jurisdiction over matters committed to County Courts.

[3] Before creation of the advisory opinion process, the Supreme Court recognized that "the initiative method did not provide a filtering legislative process for the drafting of" proposed amendments. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). By contrast, the "legislative, revision commission, and constitutional convention processes of [Article XI, Sections 1, 2, and 4 of the Florida Constitution] all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal. That opportunity for input in the drafting of a proposal is not present under the initiative process . . . ." *Id.* Thus, the advisory opinion process provides a filter otherwise absent in the drafting of initiative petitions. But, as with amendments proposed by the Legislature and filtered through the medium of public hearing and debate, amendments proposed by initiative are filtered through the advisory opinion process not immune from further judicial scrutiny.

II. The Advisory Opinion Process Does Not Deprive Circuit Courts of Jurisdiction.

The creation of an advisory proceeding in 1986 did not abolish legal challenges available under existing precedents. In fact, the Supreme Court has affirmed that all other legal challenges permissible under those precedents remain available, despite the issuance of an advisory opinion:

> When [the] provisions [creating the advisory process] were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would *not* be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised. ***This necessarily implies that other legal challenges would continue to be permissible under existing precedent*** . . . .

Fla. League of Cities v. Smith, 607 So. 2d 397, 398-99 (Fla. 1992) (notes and citations omitted; second emphasis added). Thus, any challenge permissible under existing precedents survived the creation of the advisory proceeding in 1986. Significantly, those precedents recognized not only mandamus actions, but also challenges to initiative petitions in Circuit Court. *See Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984).

Nothing in *Smith* indicates that the Supreme Court is the exclusive forum for challenges to initiative petitions. In fact, the Court's express holding that all previously available challenges remain available is the polar opposite of the Secretary's position. If the Court had intended to overturn established precedent recognizing the plenary jurisdiction of Circuit Courts—restricting future challenges to the Supreme Court—it would have been explicit. It would not have declared categorically that "challenges would continue to be permissible under existing precedent."

In *Smith*, the petitioners brought a mandamus action in the Supreme Court, arguing that the summary of an initiative petition was misleading. The Court had earlier concluded in an advisory opinion that the summary was not misleading, but the petitioners raised arguments not addressed in the advisory opinion. *Id.* at 399 n.3. The Court concluded that, under existing precedent, "mandamus is *an appropriate method* for challenging an allegedly defective proposed

amendment to the Constitution." *Id.* at 399 (emphasis added). It did *not* state that mandamus is *the* appropriate—or the *exclusive*—method to challenge initiative petitions. Indeed, it could not have done so. The Court had affirmed the continued vitality of existing precedents—precedents that included Circuit Court challenges, as well as mandamus actions in the Supreme Court.[4]

The Supreme Court recognized in *Smith* that advisory opinions in initiative-petition cases are akin to advisory opinions to the Governor. *See id.* at 399 n.3 (explaining that the non-binding nature of advisory opinions in initiative-petition cases is "entirely consistent with settled law holding that advisory opinions 'are not binding judicial precedents . . . .'" (quoting *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944))).[5] The Court has long stated that its advisory opinions to the Governor "do not necessarily control in litigated cases," *State ex rel. Williams v. Lee*, 164 So. 2d 536, 538 (Fla. 1935), and "are merely legal opinions of the individual justices, offered for the Governor's guidance," *In re Adv. Opinion to the Gov.*, 509 So. 2d 292, 301 (Fla. 1987).

In *In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987), the Court was asked to evaluate the constitutionality of a tax-reform measure enacted by the Legislature, in order to determine whether the Governor was under a constitutional obligation to propose a new budget with alternative revenue sources. The Court rejected various facial attacks against the challenged law, including arguments that it violated the equal protection, due process, and the contracts clause. The Court emphasized that its opinion did not bar actual litigation on the very

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[4] Precedent also includes a mandamus action brought in the District Court of Appeal and certified to the Supreme Court as a question of great public importance. *See Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). Circuit Courts have the same mandamus jurisdiction as District Courts of Appeal. *Compare* Art. V, § 4(b)(3), Fla. Const., *with* Art. V, § 5(b), Fla. Const.

[5] The Supreme Court has also applied the same internal procedures to the issuance of advisory opinions in both contexts. *See* Manual of Internal Operating Procedures, § 2(G).

same constitutional questions, and that all interested parties would remain "free to initiate lawsuits . . . to argue that [the advisory opinion] has been wrongly decided." *Id.* at 302.[6]

When the Legislature proposed the initiative-petition advisory opinion process in 1986, it understood that advisory opinions do not bar further litigation and can even be challenged as wrongly decided. *Cf. Seagrave v. State*, 802 So. 2d 281, 290 (Fla. 2001) ("[T]he legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.'" (quoting *Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996))). It knew that other avenues of redress would remain available.

The Constitution knows how to create binding proceedings and exclusive jurisdiction. In the constitutional revision of 1968, the Legislature proposed—and voters adopted—a 30-day process for automatic, Supreme Court review of state legislative redistricting plans. *See* Fla. HJR 1-2X (1968). This process requires the Supreme Court to enter a "declaratory judgment determining the validity of the apportionment," Art. III, § 16(c), Fla. Const., and the declaratory judgment entered by the Court is "binding upon all the citizens of the state," Art. III, § 16(d), Fla. Const. Because the Supreme Court renders a *judgment* that expressly binds all citizens, that Court alone can revisit its determination. *In re Apportionment Law Senate Joint Resolution No. 1305*, 263 So. 2d 797, 822 (Fla. 1972) ("By classifying the proceeding as one for 'declaratory judgment,' the Florida Constitution contemplates that we retain exclusive state jurisdiction and consider any and all future proceeding related to the validity of the apportionment plan.").

In the case of initiative petitions, however, the Constitution classifies the Court's determination as an "advisory opinion"—not a "declaratory judgment." The Legislature chose, and the voters approved, an advisory process, with full knowledge of the distinction between

[6] In the present case, Plaintiffs do not argue that, as to the issues actually addressed, the advisory opinion was wrongly decided. Plaintiffs raise new issues not addressed in that opinion.

judgments and advisory opinions. *Cf. Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236 (Fla. 1953) ("The difference between a declaratory judgment and a purely advisory opinion is that the former is a binding adjudication of the rights of the parties . . . ." (quoting *Ready v. Safeway Rock Co.*, 24 So. 2d 808, 811 (Fla. 1946) (Brown, J., concurring))). To treat advisory opinions as a barrier to further litigation—and as vesting exclusive jurisdiction in the Florida Supreme Court—is to transform them into final adjudications, contrary to the deliberate choice of the voters.

III. Circuit Court Is An Appropriate Forum for Challenges to Ballot Measures.

Under *Smith*, all legal challenges permissible when the advisory opinion process was created continue to be permissible. Challenges in Circuit Court were permissible, *see Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), and therefore continue to be permissible. The fact that challenges to initiative petitions have not been brought in Circuit Court does not indicate that Circuit Court challenges are no longer viable.

Indeed, challenges to the summaries of other ballot measures are routinely brought in Circuit Court. These cases include challenges to constitutional amendments proposed by the Taxation and Budget Reform Commission under Article XI, Section 6 of the Constitution, *see Fla. Dep't of State v. Slough*, 992 So. 2d 142 (Fla. 2008); *Ford v. Browning*, 992 So. 2d 132 (Fla. 2008); *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618 (Fla. 1992), to amendments proposed by the Legislature under Article XI, Section 1, *see Fla. Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666 (Fla. 1st DCA 2007); *Sancho v. Smith*, 830 So. 2d 856 (Fla. 1st DCA 2002); *Fla. Ass'n of Realtors, Inc. v. Smith*, 825 So. 2d 532 (Fla. 1st DCA 2002); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000); and measures that propose to amend county and municipal charters, *see Citizens for Term Limits & Accountability, Inc. v. Lyons*, 995 So. 2d 1051 (Fla. 1st DCA 2008); *Miami-Dade County v. Vill. of Pinecrest*, 994 So. 2d 456 (Fla. 3d DCA 2008); *Elected County Mayor Political*

Comm., Inc. v. Shirk, 989 So. 2d 1267 (Fla. 2d DCA 2008); *Seminole County v. City of Winter Springs*, 935 So. 2d 521 (Fla. 5th DCA 2006); *Harris v. Moore*, 752 So. 2d 1241 (Fla. 4th DCA 2000). There is nothing unusual about challenges to ballot measures in Circuit Court.

It would make little sense to restrict challenges to advisory opinions and mandamus actions in the Supreme Court. One recognized limitation of advisory opinions is that they are "rendered without the benefit of a record or a specific factual scenario." *In re Adv. Opinion to the Gov.*, 509 So. 2d 292, 301 (Fla. 1987). Similarly, mandamus is appropriate in disputes that involve "straightforward legal questions which do not require fact-finding." *Fine v. Firestone*, 448 So. 2d 984, 987 (Fla. 1984); *accord Brown v. Firestone*, 382 So. 2d 654, 671 (Fla. 1980). The Supreme Court is "ill-equipped to handle" cases that require factual determinations, and has historically declined to exercise its discretionary mandamus jurisdiction in cases that present "substantial issues of fact." *Harvard v. Singletary*, 733 So. 2d 1020, 1022 (Fla. 1999).

A Circuit Court, by contrast, "is a trial court." § 26.012(5), Fla. Stat. (2009). It is the appropriate tribunal to hear and decide cases involving discovery, the examination and cross-examination of witnesses, and other factual presentations. No precedent supports the Secretary's position that initiative petitions are uniquely exempt from the fact-finding processes of a Circuit Court, all of which are routinely available in challenges to other ballot measures.[7]

In this case, Plaintiffs and Intervening Plaintiffs have raised questions of fact, and are entitled to present evidence in support of their claims. For example, Plaintiffs have alleged that

[7] The Florida Constitution, moreover, contains a broad and explicit guarantee of access to the courts. Art. I, § 21, Fla. Const.; *see also Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992), *receded from on other grounds by AHCA. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996) ("The history of the provision shows the courts' intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes."). It would ill comport with this provision to construe the creation of the advisory opinion process as a bar to traditional, fact-based adjudication in Circuit Courts.

the compactness and political boundary requirements will restrain the ability of the Legislature to draw districts in which minorities will be able to elect representatives of their choice. (Compl., Ct. II.) To support this allegation, Plaintiffs are entitled to present testimony concerning the vital importance of flexible district boundaries to the advancement of minority representation, and the detrimental effect of compactness and political-boundary restrictions on minority interests.

Furthermore, the Florida House has argued that Amendments 5 and 6 will substantially affect Article III, Section 16(c) of the Florida Constitution, which requires the Supreme Court to determine the validity of redistricting plans in thirty days. It is entitled to prove the complexity of the standards imposed by Amendments 5 and 6 and the practical impossibility of determining compliance with those standards within the existing constitutional timeframe. And Plaintiffs have alleged that the new voting rights promised to language minorities are illusory because the Census did not collect the data necessary to effectuate those rights. (Compl., Ct. VIII.) They are entitled to show that, as a factual matter, the summary makes promises that cannot be fulfilled.

IV. The Secretary's Position Is Founded on Misinterpretations of Precedent.

The Secretary's chief argument hinges on the Supreme Court's perfunctory notation of "exclusive jurisdiction" in two of the scores of advisory opinions it has issued. But these are only statements of the obvious: the Supreme Court has exclusive jurisdiction to render advisory opinions under Article V, Section 3(b)(10), Florida Constitution, just as it has exclusive authority to render advisory opinions to the Governor. *See, e.g., McMullen v. Bennis*, 20 So. 3d 890, 892 (Fla. 3d DCA 2009); *Schwarz v. Nourse*, 390 So. 2d 389, 392 (Fla. 4th DCA 1980).

The Secretary repeatedly states that the Supreme Court has exclusive jurisdiction over "pre-election" challenges to initiative petitions, with the implication that this very action might be brought in Circuit Court after the election. (Motion to Dismiss at 1, 6, 8, 10.) There is no

principled basis for the distinction. If the Secretary means to suggest that review at this stage is not ripe, the suggestion is contradicted by long-standing precedent holding that challenges which aim to invalidate ballot measures in their entirety are appropriately brought *before* the election. *See Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 514-15 (Fla. 1958).

The Secretary seizes on the phrase "extraordinary cases" in *Smith*, but this standard is not relevant to Circuit Court challenges. Rather, it regulates the Supreme Court's exercise of *discretionary* jurisdiction in mandamus proceedings. *Smith* explained that the Supreme Court will "almost always . . . refus[e] to exercise its discretionary jurisdiction" in a mandamus action unless vital issues were not addressed in the earlier advisory opinion, or other "extraordinary" circumstances exist. 607 So. 2d at 399. This standard guides *that* Court's decision to accept or decline jurisdiction, but is irrelevant to a Circuit Court, the jurisdiction of which is mandatory.[8]

Even if this standard were applicable, it would be satisfied here. None of the claims raised in this litigation was addressed in the advisory opinion. Thus, the advisory opinion did not

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[8] *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), confirms this position, and is consistent with *Smith*. In *Advisory Opinion to the Attorney General–Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991) ("*Limited Political Terms*"), the Court approved a proposed amendment to impose term limits on certain public offices, including members of the Florida Legislature and Congress. Two Justices dissented, arguing that the inclusion of federal offices violated the United States Constitution, which prescribes the exclusive qualifications of members of Congress. *Id.* at 229-31 (Overton, J., dissenting). They opined that the inclusion of state and federal offices in the same proposal violated the single-subject requirement. *Id.* at 231.

Voters approved the amendment in 1992. Three years later, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Court invalidated Arkansas' attempt to impose term limits on members of Congress. As a result, in *Ray*, candidates for state office argued in Circuit Court that the entire amendment must be stricken because the unconstitutional provisions—those applicable to federal offices—were not severable. 742 So. 2d at 1280. On appeal, *amici curiae* argued, for the first time, that the Court should revisit its single-subject determination, and adopt the position urged by the dissent in *Limited Political Terms*. *Id.* at 1284. The *amici* raised no arguments not previously addressed in the earlier advisory opinion, *see* Brief of Amici Curiae James T. Hargrett and George G. Kirkpatrick, *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999) (*available at* 1999 WL 33626707), and the Court properly declined to revisit its earlier decision on the *identical* issue.

consider that the ballot summaries promise racial minorities an "*equal* opportunity . . . to elect representatives of their choice"—while the amendments ensure only that the ability of minorities to elect representatives of their choice will not be *diminished*. A promise of equality, where the amendments prohibit a bare deterioration of the status quo, is an intolerable mischaracterization.

Thus, unless new arguments are presented or other extraordinary circumstances exist, the Supreme Court will decline to exercise its discretionary jurisdiction to reconsider an advisory opinion. This case, however, is a different cause of action—and a different proceeding. It is not part of the advisory proceeding, or even a mandamus action in the Supreme Court. It is an action for declaratory and injunctive relief, and involves new and critical factual issues not discussed in the Supreme Court's advisory opinion. There is no jurisdictional obstacle to this challenge.[9]

---

[9] The Governor's brief is nothing more than political rhetoric. While in this case the Governor bewails the "unacceptable obstacles to the people's right to shape their government's defining document," the Governor has filed a similar brief in opposition to Amendment 7, urging the Court to remove it from the ballot, *without* a vote of the "people." *See Fla. State Conference of NAACP Branches v. Dep't of State*, Case No. 2010-CA-1803 (Fla. 2d Cir. Ct.). Of course, the true question is whether ballot summaries of the proposed amendments mislead the public:

> The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. . . . [A]n accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.

In re Adv. Opinion to the Att'y Gen. re Add'l Homestead Tax Exemption, 880 So. 2d 646, 653-54 (Fla. 2004). The purpose of accurate ballot language is "to ensure that each voter will cast a ballot based on the *full* truth. To function effectively—and remain viable—a constitutional democracy must require no less." *Armstrong*, 773 So. 2d at 21 (emphasis in original).

Conclusion

The Secretary points to no provision in the Constitution or Florida Statutes which, in express terms, denies Circuit Courts jurisdiction over challenges to initiative petitions. Further, the Secretary cannot avoid the Supreme Court's express determination that all legal challenges to initiative petitions available before creation of the advisory opinion process in 1986 continue to be permissible. This Court, therefore, has jurisdiction. And, as a trial court, it is the appropriate tribunal to receive evidence and find those facts which Plaintiffs and Intervening Plaintiffs seek to present. This action must proceed to the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail this sixth day of July 2010, to the following:

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

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendants,

and

BOB GRAHAM,

Intervening Defendant.

RESPONSE TO MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

FILED
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BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

Plaintiffs CORRINE BROWN and MARIO DIAZ-BALART, by and through their undersigned counsel, respond to the motions to dismiss filed by Defendant DAWN K. ROBERTS, Interim Secretary of State of the State of Florida and Intervening Defendant BOB GRAHAM.[1]

[1] Defendant FAIRDISTRICTSFLORIDA.ORG, INC. has filed a notice adopting and incorporating the motions filed by Defendants Roberts and Graham. This response should also be taken as a response to the notice by FAIRDISTRICTSFLORIDA.ORG.

Both Defendants Roberts and Graham ask this Court to dismiss this action on the grounds that this Court lacks jurisdiction to hear the challenge originally filed by the Plaintiffs or the separate challenges filed by the Florida House of Representatives and the Florida Senate. Through their respective motions, both Defendants Roberts and Graham show a fundamental misunderstanding of the role of both the Florida Supreme Court and the lower courts in determining whether a proposed constitutional amendment that made its way onto the ballot via petition signatures should remain on the ballot.

Plaintiffs brought this action to challenge proposed Amendment 6, which alters the discretion of the Florida Legislature employs in drafting Congressional districts. This response is intended only to the issue of whether this Court has jurisdiction to consider a challenge to proposed Amendment 6.[2]

PRELIMINARY STATEMENT

On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by Defendant FairDistrictsFlorida.org, Inc. for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition has since obtained the necessary number of signatures and has been certified for placement on the November 2010 general election ballot. The Secretary of State has designated the proposed Congressional redistricting amendment as proposed Amendment 6.

The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

[2] It is anticipated that both the Florida House and Senate will adequately address this Court's jurisdiction to consider the challenge to proposed Amendment 5.

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title and summary for the proposed Congressional Amendment is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Pursuant to Article IV, section 10, Florida Constitution, the Florida Supreme Court reviewed the Petitions and rendered an advisory opinion that their summaries are clear and

unambiguous and that the proposed amendments are limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).[3]

Plaintiffs brought this action setting forth eight independent grounds to challenge the placement of proposed Amendment 6 on the November 2010 ballot. All counts pray for injunctive and declaratory relief. In summary, Count I claims that the proposed amendment's prohibition against diminishment of the ability of language and racial minorities to elect representatives of their choice differs from the ballot summary's description, that Congressional districts will not be drawn to deny those minorities and "equal opportunity" to elect representatives of their choice, to such a degree that it is misleading. In Count II, the Amended Complaint alleges that the ballot summary fails to inform the voters that the new overriding criteria of compactness and the use of existing political and geographic boundaries will actually decrease, rather than increase or even preserve the Florida Legislature's ability to draw districts to protect minority voting interests. Count III misleads the voters by inference, setting forth a requirement that Congressional districts will be "as equal in population as feasible", neglecting to inform the voters that exact equality of population is already a requirement of federal law and is a feature of the present Congressional redistricting plan. Count IV alleges that the ballot summary is misleading because of the inconsistent and confusing manner in which it utilizes the phrase "drawn to". Count V asserts that the ballot summary's promise to the voters that the Legislature will ignore incumbency in drawing Congressional districts when Section 5 of the Voting Rights Act not only requires the Legislature to take it into consideration, but explain during the pre-clearance process how its failure to do so should not be considered as a sign of intentionally retrogressing the voting rights of protected minorities. Count VI asks for a

[3] A copy of the opinion is attached to this memorandum.

declaration that the use of undefined terms in the ballot summary, like "compact", "political or geographic boundaries", "feasible", and "intent", renders the proposal misleading. Count VII asks for a declaration that the use of the undefined phrase "language minorities" in the ballot summary is misleading, implying that speakers of many languages in Florida will be protected, when in fact only Spanish speakers in a handful of Florida's 67 counties could conceivably benefit. Finally, Count VIII asks the Court to declare that, because the 2010 Census will not be collecting data language usage and it will be impossible to accurately determine where members of language minorities reside, the ballot summary falsely promises that the Legislature will be able to draw districts that do not have the "intent or result" of "denying or abridging the equal opportunity" of "language minorities."

Each of the claims raised in the Amended Complaint requires the introduction of evidence and for this Court to make findings of fact, findings that the Supreme Court is unable to make when it performs its constitutionally limited review.

ARGUMENT

THIS COURT HAS JURISDICTION TO HEAR THE CLAIMS BROUGHT BY THE PLAINTIFFS

Defendants Roberts and Graham have moved this Court to dismiss Plaintiff's case claiming that it lacks jurisdiction to hear the case. It argues that the Supreme Court's decision in *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009) was the first, last, and only word on the subject of whether the ballot summary composed by Defendant FairDistrictsFlorida.org is misleading. By announcing its decision in 2009, the Defendants argue, the Supreme Court divested all other courts of jurisdiction.

The Defendants are wrong.

The Florida Supreme Court has stated that "jurisdiction" is the power to act, the authority to adjudicate the subject matter. *Bush v. State*, 945 So. 2d 1207, 1211 (Fla. 2006)(citing *Williams v. Ferrentino*, 199 So.2d 504, 510 (Fla. 2d DCA 1967). It is widely accepted that "subject matter jurisdiction", the power of the trial court to deal with a class of cases to which a particular case belongs, is conferred upon a court by constitution or by statute. *Ben-David v. Education Resources Institute, Inc.*, 974 So. 2d 1138 (Fla. 3d DCA 2008); *M.A. v. State*, 959 So. 2d 380 (Fla. 4th DCA 2007); *In re D.N.H.W.*, 955 So. 2d 1236 (Fla. 2d DCA 2007); Wardell v. State, 944 So. 2d 1089 (Fla. 5th DCA 2006).

The Supreme Court's jurisdiction is proscribed only in the Florida Constitution. Article V, section 3, which provides in relevant part:

> SECTION 3. Supreme court.-- ...
>
> (b) JURISDICTION.--The supreme court: ...
>
> (8) May issue writs of mandamus and quo warranto to state officers and state agencies.
>
> (10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Article IV, section 10, referenced in Article V, section 3(b)(10) provides:

> SECTION 10. Attorney General.--The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.

The Defendants' focus entirely upon Article V, section 3(b)(10) and from its language assert that the Supreme Court has the exclusive jurisdiction to issue relief regarding a misleading ballot summary.

The Supreme Court held in *Florida League of Cities v. Smith*, 607 So.2d 397, 398-99 (Fla. 1992) that the effect of an advisory opinion is limited. Specifically, the Court found:

> It is true that article IV, section 10 and article V, subsection 3(b)(10) are silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction.
>
> When those provisions were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent[3] and *would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised.* Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986) (available from Fla. Div. of Archives); Staff of Fla.H.R.Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986) (available from Fla. Div. of Archives).[4] *This necessarily implies that other legal challenges would continue to be permissible under existing precedent; and our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution. E.g., Askew* [*v. Firestone*, 421 So.2d 151, 155 (Fla.1982)]; *Smith v. American Airlines, Inc.*, 606 So.2d 618 (Fla.1992).
>
> [3]This is entirely consistent with settled law holding that *advisory opinions "are not binding judicial precedents, [although] they are frequently very persuasive and usually adhered to." Lee v. Dowda*, 155 Fla. 68, 73, 19 So.2d 570, 572 (1944). As a corollary, we note that *advisory opinions are only persuasive as to issues they actually address, not as to issues such as the one before us today that were not addressed at all in a prior advisory opinion.*
>
> [4]Although the committee substitutes discussed in these summaries were not themselves adopted, they differ in no relevant way from House Joint Resolution 71, which ultimately was adopted, placed

> before the voters, and approved. *See* Fla. HJR 71, 1986 Fla. Laws 2281, 2281-83.

Emphasis added.

The Supreme Court's use of the term "other legal challenges" in *Smith* implies that legal actions, such as the instant one, are permitted. Moreover, the persuasive effect of the advisory opinion in *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009) only extends to the issues raised before the Court at that time. When the Court examined the ballot title and summary in question, it considered whether proposed Amendment concerned a single subject [2 So.3d at 181-83], whether it affected multiple governmental functions [*Id.* at 183-84], whether the ballot summary was misleading for not informing voters that the judiciary will apply the redistricting standards if the Legislature fails to draw a plan [*Id.* at 185], whether the ballot summary misleads by allowing a plan to be drawn which favors an incumbent or a party, so long as there is no "intent" to favor an incumbent or a party [*Id.* at 185-86], whether the ballot summary misleads by failing to inform voters that the authority to reapportion will be shifted to the judiciary [*Id.* at 187], whether the ballot summary's use of the phrase "city, county and geographical boundaries" is misleading [*Id.* at 187-88], whether the use of the word "or" multiple times is misleading [*Id.* at 188-89], and whether the term "language minorities" is misleading [*Id.* at 189].[4] There is little overlap between the issues considered by the Florida Supreme Court in their advisory opinion and the claims raised in the Plaintiff's Amended Complaint.

[4] The Legislature's argument that the proposed amendment will impliedly repeal the Legislature's authority to draw multimember districts has non application to Congressional districts. *See* 2 U.S.C. § 2c.

The issue, then, is whether this Court has jurisdiction to hear a claim seeking both injunctive and declaratory relief. Article V, section 5 specifically provides:

> SECTION 5. Circuit courts.--
>
> (a) ORGANIZATION.--There shall be a circuit court serving each judicial circuit.
>
> (b) JURISDICTION.--The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and *all writs necessary or proper to the complete exercise of their jurisdiction.* Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

Emphasis added. The Legislature has further delineated the jurisdiction of the circuit courts, in relevant part, as follows:

> 26.012 Jurisdiction of circuit court.--
>
> (2) They [circuit courts] shall have exclusive original jurisdiction: ...
>
> (c) *In all cases in equity* including all cases relating to juveniles except traffic offenses as provided in chapters 316 and 985; ...
>
> (3) The circuit court may issue injunctions. ...
>
> (5) A circuit court is a trial court.

Further, section 86.011 further sets the jurisdiction of this Court as follows:

> 86.011 Jurisdiction of trial court.--The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

> (1) Of any immunity, power, privilege, or right; or
>
> (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

Because the Plaintiffs seek both declaratory and injunctive relief, jurisdiction is properly vested in this Court.[5]

Unlike the Florida Supreme Court, the Florida Constitution vests this Court with the authority to conduct trials, and by implication, to hear testimony, accept evidence into the record, and make findings of fact. Clearly, if the Attorney General had commenced an action seeking an advisory opinion in this Court, the Court would have been barred from issuing such an advisory opinion. However, the scheme contained in Article IV, section 10 and Article V, subsection 3(b)(10) is not a bar to this proceeding.

In the instant case, the Plaintiffs intend to introduce testimony and other evidence that bears on the claims contained in the Amended Complaint. For instance, the Plaintiffs intend to introduce evidence in support of Counts VII and VIII which deals with the scope of the 2010 and the American Community Surveys conducted by the United States Bureau of the Census and demonstrate that the ballot summary is misleading in telling the voters that the Legislature will be able to discern with any degree of accuracy where "language minorities" reside. Since the Census no longer collects language usage data, the ballot summary "flies under false colors", promising what the Legislature cannot possibly deliver. The advisory opinion process is ill

[5] To the extent that the Amended Complaint can be read as a plea for relief via mandamus, Article V, section 5(b) of the Florida Constitution grants this Court the authority to issue writs of mandamus.

suited to consider claims that are fact intense, such as Counts VII and VIII. The Florida Constitution clearly vests this Court with jurisdiction to hear the claims brought by the Plaintiffs, to weigh the evidence, and render a judgment.

CONCLUSION

The Defendants' assertion that this Court lacks jurisdiction to hear the claims raised in the Amended Complaint is simply wrong. An advisory opinion is clear that — advisory. It is persuasive, not dispositive. There is no authority for the proposition that further relief is barred in a case where the Supreme Court has issued an advisory opinion. The Supreme Court's use of the term "other legal challenges" in *Smith* implies that legal actions, such as the instant one, are permitted. Moreover, the persuasive effect of the advisory opinion is limited to those issues actually considered by the Supreme Court. This Court clearly has jurisdiction and the case should proceed to trial.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed to the persons on the attached service list this July 6, 2010.

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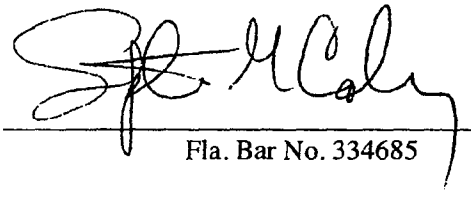

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2 So.3d 175

ADVISORY OPINION TO the ATTORNEY GENERAL RE STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES.

Advisory Opinion to the Attorney General Re Standards for Legislature to Follow in Congressional Redistricting.

No. SC08-986.
No. SC08-1149.
Supreme Court of Florida.
January 29, 2009.

[2 So.3d 178]

Bill McCollum, Attorney General, Louis F. Hubener, Solicitor General, Tallahassee, FL, for Petitioner.

Barry Richard and M. Hope Keating of Greenberg Traurig, P.A., Jon L. Mills of Boies, Schiller and Flexner, LLP, Miami, FL, and Timothy McLendon, Gainesville, FL, Mark Herron of Messer, Caparello and Self, P.A., and E. Thom Rumberger of Rumberger, Kirk and Caldwell, P.A., Tallahassee, FL, for FairDistrictsFlorida.org, Sponsor.

Jason Vail, General Counsel, Florida Senate, and Jeremiah M. Hawkes, General Counsel, Florida House of Representatives, Tallahassee, FL, on behalf of The Florida Legislature, as Opponents.

LEWIS, J.

The Attorney General of Florida has requested an opinion from this Court with regard to the validity of two initiative petitions sponsored by FairDistrictsFlorida.org, a political committee. We have jurisdiction. See art. IV, § 10, art. V, § 3(b)(10), Fla. Const. We conclude that

[2 So.3d 179]

the proposed amendments comply with the single-subject requirement of article XI, section 3 of the Florida Constitution, and that the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008).

I. THE PROPOSED AMENDMENTS

The two amendments and their respective ballot titles and summaries are nearly identical except for references to legislative versus congressional boundaries. The full text of the proposed amendment that governs legislative-district boundaries states:

Section 21. Add a new Section 21 to Article III

STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

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The ballot title for this proposed initiative is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING.

The ballot summary provides:

Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

The full text of the proposed amendment that governs congressional-district boundaries states:

Add a new Section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly

[2 So.3d 180]

equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for this proposal is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

The ballot summary provides:

Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

II. ANALYSIS

A. Single-Subject Requirement

Article XI, section 3 of the Florida Constitution provides: "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith." (Emphasis supplied.) This Court has previously explained the rationale behind the single-subject requirement:

The single-subject limitation exists because the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing

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amendments. Consequently, "[the] single-subject provision is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." This Court requires "strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature." The single-subject requirement also prevents logrolling, a practice that combines separate issues into a single proposal to secure passage of an unpopular issue. Thus, voters are protected by the single-subject requirement because they are not forced to "accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support."

Advisory Op. to Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So.2d 888, 891 (Fla.2000) (citations omitted) (quoting In re Advisory Op. to Att'y Gen.—Save Our Everglades, 636 So.2d 1336, 1339 (Fla.1994); Fine v. Firestone, 448 So.2d 984, 988-89 (Fla.1984)). To determine whether a proposed amendment addresses a single subject, this Court must evaluate whether the proposal "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Advisory Op. to Att'y Gen. re Patients' Right to Know About Adverse Med. Incidents, 880 So.2d 617, 620 (Fla. 2004) (quoting Fine v. Firestone, 448 So.2d 984, 990 (Fla.1984)).

A proposed amendment is not invalid merely because it affects more than one branch of government or may interact

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with other provisions of the Florida Constitution. See Advisory Op. to Att'y Gen. re Limited Casinos, 644 So.2d 71, 74 (Fla. 1994) ("[W]e find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent."). We have further explained that "the fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule." Advisory Op. to Att'y Gen. re Protect People, Especially Youth, From Addiction, Disease, & Other Health Hazards of Using Tobacco, 926 So.2d 1186, 1192 (Fla.2006). Rather, "it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." Patients' Right to Know, 880 So.2d at 620. Finally, speculation about possible impacts of a proposed amendment on other branches of government is premature when determining whether a proposed amendment, on its face, meets the single-subject requirement. See In re Advisory Op. to Att'y Gen. re English—The Official Language of Fla., 520 So.2d 11, 13 (Fla.1988) (approving placement of proposed amendment on the ballot even where "the amendment could have broad ramifications" because, "on its face[,] it deals with only one subject").

With regard to reapportionment, article III, section 16(a) of the Florida Constitution currently provides, in relevant part:

(a) SENATORIAL AND REPRESENTATIVE DISTRICTS. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

We conclude that the proposed amendments (1) encompass a single subject, (2) do not engage in logrolling, and (3) do not substantially alter the functions of multiple branches of government. The proposed amendments address a single function of a single

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branch of government—establishing additional guidelines for the Legislature to apply when it redistricts legislative and congressional boundaries. This Court has previously stated that under the state and federal Constitutions, the only requirements for a redistricting plan are: (1) compliance with the equal protection standard of one-person, one-vote—i.e., that "legislatures be apportioned in such a way that each person's vote carries the same weight"; and (2) that districts consist of contiguous, overlapping, or identical territory. In re Constitutionality of House Joint Resolution 1987, 81,7 So.2d 819 (Fla.2002) (quoting In re Constitutionality of Senate Joint Resolution 2G, 59,7 So.2d 276 (Fla.1992)).

Logrolling — Although the Legislature contends that the proposals violate the single-subject rule because they implement multiple reapportionment standards, such an interpretation of the rule is far too narrow. The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations. Although the proposed amendments delineate a number of guidelines, we conclude that these components possess "a natural relation and connection as component parts or aspects of a single dominant plan or

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scheme." Patients' Right to Know, 880 So.2d at 620 (quoting Fine, 448 So.2d at 990).

The instant case is distinguishable from others in which this Court has determined that proposals have violated the single-subject requirement. For example, in In re Advisory Opinion to Attorney General—Restricts Laws Related to Discrimination, 632 So.2d 1018, 1019 (Fla.1994) (Discrimination), the proposed amendment sought to prohibit discrimination based on ten separate classifications—race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, and familial status. While the sponsor contended that the amendment addressed the single subject of discrimination, we rejected this contention and instead concluded that the proposal "enfold[ed] disparate subjects within the cloak of a broad generality" in violation of the single-subject requirement. Id. at 1020 (quoting Evans v. Firestone, 457 So.2d 1351, 1353 (Fla.1984)). We explained:

> The voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation.

Id. at 1020. Unlike the provision in Discrimination, the proposals in the instant cases do not group multiple subjects under the cloak of "redistricting." Rather, they address solely the guidelines to be applied in legislative and congressional reapportionment. Thus, the instant proposals are also distinguishable from the proposed amendment in Advisory Opinion to Attorney General re Independent Nonpartisan Commission to Apportion Legislative & Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla.2006) (Nonpartisan), which we determined to be in violation of the single-subject requirement. The proposal in Nonpartisan sought not only to implement redistricting standards, but to also create an entirely new commission to replace the Legislature as the entity responsible for reapportionment in Florida. See id. at 1225. The proposed amendments here do not encompass two such disparate functions.

The proposed amendments here are more similar to proposals we have previously approved because they encompassed a single plan and merely enumerated various elements necessary to accomplish that plan. In Health Hazards of Using Tobacco, 926 So.2d at 1189,

this Court approved for placement on the ballot a proposed amendment that would create a comprehensive statewide tobacco education and prevention program. The program was designed to encompass an advertising campaign, the creation of programs to educate youth about tobacco, enforcement of laws against the sale of tobacco to minors, and annual evaluations of the effectiveness of the program. See id. Further, the proposal included a provision which required that the Legislature appropriate fifteen percent of the gross funds collected from a tobacco settlement to the program. See id. This Court held that despite the various components, the proposal did not engage in logrolling:

> It addresses a single comprehensive plan for the education of youth about the health hazards related to tobacco. Although this plan includes a list of components such as advertising, school curricula,
>
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>
> and law enforcement, all of these components are related to the single unifying purpose. It does not "combine subjects in such a manner as to force voters to accept one proposition they might not support in order to vote for one they favor." Advisory Op. to Att'y Gen. re Fla.'s Amendment to Reduce Class Size, 816 So.2d 580, 583 (Fla.2002). In other words, the proposed amendment does not combine unrelated provisions, some of which are popular and others that may be disfavored.

Id. at 1191-92. Similarly, here, the various components within the proposed amendments are directed to the single unified purpose of establishing standards by which legislative and congressional districts are to be drawn. Accordingly, we hold that the proposed amendments address a single subject.

Multiple Government Functions— The Legislature next asserts that the proposals will essentially shift the duty of reapportionment to the judiciary and, therefore, the proposals impact multiple branches of government in violation of the single-subject rule. This contention is without merit. Under the Florida Constitution, after the Legislature drafts a reapportionment plan, the attorney general files a request with this Court for a "declaratory judgment" with regard to the validity of the plan. Art. III, § 16(c), Fla. Const. If this Court rejects the plan, the Governor must reconvene the Legislature for an "extraordinary apportionment session," during which the Legislature must adopt a joint resolution that conforms to this Court's judgment. Id. § 16(d). If the extraordinary session fails to produce a resolution of apportionment, or if this Court holds that the subsequent apportionment is invalid, the Court "shall, not later than sixty days after receiving the petition of the attorney general, file with the custodian of state records an order making such apportionment." Id. § 16(f).

As noted by FairDistrictsFlorida.org, the Florida Constitution currently contains no guidelines for congressional districting. However, article I, section 2 of the United States Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States...." The Fourteenth Amendment of the United States Constitution provides that "[r]epresentatives shall be apportioned among the several states according to their respective numbers." The United States Supreme Court has held that the federal Constitution "leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Growe v. Emison, 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). In Wesberry v. Sanders, 376 U.S. 1, 4, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), the Supreme Court held that a one-person, one-vote constitutional challenge to congressional reapportionment by a state legislature is a justiciable issue.

The proposed amendments do not alter the functions of the judiciary. They merely change the standard of review to be applied when either the attorney general seeks a "declaratory judgment" with regard to the validity of a legislative apportionment, or a redistricting plan is challenged. This effect of the proposed

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amendments does not constitute a substantial alteration of the functions of the judicial branch. See Health Hazards of Using Tobacco, 926 So.2d at 1192 ("[T]he fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule.").

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The contention of the Legislature that a redistricting plan can never comply with the amendment guidelines and, therefore, the role of reapportionment will always fall upon the courts—thereby substantially changing a function of the courts—is speculative argument. There is no basis that the judiciary will reject any redistricting plan that the Legislature adopts for failure to comply with the guidelines. We must assume the Legislature will comply with the law at the time an apportionment plan is adopted. Moreover, such speculation with regard to a possible impact of the proposals on the judicial branch is premature because we need only determine at this time whether the proposed amendments, on their face, satisfy the single-subject requirement. See English—The Official Language, 520 So.2d at 13.

In light of the foregoing, we hold that the proposed amendments comply with article XI, section 3 of the Florida Constitution.

B. Ballot Title and Summary

The requirement that a ballot title and summary comply with section 101.161(1), Florida Statutes (2008), was recently explained by this Court as follows:

[A]ny proposed constitutional amendment must be "accurately represented on the ballot; otherwise, voter approval would be a nullity." Armstrong v. Harris, 773 So.2d 7, 12 (Fla.2000). Section 101.161(1), Florida Statutes (2007), codifies this principle:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot.... Except for amendments and ballot language proposed by joint resolution, the substance 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.... The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

(Emphasis supplied.) See also Askew v. Firestone, 421 So.2d 151, 155 (Fla.1982) ("[T]he voter should not be misled.... All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide.... What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (alteration in original) (quoting Hill v. Milander, 72 So.2d 796, 798 (Fla. 1954))).... To determine whether the ballot title and summary of [the proposed amendment] satisfy the requirements of section 101.161, Florida Statutes (2007), the Court must consider two questions: "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the public." Advisory Opinion to Attorney Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So.2d 210, 213-14 (Fla.2007) (quoting Advisory Opinion to Attorney Gen. re Fla. Marriage Prot. Amendment, 926 So.2d 1229, 1236 (Fla.2006)). We do not consider, nor do we address, the substantive merit of the proposed amendment.

... This Court has recognized that it must exercise extreme caution and restraint before removing a constitutional amendment from Florida voters. See Advisory Opinion to Attorney Gen. re

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Fla. Marriage Prot. Amendment, 926 So.2d 1229, 1233 (Fla.2006). We have further noted that we have no authority to inject this Court into the process, unless the laws governing the process have been "clearly and conclusively" violated. Advisory Opinion to the Attorney Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So.2d 491, 498-99 (Fla.2002).

Fla. Dep't of Rev. v. Slough, 992 So.2d 142, 146-47 (Fla.2008). Despite these various requirements, we have also noted that even though a ballot summary could have better explained the text of the amendment, that fact alone does not require a proposal to be struck:

There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such [requirements] would hamper instead of aiding the intelligent exercise of the privilege of voting. Under our system of free elections, the voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth. If he does not, it is no function of the ballot question to provide him with that needed education. What the law very simply requires is that the ballot give the voter fair notice of the question he must decide so that he may intelligently cast his vote.

Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So.2d 491, 498 (Fla. 2002) (quoting Metro. Dade County v. Shiver, 365 So.2d 210, 213 (Fla. 3d DCA 1978), aff'd sub nom. Miami Dolphins v. Metro. Dade County, 394 So.2d 981 (Fla. 1981)). Moreover, inadvertent use of different but clearly synonymous terms in the proposed amendment and the summary will not render a ballot summary fatally defective where "[t]he differing use of terminology could not reasonably mislead the voters." English—The Official Language, 520 So.2d at 13 (use of the phrase "to implement this article" in the ballot summary not misleading where the text of the proposed amendment actually provided "to enforce this section" (alteration in original)).

The Legislature presents multiple claims that the ballot titles and summaries for the proposed amendments are misleading. We address each of those arguments.

Ballot title — The Legislature first asserts that the titles are misleading because they indicate that only the Legislature must comply with the new redistricting standards where, in fact, the judiciary will be similarly obligated to apply these standards when a legislative attempt at reapportionment fails and the courts are required to redraw the districts. We conclude that this challenge is without merit.

As previously discussed, the proposed amendments have one chief purpose: to provide the Legislature with guidelines to follow when it draws legislative and congressional boundaries. Thus, it is logical that the titles would only reference the Legislature. Although the Legislature might ultimately fail to comply with these standards, this contingency does not translate into a need for the ballot titles to indicate that the standards apply to the judiciary. Rather, it can logically be presumed that if the Legislature fails to comply with the Constitution and follow the applicable standards, the entity responsible for redrawing the boundaries must also comply with these standards. The failure to mention the judiciary in the ballot titles does not render them misleading.

"Drawn to favor" vs. "Drawn with the intent to favor" — The amendment summaries provide that redistricting plans

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"shall not be drawn to favor or disfavor an incumbent or political party"; however, the body of the proposals provide that districting plans "shall not be drawn with the intent to favor or disfavor an incumbent or political party." (Emphasis supplied.) According to the Legislature, the summaries indicate that the effect of a reapportionment plan cannot be to

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favor or disfavor anyone or any party; however, under the proposed amendments, proof of intent to favor an incumbent or party must be demonstrated before a reapportionment plan will be rejected for noncompliance. The Legislature contends that the summaries are misleading because voters will believe that the proposals prohibit reapportionment plans whose effect is to favor a party or incumbent, while the amendments actually permit districts that favor a party or incumbent, provided that the district lines were drawn without intending that result.

We reject this assertion. The ballot summaries are currently seventy-four words in length. Hence, to add the words "with the intent" to the ballot summaries would exceed the statutory word limit. Thus, at issue in this case is whether the omission of these three words from the summaries (likely in an attempt to comply with the statutory word limit) causes them to be fatally misleading. As previously noted, a ballot summary need not (and because of the statutory word limit, often cannot) explain "at great and undue length" the complete details of a proposed amendment, and some onus falls upon voters to educate themselves about the substance of the proposed amendment. Right to Treatment & Rehabilitation, 818 So.2d at 498 (voters must acquaint themselves with the details of a proposed amendment together with the pros and cons thereon before they enter the voting booth and if they do not, it is no function of the ballot to provide that needed education). Here, the proposed amendments are relatively short and straightforward. The text clearly highlights that for a redistricting plan to run afoul of the proposals, the conduct by the Legislature must be intentional.

Additionally, such an intent requirement has been historically applied with regard to allegations of gerrymandering in reapportionment. For example, this Court has held that a discriminatory effect is not sufficient to prove racial discrimination in redistricting; rather, a discriminatory intent must be demonstrated:

This invidious intent or purpose of racial discrimination, the Supreme Court explained, cannot be proved by merely showing that the group discriminated against has not elected representatives in proportion to its numbers. Disproportionate effects alone will not establish a claim of unconstitutional racial vote dilution. Rather, "[a] plaintiff must prove that the disputed plan was conceived or operated as a purposeful device to further racial discrimination." Proof of a discriminatory effect is not sufficient.

Milton v. Smathers, 389 So.2d 978, 981-82 (Fla.1980) (quoting City of Mobile v. Bolden, 446 U.S. 55, 66, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)). Thus, when implementing additional constitutional apportionment standards—here, that district boundaries not be drawn to favor a party or incumbent—it is logical to presume (and the text of the amendments require) that the intent of the entity that draws the districts must similarly be considered when determining whether those standards have been violated.

Moreover, to add the "with the intent" language to the proposed summaries would require removal of at least two other words for the summaries to comply with the seventy-five-word statutory limit. The

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Legislature fails to indicate which of the current seventy-four words could be removed without creating another claim that the summaries are vague or misleading. Indeed, it is likely impossible to draft summaries that explain all of the details sought by the Legislature within the statutory-word limit. While ideal summaries for these amendments might have included the words "with the intent," we conclude that—given the strict word limits—the failure of the summaries to include these three words does not render them so misleading as to clearly and conclusively violate section 101.161, Florida Statutes. See Right to Treatment & Rehabilitation, 818 So.2d at 498 (holding that failure of ballot summary to explain that proposed amendment is self-effectuating did not

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render the summary misleading and noting that "imperfection is not necessarily fatal given the seventy-five word statutory maximum").

Shift of Authority — The Legislature next contends that the summaries are misleading because they fail to mention that the proposed amendments divest the Legislature of its responsibility to draw legislative and congressional districts and transfer this role to the judiciary. However, we have already concluded that the proposed amendments do not substantially alter the functions of multiple branches of government. Rather, under the proposals, the judiciary maintains the same role as it has always possessed—to only review apportionment plans for compliance with state and federal constitutional requirements and to adjudicate challenges to redistricting plans. The proposed amendments do not shift in any way the authority of the Legislature to draw legislative and congressional districts to the judicial branch. Accordingly, the summaries are not misleading for the failure to mention this purported "effect" of the proposals.

"City/County" boundaries vs. "Political" Boundaries — The ballot summaries state that district boundaries shall, where feasible, utilize existing "city, county and geographical boundaries"; however, the body of the amendments provide that districts must use "existing political and geographical boundaries." (Emphasis supplied.) The Legislature asserts that the term "political boundaries" encompasses more than city or county boundaries, and under the Florida Statutes, this State has many special districts—such as voting precincts and water-management districts— the borders of which would constitute "political boundaries." Thus, to the extent that the summaries use language inconsistent with that of the proposed amendments, the Legislature contends that they are misleading.

Although the phrase "political and geographical boundaries" used in the proposed amendments may be technically broader than the "city, county, and geographical boundaries" phrase used in the summaries, we conclude that this differing use of terminology could not reasonably mislead voters. The sponsor asserts that the terms "city" and "county" are utilized in the summaries because they are more understandable to the average citizen than the legal concept of "political" boundaries. We agree that most voters clearly understand the concept of a city or county boundary, but may be perplexed to define exactly what a "political boundary" may encompass. See Askew v. Firestone, 421 So.2d 151, 155 (Fla.1982) (noting that voters "must be able to comprehend the sweep of each proposal" (quoting Smathers v. Smith, 338 So.2d 825, 829 (Fla.1976))). The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts—such

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as one senate district that was challenged in Resolution 1987, 817 So.2d at 824-25—are avoided.[1] Since the "city" and "county" terminology honors this community-based standard for drawing legislative and congressional boundaries, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

The And/Or Distinction — Under this challenge, the Legislature contends that the summaries are misleading because while they provide that "[d]istricts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice," the proposed amendments provide that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." (Emphasis supplied.) According to the Legislature, the "or" in the proposals demonstrates that an apportionment plan need satisfy only one of the two conditions to comply with the amendment—

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either districts must not be drawn to deny racial or language minorities the equal opportunity to participate in the political process or districts must not be drawn to diminish the ability of racial or language minorities to elect representatives of their choice. According to the Legislature, both standards need not be accomplished. Conversely, the Legislature posits that use of the word "and" in the summary indicates that both standards must be satisfied to comply with the amendments—thus, the summaries are misleading because they promise more than is required under the proposed amendments.

We conclude that the logic of the Legislature is faulty. In support of its assertion, the Legislature relies upon the case Armstrong v. Harris, 773 So.2d 7, 16 (Fla. 2000), in which this Court held that a ballot title which read "United States Supreme Court Interpretation of Cruel and Unusual Punishment" and a summary which provided that the proposed amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment" were affirmatively misleading. See 773 So.2d at 16-17. This Court explained that although the title offered the impression that "the amendment will promote the rights of Florida citizens through the rulings of the United States Supreme Court," the amendment actually restricted the rights of Floridians because the United States Constitution ban against "cruel and unusual" punishment provided fewer protections than the Florida Constitution ban on "cruel or unusual punishment." Id. at 17. Thus, the "or" carried special significance because it prohibited punishment that is either cruel or unusual, whereas under the United States Constitution, the punishment is prohibited only if it is both cruel and unusual.

However, the proposal in Armstrong is distinguishable from the proposed amendments that we review today. While the word "or" in the Armstrong proposal was used in conjunction with two adjectives, here the word "or" separates two clauses of a sentence which share the same negative

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verb; i.e., "shall not be drawn." This verb modifies both clauses, thereby indicating that both clauses impose a restrictive imperative, each of which must be satisfied. For example, if a statute provides that "one person shall not kill another or cause him/her grievous bodily harm," it is illogical to suggest that the statute prohibits one action but not the other. Rather, the "shall not" unquestionably applies to both actions—both killing and causing grievous bodily harm are prohibited. Similarly, the negative verb "shall not be drawn" in the proposed amendments modifies both clauses "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process" and "to diminish their ability to elect representatives of their choice." Under this sentence, both effects are prohibited.[2] Thus, use of the word "or" in the proposals is synonymous with the word "and" in the summaries. Because the use of synonymous terms is not misleading, this challenge by the Legislature fails. See English—The Official Language, 520 So.2d at 13 (use of synonymous terms will not render summary fatally defective where the use of different terms could not reasonably mislead voters).

Language Minorities — The Legislature's claim that this term is vague or ambiguous is not persuasive. The term "language minorities" is both legally and commonly understood to refer to any language other than English. See, e.g., 42 U.S.C. § 1973b(f)(1) ("The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English." (emphasis supplied)); Briscoe v. Bell, 432 U.S. 404, 405, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977) ("[A]s part of the 1975 amendments to the Voting Rights Act ... Congress extended the Act's strong protections to cover language minorities; that is, citizens living in environments where the dominant

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language is not English." (emphasis supplied)); Biddulph v. Mortham, 89 F.3d 1491, 1498 (11th Cir.1996) ("The plaintiffs argued that the proposal's sponsors failed to comply with a provision of the Voting Rights Act requiring that certain jurisdictions subject to rules prohibiting discrimination against language minorities provide 'materials or information relating to the electoral process' in the minority group's language as well as English." (emphasis supplied)). The Legislature's contention that voters may be confused by the term "language minorities" is even more dubious in light of the fact that the Florida Constitution contains a provision providing that English is the official language of Florida. See art. II, § 9, Fla. Const. Use of this term does not render the summaries misleading.

Elimination of Multi-Member Districts — Lastly, the Legislature contends that the summary of the legislative-boundary proposal is misleading because it fails to inform voters that it changes the Florida Constitution to no longer permit multi-member legislative districts and to mandate single-member legislative districts.[3]

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The Florida Constitution currently mandates that legislative districts consist of either "contiguous, overlapping or identical territory." Art. III, § 16(a), Fla. Const. In 1972, we held that this language permits multi-member legislative districts:

[T]he Constitution requires that there be one senator elected from each Senatorial district and one member of the House of Representatives elected from each representative district. This, standing alone, would require single-member districts. However, the Constitution further provides that districts may be "identical territory." This means that multi-members of the Senate or the House of Representatives may be elected from the identical territory if such territory were designated as constituting several districts. To require single-member districts would void the provision of Fla. Const., art. III, § 16(a) ... authorizing the creation of districts in "identical territory."

. . . .

Under the provisions of Fla. Const., art. III, § 1 and 16 ... multi-member districts are permissible and such multi-member districts may coexist with single-member districts in the same plan.

In re Apportionment Law Senate Joint Resolution No. 1305, 26,3 So.2d 797 (Fla.1972).

The Legislature contends that adoption of the proposed legislative-boundary amendment—which includes a "contiguous" requirement but does not mention overlapping or identical districts—operates to repeal article III, section 16(a) of the Florida Constitution. Under this rationale the Legislature argues that because identical districts are no longer permitted, the proposal amends the Florida Constitution to implement a single-member district requirement, and the ballot summary fails to inform voters of this significant change. See Nonpartisan, 926 So.2d at 1226 (noting that the "identical territory" provision in article III, section 16(a) permits the creation of multi-member districts).

We disagree that adoption of the legislative-boundary proposal will have the asserted effect. This Court has explained:

A new constitutional provision prevails over prior provisions of the Constitution (a) if it specifically repeals them or (b) if it cannot be harmonized with them. Nevertheless, it is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.

Jackson v. City of Jacksonville, 225 So.2d 497, 500-501 (Fla.1969) (emphasis supplied). Since the legislative-boundary proposal does not expressly repeal section 16(a), this constitutional

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provision will be considered repealed by implication only if it cannot be harmonized with the proposal.

We conclude that harmonization of these two provisions is possible and, therefore, "identical" multi-member districts in Florida will still be constitutionally permissible even if the legislative-boundary proposal is adopted. In 1982, this Court clarified that the word "contiguous" in article III, section 16(a) "means only that each district must be contiguous within itself" and does not refer "to the relationship of the districts to each other." In re Apportionment Law Appearing as Senate Joint Resolution No. 1E, 41,4 So.2d 1040 (Fla.1982) (emphasis supplied).

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Thus, under this Court's prior case law, the reference to "contiguous" in the proposed legislative-boundary amendment solely addresses the characteristics of an individual district—not its relationship with any other district. Accordingly, a constitutional contiguity requirement for each individual district may exist, but—at the same time—an individual district may still overlap with, or be identical to, another individual district. Because these two provisions can be harmonized in such a manner, the proposed legislative-boundary proposal would not operate to repeal article III, section 16(a).[4]

Since the legislative-boundary proposal does not have the effect of prohibiting multi-member districts, the ballot summary is not misleading for the failure to mention this purported "effect."

III. CONCLUSION

In conclusion, we hold that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008). Accordingly, we approve the amendments for placement on the ballot.

It is so ordered.

QUINCE, C.J., and ANSTEAD, Senior Justice, concur.

WELLS, CANADY, and POLSTON, JJ., concur in result only.

PARIENTE, J., recused.

Notes:

1. That senate district connected a region of Lee County with a region of Palm Beach County across the waters of Lake Okeechobee without any connecting territory on either the northern or southern shores of the lake. See id. at 828. Thus, the only way to travel from one end of the district to the other without passing through another district was by boat.

2. One legal dictionary has explained:

"[O]r" has an inclusive sense as well as an exclusive sense. Hence:

. . . .

• The "inclusive or": A or B, or both

• The "exclusive or": A or B, but not both.

Bryan A. Garner, A Dictionary of Modern Legal Usage 624 (2d ed.1995).

3. In Branch v. Smith, 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003), the Supreme Court determined that "that in enacting 2 U.S.C. § 2c, Congress mandated that States are to provide for the election of their Representatives from single-member districts." Thus, even if the congressional-boundary amendment were interpreted to mandate single-member districts, this proposal would be consistent with federal law.

4. The proposals here are decidedly different from the proposed amendment that this Court struck from the ballot in Nonpartisan. In Nonpartisan, the proposal deleted article III, section 16(a) in its entirety and inserted a new section 16(a), which would have required "single-member" districts of "convenient contiguous territory." See 926 So.2d at 1221. Thus, in Nonpartisan, there was an express repeal of the

fastcase

constitutional provision that allowed districts to be overlapping and identical.

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fastcase

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

CORRINE BROWN AND **MARIO DIAZ-BALART**,

PLAINTIFFS, AND

FLORIDA HOUSE OF REPRESENTATIVES,
AND **FLORIDA SENATE,**

INTERVENING PLAINTIFFS,

V. CASE NO.: 2010 CA 001824

DAWN K. ROBERTS, IN HER CAPACITY AS
INTERIM SECRETARY OF STATE OF THE STATE OF
FLORIDA, AND **FAIRDISTRICTSFLORIDA.ORG, INC.,**
A FLORIDA NOT-FOR-PROFIT CORPORATION,

DEFENDANTS, AND

BOB GRAHAM,

INTERVENING DEFENDANT.
_____/

FLORIDA HOUSE OF REPRESENTATIVES'
WITNESS LIST, EXHIBIT LIST, AND EXPERT WITNESS DISCLOSURES

Intervening Plaintiff, Florida House of Representatives, pursuant to the Court's Scheduling Order dated June 11, 2010, identifies the following witnesses and exhibits to be presented at the non-jury trial on July 26, 2010, and makes the following expert witness disclosures:

WITNESS LIST

1. Congresswoman Corrine Brown
2. Congressman Mario Diaz-Balart

3. Dawn K. Roberts, Interim Secretary of State

4. Ellen Freidin

5. Corporate Representative of FairDistrictsFlorida.org, Inc.

6. Senator Bob Graham

7. John Guthrie

8. Bob West

9. Ronald Keith Gaddie (expert)

10. All witnesses listed by Plaintiffs, Defendants, or Intervening Defendant

The Florida House reserves the right to supplement this witness list as allowed by the court and reserves the right to present testimony through admission of deposition transcripts or videotapes.

EXHIBIT LIST

1. Maps showing minority concentrations in Florida in 1992, 2002, and present day representations or projections of minority concentrations

2. Section 2, Voting Rights Act

3. Section 5, Voting Rights Act

4. Timeline of Redistricting Process (2010-2012)

5. Maps of Compact vs. Non-compact districts

6. Maps using political or geographical boundaries

7. Diagram of interaction of racial populations with political or geographical boundaries

8. Diagram of interaction of racial populations with compact or non-compact districts

9. Listing of majority-minority seats after 1982, 1992, and 2002 redistricting

10. Data of districts of 20% or greater minority population after 1982, 1992, and 2002

redistricting

11. Maps and all related data for Florida state and Congressional maps in 1982, 1992, and 2002

12. Maps and related data from other states

13. Publications and website statements from Fair Districts

14. Legislative testimony of Ellen Freidin

15. All expert CVs

16. All expert reports

17. All answers to interrogatories and responses to requests for admissions served by any party in this case

18. All deposition transcripts and videotapes, errata sheets, and deposition exhibits taken in this case:
    A. Bob Graham
    B. Ellen Freidin
    C. Corporate Representative of FairDistrictsFlorida.org., Inc.

19. All documents produced by any party or nonparty to this case

20. All exhibits listed by Plaintiffs, Defendants, or Intervening Defendant

21. Other documents discovered between the date of this exhibit list and the close of discovery

22. All exhibits and other documents necessary for impeachment or rebuttal

The Florida House reserves the right to supplement this exhibit list as allowed by the Court.

EXPERT WITNESS DISCLOSURES

NAME	SUMMARY OF TESTIMONY
Ronald Keith Gaddie	1. Background of the VRA and its key provisions. 2. Relationship between the proposed amendments and the VRA, including but not limited to issues of

incumbency and partisanship as they relate to the VRA.
3. Redistricting in Florida from the 1980s to the present, with a focus on the treatment of minority voters.
4. The general mechanics of map-drawing, in the context of complying with the VRA and with requirements like those in the proposed amendments.
5. The traditional understanding, in the redistricting context, of the term "compact."
6. The likely effects of the proposed amendments on the Legislature's ability to promote the interests of minority voters in redistricting.
7. The complexity of redistricting litigation generally and the issues that would likely be litigated if the proposed amendments were to govern the drawing of districts in Florida.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished as indicated below this 16th day of July, 2010, to the following:

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

CASE NO: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S NOTICE OF ADOPTING ITS RESPONSE IN OPPOSITION TO DEFENDANT SECRETARY OF STATE'S MOTIONS TO DISMISS AS RESPONSE TO SAME MOTIONS TO DISMISS FILED BY DEFENDANTS GRAHAM AND FAIRDISTRICTSFLORIDA.ORG

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel, and hereby files this Notice that it adopts and reincorporates its Response in Opposition to Secretary of State's Motions to Dismiss Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction filed on July 6, 2010 as its response in opposition as if fully stated herein to the following Motions:

1. Defendant GRAHAM's Motion to Dismiss for Lack of Subject Matter and Motion to Expedite Disposition filed on June 24, 2010.

2. Defendant FAIRDISTRICTSFLORIDA.ORG, INC.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition filed on June 29, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 6th day of July, 2010.

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Corrine Brown and Mario Diaz-Balart et al v. Dawn K. Roberts, et al.
Case No.: 2010-CA-1824

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

CASE NO: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S RESPONSE IN OPPOSITION TO SECRETARY OF STATE'S MOTIONS TO DISMISS PLAINTIFFS' COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel, and hereby files this Response in Opposition to Secretary of State's Motions to Dismiss Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss")[1] in the above-styled litigation, and in support of its response asserts the following:

I. INTRODUCTION

As plead by the Florida Senate, this case involves a pre-election challenge to the legality of two proposed redistricting amendments that are currently set to be on the November, 2010 general election ballot. Proposed Amendments 5 and 6 would not only radically alter the duties, powers, and scope of legislative and congressional reapportionment in this State but would also likely set back minority voting rights in Florida by a generation or more. Such perniciousness should not be countenanced by this Court.

[1] In addition, the other defendants in this case, Sen, Robert Graham and FairDistrictsFlorida.org have both filed Motions to Dismiss adopting in full the arguments made by the Secretary of State in her Motions to Dismiss. The Florida Senate's response herein serves as a response in opposition to the Motions to Dismiss of these other defendants as well.

In its Complaint, the Florida Senate asserts two separate claims:[2] both for a declaratory judgment and an injunction against the Secretary of State, asking that the proposed constitutional amendments at issue in this litigation be barred from the upcoming ballot because they plainly violate paramount federal law and also because they violate the separation of powers scheme set up in the Florida Constitution and are flatly unworkable. The Florida Senate believes quite strongly that these proposals are illegal and impermissibly violate paramount federal law (and would actually largely eviscerate the power of minority voting rights in Florida), and thus, contends that it is neither legally right nor appropriate for these two proposed constitutional amendments to be placed on the general election ballot in November, 2010. Accordingly, the Florida Senate has, in good faith and in support of the elected Plaintiffs and in accordance with established Florida law, sought pre-election judicial review of their legality prior to having them submitted to the electorate. Should this Court determine the proposed Amendments 5 and 6 to be unconstitutional and/or invalid, the Florida Senate respectfully requests the Court prohibit the Secretary of State from putting them on the upcoming general election ballot.

In her Motion to Dismiss, the Florida Secretary of State claims that pre-election review of the Florida Senate's claims is precluded, that only the Florida Supreme Court has exclusive jurisdiction to hear such claims, and that, therefore, this Court lacks subject matter jurisdiction to hear this case. However, the Secretary's Motion to Dismiss contains three fatal errors: 1) it falsely asserts that the Florida Supreme Court's advisory—and limited-- review of the proposed constitutional amendments precludes more substantive review by this Court; 2) it ignores Florida Supreme Court decisions which expressly allow substantive pre-election review of initiative proposals that violate federal and other constitutional laws; and 3) it ignores the constitutional role of the Circuit Courts of this State (which are primarily vested with the judicial trial power in

[2] In addition to asserting its own claims, the Florida Senate has adopted the claims asserted in the Florida House's Amended Complaint. However, the claims asserted directly by the Florida Senate in its Complaint have not been raised by any other Plaintiff in this case.

deciding the very kinds of issues presented here). Because the Secretary of State's Motion to Dismiss is based wholly on an inaccurate analysis of the controlling law and the Florida Senate's claims, the Secretary's Motion to Dismiss must be denied in all respects.

II. MEMORANDUM OF LAW

A. This Court Has Jurisdiction To Hear The Florida Senate's Claims

1. The Florida Supreme Court's Previous Review Was Both Limited And Advisory.

a. Florida Supreme Court Ballot Summary And Single Subject Review Is Limited.

For her first argument in favor of dismissal, the Secretary of State contends that only the Florida Supreme Court has jurisdiction to consider pre-election challenges to voter initiative amendments. This argument is easily disproven by a number of Florida Supreme Court cases and holdings, as set out in more detail below.

The Florida Constitution and § 101.161, Fla. Stat., do provide the Florida Supreme Court with limited advisory authority to review proposed voter initiatives for their compliance with ballot summary and single-subject requirements prior to their placement upon any ballot. This review is purely "advisory" in nature. It is certainly true that the Florida Supreme Court reviewed proposed Amendments 5 and 6 earlier pursuant to the statutory procedure set out in § 101.161. *Advisory Opinion to the Attorney General Re: Standards for Establishing Legislative District Boundaries*, 1 So.3d 175 (Fla. 2009). However, the holdings from the § 101.161 process are very limited and the Florida Supreme Court itself has characterized its preliminary limited review over the initiatives here as "advisory" only. With respect to the proposed constitutional amendments at issue, the Florida Supreme Court's earlier review held only that "the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and [their] ballot title summaries comply with section 101.161(1), Florida Statutes." *Advisory Opinion to the Attorney General Re: Standards for Establishing Legislative District Boundaries,*

1 So.3d 175, 191 (Fla. 2009).

But, as the Florida Supreme Court itself acknowledges, its early review of such voter initiatives is quite limited in nature.[3] The Florida Supreme Court ably laid down the elements of this review in *Advisory Opinion to Atty. Gen. ex rel. Amendment*, 778 So.2d 888 (Fla. 2000), as follows:

> The court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999). *See Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 565 (Fla. 1998); *Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So.2d 972, 974 (Fla. 1997). In order for the Court to invalidate a proposed amendment, the record must show that the proposal is clearly and conclusively defective on either ground. *See Askew v. Firestone*, 421 So.2d 151, 154 (Fla. 1982). In determining the propriety of the initiative petitions, the Court does not review the merits of the proposed amendments. *See Right of Citizens to Choose Health Care Providers*, 705 So.2d at 565; *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So.2d 1304, 1306 (Fla. 1997). . . This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments...."

In that same case, moreover, the Florida Supreme Court held that specifically that other substantive challenges are ***not*** justiciable in this type of § 101.161 advisory proceeding. 778 So.2d at 891. *See also Advisory Opinion to the Attorney General-Limited Political Terms in Certain Elective Offices*, 592 So.2d 225, 227 (Fla. 1991).

Since *Grose v. Firestone*, 422 So.2d 303 (Fla. 1982), the Florida Supreme Court has consistently adhered to the holding that "other constitutional challenges are not justiciable in this

[3] Moreover, review of the ballot summary and single-subject issues is not strictly foreclosed by Florida Supreme Court review under § 101.161, as the Florida Supreme Court stated in *Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992), that re-litigation of the ballot summary and single-subject issues was "strongly disfavored" and should be "entertained only in truly extraordinary cases." It should be noted that the claims raised by the Florida Senate in its Complaint do not attempt to relitigate, in any way, the ballot summary or single-issue limitations previously reviewed by the Florida Supreme Court. Hence, this proposition is inapposite to this Court's jurisdiction to review the Florida Senate's case and to hear its claims. *See also* 12A Fla. Jur. 2d Courts and Judges § 98 ("Advisory opinions")(confirming that the Florida Supreme Court has jurisdiction to reconsider its advisory opinions as they would not be binding precedent and noting that other challenges were permissible by implication).

type of [ballot summary] proceeding" but that other substantive claims may be raised about the amendments in other proceedings. More specifically, the *Grose* Court ruled:

> Appellants' argument that the substance of the amendment is unconstitutional is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented. *Gray v. Winthrop,* 115 Fla. 721, 156 So. 270 (1934); *Gray v. Moss* 115 Fla. 701, 156 So. 262 (1934).

422 So.2d at 306. More importantly, the Florida Supreme Court has expressly ruled that substantive voting rights issues, such as those raised by the Florida Senate in the case at bar, are not properly heard during advisory opinion proceedings but should instead be heard at trial. Specifically, in the case of *In re Constitutionality of House Joint Resolution 1987*, 817 So.2d 819, 829 (Fla. 2002), wherein the parties raised substantive voting rights issues during the advisory review of a reapportionment plan, the Court declined to address such issues and held:

> with the advancement of redistricting technology, the continued development of case law in this area, and the unique fact intensive circumstances presented in the instant case we determine that we are not in a position to properly address such issues in the present proceeding, especially in light of the constitutional time limitations placed on the Court. Such claims are better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings on the evidence presented.

Hence, it is clear from the Florida Supreme Court's own opinions and holdings that its § 101.161 review of proposed ballot initiatives is strictly limited to two narrow issues, and that other substantive claims can be raised in appropriate proceedings before appropriate tribunals such as this Court. *See Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982); *In re Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226-27 (Fla. 1991); *In re Prohibiting Public Funding of Political Candidates' Campaign*, 693 So. 2d 972, 976 (Fla. 1997).

Thus, while it is clear that the Florida Supreme Court has exclusive authority to review the ballot summaries under a § 101.161 ballot advisory review early on, it is simply untrue for the Secretary of State to assert, as she does repeatedly in her Motion to Dismiss, that the Florida Supreme Court has exclusive jurisdiction to review ballot initiatives for substantive defects and

illegalities or that such substantive pre-election review is wholly precluded by a lack of subject matter jurisdiction by this Court.

b. Advisory Opinions Are Meant To Be "Advisory."

The Florida Supreme Court has also acknowledged that its advisory opinions are "not strictly binding precedent." *Fla. League of Cities v. Smith*, 607 So.2d 397, 399 (Fla. 1992). Hence, the mere fact that the Florida Supreme Court has undergone a cursory advisory review of these proposed initiatives for two minimal requirements does not, in any way, preclude more substantive judicial review of these proposed constitutional amendments, especially where, as here, the Florida Senate has alleged that they patently violate paramount federal law, namely the Voting Rights Act, and improperly impinge on minority voting rights in ways that are so fundamental as to be both incurable and plainly illegal.[4]

c. The Florida Supreme Court Lacks Authority To Review These Proposals For The Substantive Constitutional Issues Raised By The Senate.

As noted above, the Florida Supreme Court has already held that it lacks the authority to review substantive constitutional issues in a § 16.061 advisory opinion proceeding. *See Advisory Opinion to Attorney General – Limited Political Terms*, 592 So.2d 225, 227 (Fla. 1991); *Advisory Opinion to Attorney General – Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1019, n.1 (Fla. 1994). This means that the Florida Supreme Court does not have "exclusive" jurisdiction to review the Florida Senate's claims in the first instance and that the

[4] Indeed, the Secretary of State's use of the *Florida League of Cities* case for the proposition that jurisdiction over the claims raised by the Florida Senate here lies only in the Florida Supreme Court is refuted by that case itself. In that case, the Florida Supreme Court noted that relitigation of the ballot summary and single-issue claims previously reviewed was "strongly disfavored" and that it would not generally exercise its discretionary jurisdiction to rehear such "renewed litigation" absent extraordinary circumstances. But, reference to the Florida Supreme Court's discretionary jurisdiction further implies that such a case could be heard by the courts below. Regardless, in this case, the Florida Senate has raised independent substantive challenges to the proposed constitutional amendments that were not previously heard by the Florida Supreme Court. Hence, the *Florida League of Cities* quote from page 11 of the Motion to Dismiss is plainly inapposite to the jurisdiction of ***this*** Court to hear the pending matters.

Secretary of State's arguments to the contrary must be wrong. Thus, her Motion to Dismiss should be denied accordingly.

2. The Florida Supreme Court Has Allowed More Substantive Review Of Proposed Constitutional Initiatives By The Lower Courts.

In her Motion to Dismiss, the Secretary of State also argues that only constitutional amendments proposed by joint resolution of the Florida Legislature can be reviewed in the lower courts by declaratory judgment action. This, too, is flat wrong. In *Dade County v. Dade County League of Municipalities*, 104 So.2d 512, 514 (Fla. 1958), the Florida Supreme Court confirmed that pre-election review of constitutional questions over voter-proposed initiatives was appropriate for ballot initiatives being challenged on a substantive basis:

> At the outset we dispose of the matter of the propriety of considering the constitutionality of the proposal in advance of an election called to enable the electorate to express its approval or disapproval of the subject proposal. There is adequate precedent for doing so. We are not here confronted with an election in which the people are to have the privilege of expressing their choice as between candidates for public office. If the latter were the situation, the matter for determination would be purely political rather than judicial and the courts would not interfere. *State ex rel. Landis v. Tedder*, 106 Fla. 140, 143 So. 148. We are here dealing with an election involving a matter with reference to which the public interest and public rights may be determined in advance of the ballot, in order to preclude or forestall possible expenditure of substantial sums of public monies in the doing of what could be a vain and useless thing. *Duval County v. Jennings*, 121 Fla. 584, 164 So. 356; *Dubose v. Kelly*, 132 Fla. 548, 181 So. 11; *Gray v. Moss*, 115 Fla. 701, 156 So. 262; *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804.

See also West Palm Beach Ass'n of Firefighters v. Bd of City Commisioners, 448 So.2d 1212, 1213-1214 (Fla. 4th DCA 1984)(questioning why City had not sought declaratory relief as to validity of proposed ballot initiative and noting that would have been the preferred procedure).

3. The Florida Constitution Vest This Court With The Power To Hear This Case.

Now that the Florida Senate has wholly refuted the Secretary of State's arguments and established that the Florida Supreme Court does not have exclusive jurisdiction to hear

substantive challenges to proposed constitutional amendments and that substantive challenges to voter initiatives can be heard prior to an election, we reach the next issue: Whether the Florida trial courts have jurisdiction to hear substantive pre-election challenges to constitutional amendments proposed by voter initiative. As discussed in detail below, the Florida Circuit Courts are the ***only*** place where such claims can be heard in the first instance.

As the Fourth District Court of Appeal held in a redistricting case brought by Plaintiff Brown, Brown v. Butterworth, 831 So.2d 683, 686 (Fla. 4th DCA 2002), held:

> We begin with the proposition that, as the Circuit Judge himself noted, the circuit courts in Florida are the primary trial courts of general jurisdiction. As our supreme court has explained,
>
> > "In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be.... 'The circuit courts of the State of Florida are courts of general jurisdiction similar to the Court of King's Bench in England clothed with most generous powers under the Constitution, which are beyond the competency of the legislature to curtail. They are superior courts of general jurisdiction, subject of course to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and as a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly out side of and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto.' " [c.o.]
>
> *English v. McCrary,* 348 So.2d 293, 297 (Fla.1977) (quoting *State ex rel. B.F. Goodrich Co. v. Trammell,* 140 Fla. 500, 192 So. 175 (1939)). We find nothing in the Florida Constitution that expressly and clearly vests all apportionment claims in some court other than the circuit court.

The same result is, thus, demanded here. There is simply nothing in any Florida Supreme court case or other authority that somehow divests the jurisdiction of this Court to hear the Florida Senate's claims, and the Secretary of State has pointed to none. Thus, there is simply no real question as to this Court's jurisdiction to hear the Florida Senate's claims in this case.

Similarly, in *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So.2d 1144, 1147 (Fla. 2d DCA 2006), the Florida appellate court confirmed the circuit court's jurisdiction to hear pre-election claims. It held that, if the opponent of a proposed amendment "in good faith questions the constitutionality of the ordinance in its entirety and on its face[,] the court may properly consider that question in advance of an election concerning its approval." *W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs of the City of W. Palm Beach*, 448 So.2d 1212, 1214 (Fla. 4th DCA 1984)." *See also Gaines v. City of Orlando*, 450 So.2d 1174, 1178 (Fla. 5th DCA 1984)(holding that circuit court has discretion to make a pre-election determination of the facial constitutionality of any proposed amendment slated to appear on the ballot) *See also Fine v. Firestone,* 448 So.2d 984 (Fla.1984); *City of Miami Beach v. Smith*, 165 So.2d 748 (Fla. 1964); *Dade County v. Dade County League of Municipalities,* 104 So.2d 512 (Fla. 1958).

Therefore, contrary to the assertions made by the Secretary of State (and the other defendants), this Court absolutely has jurisdiction to hear the Florida Senate's claims here. Indeed, it is the only court where a trial can actually be held on the matter. It is similarly not true that only amendments proposed by joint resolution can be reviewed in advance of an election as the many cases cited above confirm that even voter-proposed initiatives can be substantively reviewed by the circuit courts prior to their submission to the ballot to keep the voters from voting on "a vain and useless thing."

B. The Florida Senate Correctly Relies on *Gray v. Winthrop* In Challenging The Validity of the Proposed Amendments.

The Secretary of State's Motion to Dismiss also claims that the Florida Senate's reliance on the Florida Supreme Court's seminal case of *Gray v. Winthrop*, 115 Fla. 721 (Fla. 1934)(allowing substantive pre-election review of constitutional initiatives) is misplaced because the Florida Supreme Court later held in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So.2d 225, 229 (Fla. 1991) that its jurisdiction was limited to addressing whether the proposed amendment and ballot summaries of proposed constitutional ballot initiatives complied with the Florida Constitution and § 101.161, Fla. Stat. Motion to Dismiss, p. 12. The Secretary of State's argument plainly misreads this case, intentionally or otherwise.

The Florida Supreme Court's decisions in the *Limited Political Terms* and related cases, stand only—with respect to this case and the jurisdictional issue raised in the pending Motion to Dismiss-- for the proposition that other constitutional/illegality challenges (such as the kind raised by the Florida Senate in its Complaint here) are not reviewable in the first instance by the Florida Supreme Court in a § 101.161 ballot review advisory proceeding. The Florida Supreme Court's own opinions do not stand for the proposition, and the Florida Supreme Court has never held, that substantive challenges to voter initiatives are not justiciable by the circuit courts before an election, and the Secretary of State's twisted interpretations to the contrary are simply incorrect. The fact that Justice Overton wanted to expand the scope of the Florida Supreme Court's § 101.161 review to include other constitutional issues but could not carry the majority has no bearing on the fact that the Florida courts have repeatedly held that other, substantive challenges to proposed constitutional amendments can be raised in the circuit courts prior to an election.

That pre-elections suits for injunction are available where a proposed citizen initiative will clearly violate state or federal law is also confirmed by Florida Jurisprudence 2d:

> There are some exceptions to the general rule against the availability of an injunctive remedy. Thus, where an election is to be held in violation of the law or contrary to some well-established legal requirements, or when it will result in some substantial injury to any suitor or to the public generally, the election may be enjoined in the absence of other legal remedy. Moreover, in elections not involving the right to public office, where asserted vested contract or property rights can be more effectually protected by restraining in advance a threatened unlawful election tending toward their encroachment, a court of equity is not bound to speculate upon the likely or probable result of the election if held, but may enjoin the holding of such election in a clear case.

21 Fla. Jur. 2d Elections § 178 ("When injunction may be available")(citations omitted). Thus, the Secretary of State's Motion to Dismiss must fail for being flatly contrary to both established case law and recognized Florida authority confirming the Florida Senate's positions.

C. <u>The Jurisdiction For-- And Standards Of—Pre-Election Judicial Review Are Clear</u>.

It is beyond peradventure that this Court has subject matter jurisdiction to hear the Florida Senate's claims in this case. As Florida Jurisprudence 2d further confirms:

> If a proposed amendment to the state constitution by its terms specifically and necessarily violates the Federal Constitution, its submission to the electorate of the state for adoption or rejection may be enjoined at the suit of proper parties in order to avoid the expenses of submission.

10 Fla. Jur 2d Constitutional Law § 35 ("Injunction when amendment violates United States Constitution")(citing to the continued viability of *Gray v. Winthorp*, 156 So. 274 (1934)). This authority also further refutes the Secretary of State's assertion in her Motion to Dismiss that the *Gray* case is no longer valid. The above quote from Florida Jurisprudence 2d confirms the continued viability of the *Gray* case and its holding that proposed amendments can be enjoined from the ballot where, as here, they are plainly illegal.

Admittedly, pre-election challenges must satisfy exacting standards. The standard applied when evaluating a pre-election challenge, as stated by the Florida Supreme Court is clear: this

court has jurisdiction to hear pre-election challenges to proposed constitutional amendments, but courts are not to invalidate such initiatives lightly. Even so, a plainly unconstitutional or illegal initiative must be kept from the ballot.

III. CONCLUSION

The Florida Senate fully supports the right of Floridians to appropriately amend the Florida Constitution. However, it is clear from the very text of the proposed constitutional amendments at issue that they are violative of paramount federal law and are wholly unworkable. The wholesale restructuring of Florida voting rights and reapportionment contemplated by proposed Amendments 5 and 6 are suspicious and demand careful judicial scrutiny. Too often such "redistricting reforms" have been shills for disfranchising minorities and the Florida Senate believes that these amendments are so plainly violative of the Voting Rights Act that there would be no way to implement them without Florida minorities losing at least half their state and federal seats in Florida, thereby setting minority voting rights in Florida back a generation or more. This would be both illegal and unconscionable. Thus, the Florida Senate is rightfully concerned and legitimately asking this Court to exercise its lawful jurisdiction and review these proposed constitutional amendments for the protection of all Floridians and the Florida Constitution.

WHEREFORE, for all the foregoing reasons, the Florida Senate respectfully requests that this Honorable Court enter an Order denying the Secretary of State's Motion to Dismiss (and all the other related Motions to Dismiss) in their entirety and awarding all such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 6th day of July, 2010.

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Corrine Brown and Mario Diaz-Balart et al v. Dawn K. Roberts, et al.
Case No.: 2010-CA-1824

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

SUPPLEMENT TO MOTIONS TO DISMISS
BY DEFENDANTS GRAHAM AND FAIRDISTRICTSFLORIDA.ORG, INC.

Defendant FairDistrictsFlorida.org, Inc. and Intervening Defendant Bob Graham, pursuant to Rule 1.140(b), file this supplement to their previously filed motions to dismiss this action. FairDistrictsFlorida.org, Inc. and Graham set forth why the claims of Plaintiffs and each of the Intervening Plaintiffs must be dismissed.

FairDistrictsFlorida.org, Inc. also asserts an additional ground as to why it must be dismissed from the case.

Common Claims by Plaintiffs and Intervening Plaintiffs

The claims brought by Plaintiffs and Intervening Plaintiff the Florida House of Representatives all challenge the accuracy of the ballot title and summary of Amendment 5 and/or Amendment 6. (Amended Complaint for Declaratory and Injunctive Relief, filed June 29, 2010; Florida House of Representatives' Amended Motion to Intervene, filed June 25, 2010). Specifically, the "wherefore" clause of each count in Plaintiffs' amended complaint seeks a declaration that ballot summary for Amendment 6 violates section 101.161, Florida Statutes. The House, in its Amended Motion to Intervene, adopts in full Counts I through VI of the Plaintiffs' complaint, and seeks to apply these claims to the ballot summary for Amendment 5. (Amended Motion to Intervene ¶¶ 16-17.) The House also asserts an additional ground for challenging the ballot summaries of Amendments 5 and 6 (failure to disclose alleged purpose and intent of moving redistricting process from Legislature to Florida Supreme Court), and an additional ground for challenging the ballot summary of Amendment 5 only (failure to disclose alleged effect on Florida Supreme Court's mandatory review of redistricting plans). (*Id.* ¶¶ 18, 19-32). The Florida Senate expressly adopts and incorporates the claims of the Plaintiffs and the Florida House of Representatives. (Intervenor's Complaint of the Florida Senate, filed June 14, 2010, at ¶ 1). The Senate asserts two additional claims, addressed separately below.

The Florida Supreme Court has ruled that the ballot summaries for Amendments 5 and 6 comply with section 101.161, Florida Statutes. *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009). Therefore, Plaintiffs' and the Florida House's attempts to relitigate this issue, if they are to be adjudicated at all, can only be adjudicated by the Florida Supreme Court. This is because, since 1986, the Florida Supreme Court has had mandatory and exclusive jurisdiction over all challenges to the validity of an initiative petition. *See* Art. V, § 10, Fla. Const. ("The attorney general shall . . . request the opinion of the justices of the supreme court *as to the validity of any initiative petition* circulated pursuant to Section 3 of Article XI. The justices shall . . . permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters . . . .") (emphasis added); Art. V, § (b)(10) ("JURISDICTION.—The supreme court . . . [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law."); § 16.061(1), Fla. Stat. ("the Attorney General shall . . . petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161. The petition may enumerate any specific factual issues that the Attorney General believes would require a judicial determination.")

The case of *Fla. League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1982), holds that in "truly extraordinary cases," *the Florida Supreme Court* may allow the issue of the clarity of a ballot summary to be relitigated via mandamus petition to that Court. *Id.* at 399. But no reading of this case suggests the Court intended to relinquish its exclusive jurisdiction over such a claim to any other court. *Id.* at 398 ("Initially, we must address the question of whether our earlier advisory proceeding precludes *us* from considering the present cause.") (emphasis added); *id.* at 399 (cautioning that relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored and "almost always will result in *this Court* refusing to exercise its discretionary jurisdiction") (emphasis added). The Court was simply answering the question posed to it, *i.e.*, whether its previously issued advisory opinion approving the proposed amendment's ballot summary pursuant to article IV, section 10 of the Florida Constitution, served as an absolute bar to its consideration of the accuracy of the ballot summary a second time, this time in the form of a petition for writ of mandamus. The fact that the Court answered this question in the negative can only stand for this proposition; it cannot be interpreted to allow litigants to circumvent the Florida Supreme Court's exclusive jurisdiction over such claims.

Most, if not all, of Plaintiffs' and Intervening Plaintiffs' challenges to the ballot summaries were considered and rejected by the Florida Supreme Court in *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009). To the extent Plaintiffs and Intervening Plaintiffs assert they should be permitted to challenge Amendments 5 and 6 on grounds that are not expressly

addressed in that decision, the Florida Supreme Court has said otherwise. In *Advisory Opinion to the Attorney Gen. re Referenda Required for Adoption and Amendment of Local Govt. Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court applied the doctrines of law of the case and res judicata to bar claims that were or could have been raised in the consideration of a prior iteration of the ballot summary, stating:

> . . . [B]ecause our opinions addressing citizen initiatives are intended to enable proponents to remedy any flaws in the ballot language, the fact that we found only the first sentence of the ballot summary defective indicates that we implicitly rejected other challenges to the ballot summary. To hold otherwise would allow serial attacks on a proposed amendment, thwarting a proponent's efforts indefinitely. . . . All alleged deficiencies with the terms in the ballot title and summary should have been raised in the first case in which we considered this proposed amendment. Allowing only piecemeal attacks on a proposed amendment would not only be fundamentally unfair to the proponent of an amendment, it would be a misuse of the process for approval of citizen initiatives.

Id. at 505.

Accordingly, the common claims of Plaintiffs, the Florida House, and Florida Senate must be dismissed because this court lacks subject matter jurisdiction over such claims.

Additional Claims by the Florida Senate

The claims brought by Intervening Plaintiff the Florida Senate do not challenge the ballot summaries of Amendments 5 and 6 but rather allege that these amendments cannot be implemented in a manner consistent with the Voting Rights Act and the Florida Constitution. (Intervenor's Complaint of the Florida Senate, filed June 14,

2010).[1] These claims must also be dismissed because the Florida Supreme Court has repeatedly held that challenges to the substance and effect of a proposed amendment are not justiciable in a pre-election proceeding relating to the validity of a proposed constitutional amendment, whether proposed by initiative petition or by the legislature. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 801 n.1 (1998) (declining to pass on constitutionality of proposed amendment because Court's jurisdiction to issue advisory opinions regarding proposed amendments is limited to the single subject requirement and accuracy of ballot title and summary); *Advisory Opinion to the Attorney Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991) (finding opponents' "various constitutional challenges" to proposed constitutional amendment "not justiciable in the instant proceeding") (citing Art. XI, § 3, Fla. Const., Art. IV, § 10, Fla. Const.; § 16.061(1), Fla. Stat.); *Grose v. Firestone*, 422 So. 2d 303, 306 (1982) (refusing to engage in pre-election consideration of whether constitutional amendment proposed by the legislature was unconstitutional because such argument "is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented.")

These cases recognize that challenges to the substance and operation of a proposed amendment are not yet ripe—and therefore are not justiciable—until the amendment has been approved by the voters *and* appropriate facts are developed and presented to the court in an appropriate proceeding to evaluate how the amendment will operate on a real set of existing facts. *Dade County v. Dade County League of*

[1] The Senate has not filed an amended complaint adding FairDistrictsFlorida.org, Inc. as a party.

Municipalities, 104 So. 2d 512, 515 (Fla. 1958) (courts will not interfere with placement of proposed amendment on the ballot if, upon approval, the proposal can have a valid field of operation "even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law"); *Gray v. Winthrop*, 156 So. 270, 272 (Fla. 1934) (holding submission of proposed amendment to electorate should not be enjoined if amendment is not wholly void, "even though, if adopted, it may in appropriate procedure by proper parties, allegations of facts, and proof or admissions, be shown that the amendment violates paramount federal law"); *Gray v. Moss*, 156 So. 262, 266 (Fla. 1934) (rejecting effort to enjoin Secretary of State from placing proposed constitutional amendment on ballot and noting if adopted "the amendment may by due procedure be shown to be invalid if and to the extent that it operates to violate any controlling provision of the . . . Federal Constitution"); *Grose*, 422 So. 2d at 306 (constitutionality of proposed amendment may be raised in an appropriate proceeding in due course when the issues is properly presented). In light of these authorities, the Senate's claims regarding the substance and operation of Amendments 5 and 6 are not justiciable in *any* court unless and until the amendments are approved by the requisite percentage of Florida voters and a set of operative facts is developed against which to evaluate the new provisions. At that time, an interested party may bring an appropriate action to challenge the effect of the amendments as applied to a real set of facts.

The Senate asserts a right to challenge proposed amendments before the election based upon alleged conflict with federal law, citing *Gray v. Winthrop*, 156 So. 270 (Fla.

1934). As the above discussion demonstrates, the Florida Supreme Court has squarely held such claims are not justiciable before the election. *Advisory Opinion to the Attorney Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991); *see also id.* at 229-30 (Overton, J., dissenting, stating that the majority's construction means that a claim of unconstitutionality must wait until after the election to be addressed); *Grose*, 422 So. 2d at 306 (argument that substance of legislatively-proposed constitutional amendment was unconstitutional was not justiciable in proceeding seeking to enjoin submission of amendment to the electorate but may be raised in appropriate proceeding in due course when the issue is properly presented).

Even if *Gray v. Winthrop* were applicable in the present proceeding, which it is not, the principles espoused in that case and its progeny would not save the Senate's claims from dismissal. In *Gray v. Winthrop*, the Florida Supreme Court held that a court could enjoin the submission of a proposed amendment to the electorate when the amendment, on its face, violated the Federal Constitution such that no portion of the amendment could legally be effective. 156 So. at 272. However, that high standard was not met in *Gray v. Winthrop*: "The language of the amendment does not express or imply an intent that [its terms] shall operate to violate any provision of the paramount Federal Constitution, and it must be assumed, in the absence of express terms to the contrary, that the . . . amendment was intended to be operative in accord with such dominant federal law." *Id.* (reversing denial of motion to dismiss); *see also Gray v. Moss*, 156 So. 262, 264 (Fla. 1934) (reversing denial of motion to dismiss in action for injunction to prevent proposed amendment from being placed on the ballot, because amendment

did not specifically violate a provision of the Federal Constitution and was not wholly void and inoperative; therefore court was not "authorized to interfere with the processes prescribed by the Constitution for proposing and adopting amendments to the Constitution").

The Senate makes no claim that Amendments 5 and 6 expressly violate the Federal Constitution. Moreover, since the inception of the case Plaintiffs and Intervening Plaintiffs have asserted their claims are not facial claims but rather will require significant factual development.[2] Accordingly, to the extent the Senate seeks to apply the principles of *Gray v. Winthrop* to its claims in the present case, those principles necessitate dismissal of their claims.

Additional Ground for Dismissal as to FairDistrictsFlorida.org, Inc.

FairDistrictsFlorida.org, Inc., should be dismissed as a defendant because no cause of action is brought against it. Although the Florida House of Representatives orally moved for and was granted leave of court to add FairDistrictsFlorida.org, Inc. as a party defendant, neither Plaintiffs nor either of the Intervening Plaintiffs have brought any cause of action against FairDistrictsFlorida.org, Inc.

Plaintiffs' Amended Complaint merely added FairDistrictsFlorida.org, Inc. to the style of the action and added a paragraph asserting that FairDistrictsFlorida.Org, Inc. is a Florida corporation and the political committee that sponsored the Congressional

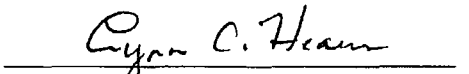
[2] Graham and FairDistrictsFlorida.org, Inc. dispute that the type of factual development Plaintiffs and Intervening Plaintiffs seek in this case is relevant, and have moved to stay discovery pending resolution of the motions to dismiss.

Amendment. (Amended Complaint ¶ 13). But none of the eight counts in Plaintiffs' Amended Complaint seeks relief from FairDistrictsFlorida.Org, Inc. Likewise, the Florida House of Representatives' Amended Motion to Intervene adds FairDistrictsFlorida.Org, Inc. to the style of the case but adds no substantive claims against it and seeks no relief from it.

Accordingly, this action should be dismissed as to FairDistrictsFlorida.org, Inc. for failure to state a cause of action.

WHEREFORE, Bob Graham and FairDistrictsFlorida.org, Inc. respectfully requests that this Court enter an order dismissing this action in its entirety, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES'
RESPONSE TO SUPPLEMENT TO MOTION TO DISMISS

Intervening Plaintiff, Florida House of Representatives, responds to the Supplement to Motion to Dismiss filed yesterday by Defendants Bob Graham and FairDistrictsFlorida.org, Inc.

1. In their Supplement, Defendants continue to treat *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992), as controlling—which it is. But Defendants maintain that arguments not addressed in the Supreme Court's advisory opinion are forever barred. (Supp. at 4-5.) They are not. Defendants' new argument—which does not relate to jurisdiction at all—relies on a misreading of *Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Land Use Plans*, 938 So. 2d 501 (Fla. 2006).

2. In *Advisory Opinion to the Attorney General re Referenda Requested for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 902 So. 2d 763 (Fla. 2005), the Court concluded that the first sentence of the ballot summary of a proposed amendment was misleading. In reliance on the Court's opinion, the sponsor rewrote the ballot summary, deleting the first sentence in its entirety, and then circulated the corrected petition.

3. When the corrected petition was presented to the Court for advisory review, its opponents again attacked it as misleading. *Adv. Opinion to the Att'y Gen. re Referenda Required for Adoption & Amend. of Local Gov't Land Use Plans*, 938 So. 2d 501 (Fla. 2006) ("*Land Use Plans*"). The Court recognized that the advisory process "is not a true adversarial proceeding," but, by analogy, used *res judicata* and the law-of-the-case doctrine to discourage the litigation of new issues ***after*** the sponsor had corrected a deficiency in reliance on an advisory opinion. *Id.* at 505. Nevertheless, the Court then proceeded to address each of the opponents' arguments on the merits, *see id.* at 505-06, and to hold that the corrected summary is not misleading, *id.* at 506.

4. *Land Use Plans* has nothing to do with this Court's jurisdiction. It reflects the Supreme Court's management of its own advisory proceeding—and its reluctance to consider arguments directed to an initiative petition specifically revised and corrected by the sponsor in reliance on an earlier opinion of the Court. Further, even under the unique circumstances of the case, the Court proceeded to address those arguments on their merits and hold that the summary complied with the accuracy requirement of Section 101.161(1), Florida Statutes. The Court's discussion of *res judicata* and law of the case was unessential to its holding and therefore *dictum*.

5. *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992), remains the law, as Defendants recognize. *Land Use Plans* does not mention—much less overrule—*Smith*. Indeed, the Supreme Court "does not intentionally overrule itself *sub silentio*." *Puryear v. State*, 810 So.

2d 901, 905 (Fla. 2002). Thus, "[w]here a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding." *Id.*; *accord Puryear v. State*, 774 So. 2d 846, 853-54 (Fla. 4th DCA 2000) (Farmer, J., dissenting) (approved by the Supreme Court in *Puryear*, 810 So. 2d at 903).

6. *Land Use Plans*, therefore, does not silently overrule decades of Supreme Court precedent holding that advisory opinions are not binding and may even be shown in subsequent litigation to have been "wrongly decided." *See In re Adv. Opinion to the Governor*, 509 So. 2d 292, 302 (Fla. 1987); *accord Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 n.3 (Fla. 1992).

WHEREFORE, Intervening Plaintiff, Florida House of Representatives, requests that the Court deny the Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction filed by Defendant, Dawn K. Roberts, and the Motions to Dismiss for Lack of Subject Matter Jurisdiction filed by Bob Graham and FairDistrictsFlorida.org, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail this seventh day of July 2010, to the following:

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

CASE NO: 10-CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S WITNESS LIST

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel and hereby files its witnesses, whose testimony may be used at trial in this matter pursuant to the Scheduling Order dated June 11, 2010 and states as follows:

1. Ronald K. Gaddie, Ph.D. (Expert)
Department of Political Science
The University of Oklahoma
Norman, OK 73019
(405) 325-4989/(405) 325-0718 Fax
rkgaddie@ou.edu

3801 Chamberlyne Way
Norman, OK 73072
(405) 329-9723

Summary of Expected Testimony: Professor Gaddie is expected to testify about the fundamentals of the redistricting process nationally and in Florida; the applicable federal and state redistricting standards; and how the proposed Amendments at issue will impact on the redistricting process.

2. John Guthrie (Expert)
Staff Director
Committee on Reapportionment
103 Senate Office Building
404 S. Monroe Street
Tallahassee, FL 32399-1100
(850) 487-5855 / Senate VOIP 5855

Summary of Expected Testimony: Mr. Guthrie is expected to testify about the fundamental components of the redistricting process in Florida; history of redistricting in Florida; the applicable federal and state redistricting standards; and how the proposed Amendments at issue will impact on the redistricting process.

3. Representative of the Florida Senate.

4. All parties to this action.

5. Any witness(es) required to authenticate or identify any documents, exhibits or other evidence.

6. All witnesses listed by all parties in this matter.

7. Any impeachment and rebuttal witnesses, as necessary.

8. Florida Senate reserves the right to object to any and all witnesses listed by all other parties in this matter.

9. Florida Senate reserves the right to amend its witness list should additional witnesses be identified through discovery subsequent to the date of the filing of this, Florida Senate's Witness List.

10. Respondent hereby reserves the right to call and/or produce any and all witnesses and/or documentary evidence listed by all parties in this matter.

Dated this 6th day of July, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 6th day of July, 2010.

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Corrine Brown and Mario Diaz-Balart et al v. Dawn K. Roberts, et al.
Case No.: 2010-CA-1824

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

CASE NO: 10-CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S EXHIBIT LIST

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel and hereby files this, Trial Exhibit List pursuant to the Scheduling Order dated June 11, 2010 and states as follows:

1. 2001 Reapportionment Public Hearing Schedule

2. Reapportionment Public Hearing Transcripts:

   a. July 12, 2001 hearing in Tallahassee, FL;
   b. August 6, 2001 hearing in Jacksonville, FL;
   c. August 7, 2001 hearing in Ocala, FL;
   d. August 20, 2001 hearing in Orlando, FL;
   e. August 21, 2001 hearing in Daytona Beach, FL;
   f. August 27, 2001 hearing in Tampa, FL;
   g. August 27, 2001 hearing in Clearwater, FL;
   h. August 28, 2001 hearing in Lakeland, FL;
   i. September 5, 2001 hearing in Vero Beach, FL;
   j. September 5, 2001 hearing in West Palm Beach, FL;
   k. September 6, 2001 hearing in Delray Beach, FL;

l. September 20, 2001 hearing in Wauchula, FL;

m. September 21, 2001 hearing in Sarasota, FL;

n. September 24, 2001 hearing in Labelle, FL;

o. September 24, 2001 hearing in Naples, FL;

p. September 25, 2001 hearing in Fort Myers, FL;

q. October 1, 2001 hearing in Pembroke Pines, FL;

r. October 1, 2001 hearing in Davie, FL;

s. October 2, 2001 hearing in Miami, FL at Miami Central High School Auditorium;

t. October 3, 2001 hearing in Miami, FL at Florida International University;

u. October 4, 2001 hearing in Key Largo, FL;

v. October 15, 2001 hearing in Pensacola, FL;

w. October 16, 2001 hearing in Panama City, FL; and

x. October 17, 2001 hearing in Gainesville, FL.

3. 2002 Districts – Maps and Geographic Background.

4. Corrected Second Amended Complaint for Declaratory and Injunctive Relief filed in the United States District Court, Middle District on December 3, 2002 in the case styled, *Honorable Mayor Raul L. Martinez, et al v. John Ellis "Jeb" Bush, et al.,* Case No.: 02-20244-CIV-JORDAN.

5. Intervenors' Amended Complaint for Declaratory and Injunctive Relief filed by Peter R. Deutsch, et al, in the United States District Court, Middle District on May 6, 2002 in the case styled, *Honorable Mayor Raul L. Martinez, et al v. John Ellis "Jeb" Bush, et al.,* Case No.: 02-20244-CIV-JORDAN.

6. Plaintiff- Intervenor, City of Pembroke Pines Complaint the United States District Court, Middle District on April 25, 2002 in the case styled, *Honorable Mayor Raul L. Martinez, et al v. John Ellis "Jeb" Bush, et al.,* Case No.: 02-20244-CIV-JORDAN.

7. Proffer of Kathleen Mears dated May 31, 2002 filed in the case styled *Honorable Mayor Raul L. Martinez, et al v. John Ellis "Jeb" Bush, et al.,* Case No.: 02-20244-CIV-JORDAN.

8. Memorandum Opinion entered by the United States District Court, Middle District on December 3, 2002 in the case styled, *Honorable Mayor Raul L. Martinez, et al v. John Ellis "Jeb" Bush, et al.,* Case No.: 02-20244-CIV-JORDAN.

9. Maps of 1996-2002 Enactive.

10. Maps of 2002 Proposed Plan.

11. Table of elected officials, 1998-2002, Florida.

12. Public hearing schedule 2002.

13. Statistical Summary of Election Results by David Bostis.

14. Maps of public hearing locations.

15. Article VI Sec. 5, Florida Constitution.

16. List of Speakers at 2001 public hearings.

17. Documentation of FREDS distribution.

18. 2010 Proposed Florida Constitutional Amendment 5.

19. 2010 Proposed Florida Constitutional Amendment 6.

20. 2010 FREDS Program.

21. White Pages by Jon Mills ("How will the Fair DistrictsFlorida.org Amendments Work?")

22. FairDistrictsFlorida.Org materials

23. Exhibit list from 2002 cases

24. Witness list from 2002 cases

25. Senate Reapportionment Committee 2009/2010 minutes, transcripts, and exhibits.

26. Transcript of Joint Meeting of the Senate Reapportionment Committee and House Select Policy Counsel on Strategic and Economic Planning held on February 11, 2010.

27. All transcripts of depositions taken in this matter including exhibits.

28. All documents produced by any party to this action.

29. All documents maintained by any party mentioned in depositions relating to this action.

30. All exhibits listed by any parties to this action.

31. All experts' reports on behalf of any parties in this action.

32. All investigative materials related to this action.

33. FLORIDA SENATE reserves the right to supplement and/or amend this exhibit list should further information become available.

Dated this 6th day of July, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 6th day of ~~June~~ July, 2010.

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Corrine Brown and Mario Diaz-Balart et al v. Dawn K. Roberts, et al.
Case No.: 2010-CA-1824

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation.

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

PLEASE TAKE NOTICE that at the July 8, 2010 hearing on Defendant Dawn K. Roberts' Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction, Defendant intends to rely upon the following authority not previously cited in her motion to dismiss:

- *Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d 1129 (Fla. 2003) (holding that the Supreme Court has exclusive jurisdiction to review judicial assignments).

Defendant intends to rely on *Pfeifler*, and the authorities cited therein, in regard to the manner in which the Florida Supreme Court determines whether its jurisdiction is exclusive or concurrent with the Florida circuit courts. *Id.* at 1132-34 (citations omitted).

Dated this 7th day of July, 2010.

TANNER BISHOP

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Attorneys for Dawn K. Roberts, in her capacity as Florida Interim Secretary of State

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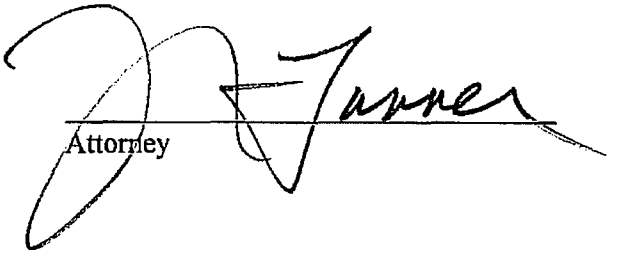

Attorney

00017979

846 So.2d 1129, 28 Fla. L. Weekly S370
(Cite as: 846 So.2d 1129)

C

Supreme Court of Florida.
PHYSICIANS HEALTHCARE PLANS, INC., et al., Petitioners,
v.
Raymond PFEIFLER, et ux., Respondents.
Kurshid Kahn, M.D., et al., Petitioners,
v.
Raymond Pfeifler, et ux., Respondents.
Nos. SC01-2062, SC01-2079.

May 1, 2003.

Medical malpractice action was brought and set for trial on the senior judges' docket in the circuit court. Defendant physicians filed motion to return the case to the elected circuit judge. The Circuit Court, Seventeenth Judicial Circuit, denied motion. Defendant physicians then petitioned for writ of prohibition. The Supreme Court held that: (1) appointment of nonelected judges as senior judges did not violate suffrage rights; (2) use of senior judge docket amounted to a proper "temporary assignment"; (3) use of senior judges to relieve overcrowding of dockets did not constitute a "division" that had to be created by local rule and approved by the Supreme Court; and (4) eligibility for temporary appointment as a retired judge was not restricted to only those judges who reached retirement age.

Petition denied.

Wells, J., filed concurring opinion.

Lewis, J., filed opinion concurring in part and dissenting in part.

Pariente and Quince, JJ., concurred in result only.

West Headnotes

[1] Courts 106 ⇐472.2

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)1 In General
106k472 Exclusive or Concurrent Jurisdiction
106k472.2 k. Appellate or Supreme Courts. Most Cited Cases
The Supreme Court has exclusive jurisdiction to review judicial assignments. West's F.S.A. Const. Art. 5, § 2(a, b).

[2] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
When a chief judge of a judicial circuit exercises his or her delegated assignment authority, the judge is acting under the Chief Justice's constitutional power to make temporary judicial assignments to ensure the speedy, efficient, and proper administration of justice within the various circuits. West's F.S.A. Const. Art. 5, § 2(a, b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

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846 So.2d 1129, 28 Fla. L. Weekly S370
(Cite as: 846 So.2d 1129)

[3] Courts 106 ⇐472.2

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)1 In General
106k472 Exclusive or Concurrent Jurisdiction
106k472.2 k. Appellate or Supreme Courts. Most Cited Cases
Because of the vital role temporary judicial assignments play in the administration of the state court system, the Supreme Court must have exclusive jurisdiction to review such assignments under its constitutional authority to oversee the administrative supervision of all courts. West's F.S.A. Const. Art. 5, § 2(a); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[4] Prohibition 314 ⇐17

314 Prohibition
314II Procedure
314k17 k. Presentation of Objections in Original Proceeding. Most Cited Cases
The Supreme Court should not address by writ of prohibition issues relating to judicial assignments that have not been raised to the trial court.

[5] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Constitutional provision specifically granting the Chief Justice power to assign retired justices or judges to temporary duty in any court for which they were qualified, together with the authority to delegate this power to the chief judge of a judicial circuit, permitted appointment of nonelected judges, and thus such appointment was not a violation of suffrage rights. West's F.S.A. Const. Art. 5, §§ 2(b), 10(b).

[6] Constitutional Law 92 ⇐602

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k595 Intrinsic Aids to Construction
92k602 k. In Pari Materia. Most Cited Cases
(Formerly 92k15)
Constitutional provisions must be read in pari materia to form a congruous whole so as not to render any language superfluous.

[7] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Use of senior judge docket in one circuit amounted to a "temporary assignment," and not an improper permanent assignment in violation of Chief Justice's constitutional authority to assign retired judges to temporary duty, even if some senior judge assignments were successive, where assignment records and docket records indicated that cases were assigned to senior judges primar-

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ily to relieve overcrowded and backlogged calendars in both the civil and criminal court dockets or because a case was likely to be one of long duration, and not all long-duration trials were transferred to senior judge docket. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[8] Courts 106 ⇨70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
A county judge cannot be assigned to perform solely circuit court work, and vice versa, unless the assignment is for a relatively short time. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[9] Courts 106 ⇨70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
A judge may be assigned to hear other court work on a temporary, regular basis as long as the assignment is directed to a specified class of cases, is used to maximize the efficient administration of justice, and supplements and assists the judges in the other court rather than replaces them. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[10] Courts 106 ⇨70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
In determining whether a judicial assignment is a "temporary assignment," the Supreme Court considers more than the duration of the individual assignment; the successive nature of the assignment, the type of case covered by the assignment, and the practical effect of the assignment on the court's jurisdiction over a particular type of case also must be considered. West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[11] Courts 106 ⇨70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Successive and repetitive judicial assignments of nonelected judges, which might be valid if considered individually, are not temporary where the practical effect is to create a de facto permanent circuit judge by administrative order. West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[12] Courts 106 ⇨50

106 Courts
106II Establishment, Organization, and Procedure

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106II(A) Creation and Constitution
106k50 k. Divisions and Parts of Courts. Most Cited Cases

Courts 106 ⚿70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Use of senior judges to relieve overcrowding of the civil and criminal dockets in a judicial circuit by assigning them to cases of long duration did not constitute a complex case "division" that had to be created by local rule and approved by the Supreme Court, but could be created by administrative order of the chief judge of the circuit court. West's F.S.A. Const. Art. 5, § 7; West's F.S.A. § 43.30; West's F.S.A. R.Jud.Admin.Rule 2.050.

[13] Courts 106 ⚿50

106 Courts
106II Establishment, Organization, and Procedure
106II(A) Creation and Constitution
106k50 k. Divisions and Parts of Courts. Most Cited Cases
A special court division may not be created by means of the temporary appointment power of the Chief Justice which is delegated to the chief judges of the circuit courts. West's F.S.A. Const. Art. 5, §§ 2(b), 7.

[14] Courts 106 ⚿81

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k81 k. Making and Promulgation of Rules. Most Cited Cases
Unlike local court rules, administrative orders of a chief judge of a judicial circuit generally do not have to be approved by the Supreme Court. West's F.S.A. Const. Art. 5, § 7; West's F.S.A. § 43.30; West's F.S.A. R.Jud.Admin.Rule 2.050.

[15] Judges 227 ⚿16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
A senior judge may be assigned temporarily to serve in a circuit other than the one in which he or she resides. West's F.S.A. Const. Art. 5, § 8.

[16] Judges 227 ⚿16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
The accountability for senior judges rests with the Chief Justice rather than the voters of a particular circuit or district; because the Chief Justice's authority and responsibility extend throughout the state, the Chief Justice can assign a senior judge to duty without limitation to the jurisdiction of the senior judge's prior service. West's F.S.A. Const. Art. 5, § 8.

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[17] Courts 106 ⚿70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
As the administrative officer of all courts within a judicial circuit, the chief judge is best equipped to assess the needs of each trial court and to allocate the judicial labor available within the circuit accordingly. West's F.S.A. R.Jud.Admin.Rule 2.050(b)(3).

[18] Judges 227 ⚿16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
Eligibility for temporary appointment as a "retired judge" was not restricted to only those judges who reached retirement age. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. § 25.073(1); West's F.S.A. R.Jud.Admin.Rule 2.030(a)(3)(B).

[19] Judges 227 ⚿16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
Under both the Rules of Judicial Administration and statutory definition of a retired judge, there are only two restrictions on the eligibility of retired judges who may be assigned to temporary judicial duty: they may not be engaged in the practice of law; and they may not have been defeated for reelection or retention in their last judicial office. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. § 25.073(1); West's F.S.A. R.Jud.Admin.Rule 2.030(a)(3)(B).

[20] Judges 227 ⚿15(1)

227 Judges
227II Special or Substitute Judges
227k15 Necessity and Grounds for Appointment
227k15(1) k. In General. Most Cited Cases
The express language of the constitutional provision that gives the Chief Justice the power to appoint temporary judges does not restrict the power to emergencies. West's F.S.A. Const. Art. 5, § 2(b).
***1131** Louise H. McMurray and Douglas M. McIntosh of McIntosh, Sawran, Peltz & Cartaya, Miami, FL, on behalf of Physicians Healthcare Plans, Inc.; F. Bryant Blevins of Marlow, Connell, Valerius, Abrams, Adler & Newman, Miami, FL, on behalf of Ronald S. Gup, M.A., etc.; Kevin P. O'Connor of O'Connor, Chimpoulis, Restani, Marreo & McAllister, P.A., Coral Gables, FL, on behalf of Ralph Greenwasser, Jr., D.O.; and Nancy W. Gregoire and Michael J. Rotundo of Bunnell, Woulfe, Kirschbaum, Keller, McIntyre & Gregoire, P.A., Fort Lauderdale, FL, on behalf of Khurshid Khan, M.D., et al., Petitioners.

Gary M. Farmer, Jr. of Gillespie, Goldman, Kronengold & Farmer, P.A., Fort ***1132** Lauderdale, FL; Charles J. Crist, Jr., Attorney General, and Charles M. Fahlbusch, As-

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846 So.2d 1129, 28 Fla. L. Weekly S370
(Cite as: 846 So.2d 1129)

sistant Attorney General, Fort Lauderdale, FL; and Michael S. Freedland of The Law Offices of Freedland & Glassman, Weston, FL, for Respondents.

PER CURIAM.

Physicians Healthcare Plans, Inc., Dr. Kurshid Kahn, and others petition this Court for a writ of prohibition. We have jurisdiction. *See* art. V, § 3(b)(7), Fla. Const.

The instant case arose from a 1998 medical malpractice action by Raymond and Cynthia Pfeifler against Physicians Healthcare Plans, Inc. (Physicians), Dr. Kurshid Kahn (Kahn), and others, which was set for trial on the senior judges' docket in the Seventeenth Judicial Circuit. In July 2000, the codefendants filed a motion in circuit court to return the case to the elected circuit judge, arguing that the assignment to a senior judge violated both this Court's general guidelines and procedures for the assignment of senior judges and the Florida Constitution. The circuit court heard argument in November 2000, denied the motion, but certified the issue as being of great public importance and invited the codefendants to seek a writ of prohibition to resolve the issues presented.

Petitioners Physicians and Kahn have filed two separate petitions for writs of prohibition with this Court. Both petitions raise a number of challenges to the senior judges' docket in the Seventeenth Judicial Circuit and ask this Court to prohibit the assignment of senior judges to preside over "long trial" medical malpractice and other "complex litigation" cases.[FN1] We have consolidated the cases as they present the same issues for the Court's resolution.

FN1. In our recent review of the Report and Recommendations of the Committee On Appointment and Assignment of Senior Judges, "we acknowledge [d] the reality of problems in isolated cases with senior judges presiding over complex and lengthy trials" and urged chief judges "to respond directly to concerns expressed when such problems are presented to them." *In re Report & Recommendations of the Comm. on Appointment & Assignment of Senior Judges*, op. at 15, 847 So.2d 415, 422, 2003 WL 1987980 (Fla. May 1, 2003). Despite such problems, we declined to adopt "either a per se prohibition on the assignment of senior judges to complex cases or a requirement that chief judges be required to show a good cause for such assignments," recognizing that "[c]hief judges must be afforded deference and latitude in the management of judicial assignments and dockets." *Id.* at 15-16, at 422. Finally, we reminded the chief judges of their duty to "select senior judges with the proper skills and experience to preside over complex cases when such assignments are necessary" and their responsibility to "periodically review[ ] the progress of *all* cases assigned to senior judges to ensure expeditious and proper handling." *Id.* at 16, at 422.

Before considering the challenges raised in the petitions, we find it necessary to explain the background relating to the assignment of senior judges. For the purposes of judicial administration, a "retired judge" is defined as a judge not engaged in the practice of law

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who has been a judicial officer of this state. *See* Fla. R. Jud. Admin. 2.030(a)(3)(B). Section 25.073(1), Florida Statutes (2001), also specifies that a retired judge may not have been defeated in seeking reelection or retention to his or her last judicial office. In 1990, Florida Rule of Judicial Administration 2.030(a)(3) was amended to provide that a retired judge serving on assignment to temporary judicial duty may be referred to by the honorary designation "senior judge." This designation had no effect on the responsibilities or conduct of the retired judge. *See In re Amendment to Rules of Judicial Admin.*, 560 So.2d 786, 787 (Fla.1990).

***1133** [1][2][3] This Court has exclusive jurisdiction to review judicial assignments based upon article V, section 2(a)-(b) of the Florida Constitution. Article V, section 2(a) gives this Court authority to adopt rules for the administrative supervision of all courts. Article V, section 2(b) gives the chief justice of this Court, as the chief administrative officer of the judicial system, "the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in that circuit." Florida Rule of Judicial Administration 2.050(b)(4) delegates the chief justice's assignment power to the chief judges of the judicial circuits to "assign any judge to temporary service for which the judge is qualified in any court in the same circuit." "When a chief judge exercises this delegated assignment authority, the judge is acting under the Chief Justice's constitutional power to make temporary judicial assignments to ensure the speedy, efficient, and proper administration of justice within the various circuits." *Wild v. Dozier*, 672 So.2d 16, 18 (Fla.1996). Because of the vital role temporary judicial assignments play in the administration of our court system, this Court must have exclusive jurisdiction to review such assignments under its article V, section 2(a) authority to oversee the administrative supervision of all courts. *See id.*

This Court has long recognized the necessity of assigning retired judges and justices to judicial service in Florida courts. *See In re Assignments of Justices & Judges*, 222 So.2d 22 (Fla.1969). As we have explained, "unless retired justices and judges are assigned to ... other courts, long delays in the discharge of case loads of some of the trial courts will result." *Id.* at 23. Thus, retired judges have provided valuable service to Florida's judicial system for many years by assisting with increased caseloads and providing relief to active judges when they are ill or disqualified. *See In re Rules Governing Assignment to Duty of Retired Justices & Judges*, 239 So.2d 254 (Fla.1970). "Were it not for the availability of this resource, the delays in scheduling hearings and trials ... would be much greater." *In re Certification of Judicial Manpower*, 592 So.2d 241, 246 (Fla.1992). Furthermore, "[t]he use of retired judges is the most cost effective and flexible program we have to address calendaring problems and emergencies as they arise." *In re Certification of Judicial Manpower*, 576 So.2d 1303, 1307 (Fla.1991). We have repeatedly noted that the services of retired judges "are available at much less expense than full-time judges." *In re Certification of Need for Additional Judges*, 669 So.2d 1037, 1039 (Fla.1996). Senior judges currently perform the work of approximately thirty-five full-time judges, at a cost of about $2.9 million, a small fraction of the cost of

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that number of full-time judges. *See* Comm. On Appointment and Assignment of Senior Judges, *Report and Recommendations of the Committee On Appointment and Assignment of Senior Judges,* 4 (Feb. 22, 2002) (on file with Clerk, Fla. Sup. Ct.).

[4] It is against this background that we address the petitioners' challenges to the assignment of senior judges. The petitioners claim that the use of senior judges violates the suffrage rights of voters; the assignment of cases to the senior judges' docket in the Seventeenth Judicial Circuit constitutes an improper permanent assignment and violates the constitutional prohibition against the creation of special court divisions; the assignment of a retired judge who resides in another judicial circuit violates the constitutional judicial ***1134** qualifications; the assignment of complex cases to the senior judge docket results in delay which constitutes an unconstitutional restraint on access to courts; judges younger than seventy years of age and those who are not eligible for retirement benefits under the state retirement system do not meet the constitutional definition of a retired judge; and senior judges may not be appointed for matters of convenience. [FN2]

> FN2. The Kahn petition makes two challenges that were not raised below: the time standards for civil litigation are violated by the use of senior judges and the intent of the Medical Malpractice Reform Act is similarly violated. This Court should not address issues relating to judicial assignments that have not been raised to the trial court. *See Wild.* Accordingly, we decline to address these challenges.

[5][6] The petitioners argue that the use of senior judges violates their suffrage rights. *See* Art. V, § 10(b) Fla. Const. (providing for election of circuit court and county court judges unless a majority of the voters in the jurisdiction approve a local option to select judges by merit selection and retention); *id.* § 11(b) (providing that when a vacancy occurs on a circuit or county court where the judges are elected by the voters the governor shall appoint a judge to fill the vacancy but an election shall be held to fill the judicial office at the end of the appointed term). The petitioners contend that voters are being deprived of the right to have their cases tried by judges who are accountable to the public because senior judges are not elected to judicial office. However, constitutional provisions must be read in pari materia "to form [a] congruous whole so as not to render any language superfluous." *Department of Envtl. Prot. v. Millender,* 666 So.2d 882, 886 (Fla.1996). The Florida Constitution specifically grants the chief justice power to assign retired justices or judges to temporary duty in any court for which they are qualified and the authority to delegate this power to the chief judge of a judicial circuit. *See* art. V, § 2(b), Fla. Const. Thus, where appointments fall within the parameters outlined in this provision, the Florida Constitution obviously permits appointment of nonelected judges and does not consider this to be a violation of suffrage rights.

[7][8][9] Next the petitioners contend that the use of senior judges in the Seventeenth Judicial Circuit constitutes an improper permanent assignment, which violates the chief justice's constitutional authority to assign retired judges to "temporary duty." Art. V, § 2(b). Based upon our previous cases,

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we can glean some basic constitutional parameters relating to the temporal nature of judicial assignments. A county judge cannot be assigned to perform solely circuit court work, and vice versa, unless the assignment is for a relatively short time. *See* Payret v. Adams, 500 So.2d 136 (Fla.1986); Crusoe v. Rowls, 472 So.2d 1163 (Fla.1985). However, a judge may be assigned to hear other court work on a temporary, regular basis as long as the assignment is directed to a specified class of cases, is used to maximize the efficient administration of justice, and supplements and assists the judges in the other court rather than replaces them. *See* Holsman v. Cohen, 667 So.2d 769 (Fla.1996); *Wild; Crusoe.*

[10][11] In determining whether a judicial assignment is a temporary assignment under Florida Rule of Judicial Administration 2.050(b)(4), this Court considers more than the *duration* of the individual assignment. The successive nature of the assignment, the type of case covered by the assignment, and the practical effect of the assignment on the court's jurisdiction over a particular type of case also must be considered. *See Wild.* At one end of the ***1135** spectrum, this Court has concluded that successive assignments totaling more than two years may be considered temporary where the class of cases covered by the assignment is limited and the practical effect is to assist the judges rather than usurp the court's jurisdiction over a particular type of case. *See Crusoe.* However, successive and repetitive assignments which might be valid if considered individually are not temporary where the practical effect is to create a de facto permanent circuit judge by administrative order. *See Payret.*

The petitioners have not challenged specific successive senior judge assignments, but instead make a blanket claim that the senior judge docket in the Seventeenth Judicial Circuit is not a temporary assignment. However, even assuming that some of the senior judge assignments have been successive, this Court has approved other successive judicial assignments. *See Wild* (approving successive six-month assignments spanning four years of county judge to preside in circuit court over half of all felony cases in a county); Rivkind v. Patterson, 672 So.2d 819, 820-21 (Fla.1996) (approving successive monthly assignments spanning several years as "a logical and lawful means to ensure the expeditious and efficient resolution of domestic violence issues in the Eleventh Circuit"); J.G. v. Holtzendorf, 669 So.2d 1043 (Fla.1996)(approving successive six-month assignments of county judge to hear most, though not all, of the juvenile cases in the county and a few other circuit court actions over the course of five years); *Holsman* (approving successive monthly assignments spanning several years of circuit court judge to handle a limited number of county court domestic violence misdemeanors in special domestic violence court); *but see Payret* (disapproving successive one-year assignments of county court judge assigned to hear all circuit court matters in special jury district of Fifteenth Judicial Circuit over five years).

Under *Wild,* however, the successive nature of the assignment is only one of three factors to be considered in determining whether an assignment is temporary. The type of case covered by the assignment and the practical effect of the assignment on circuit court jurisdiction over a particular type of case must also be considered. *See* Wild, 672 So.2d at 19. In the instant case, there is a factual dis-

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pute over the type of cases handled by the senior judge docket. The petitioners contend that the senior judge docket handles only complex, long-duration cases. The respondents counter that the records of the senior judge docket show that a wide range of circuit court cases and matters are being handled by senior judges. In fact, the circuit court's assignment records indicate that cases are assigned to senior judges primarily because of overcrowded and backlogged calendars in both the civil and criminal court dockets or because the case is likely to be one of long duration. The docket records of the elected judges also indicate that not *all* long-duration trials are transferred to the senior judge docket. Senior judge utilization statistics reflect senior judge assignments in each division of the Seventeenth Judicial Circuit, and far more in the criminal division than in any other. Further, as noted in the procedures for assignment of senior judges issued by this Court and the forms for senior judge assignments, we conclude that the senior judge assignments in the Seventeenth Judicial Circuit are compatible with the instructions and the guidance of this Court.

As to the final *Wild* factor of the practical effect of the assignment on circuit court jurisdiction, the senior judge assignments here are used to maximize the efficient administration of justice and have ***1136** the practical effect of supplementing and assisting the circuit court judges rather than usurping the judges' jurisdiction over a particular type of case. Under these criteria, we conclude the senior judge assignments are temporary and thus do not violate the constitutional parameters of article V, section 2(b).

[12][13] Unlike the judicial assignment cases cited above, the petitioners here challenge more than the temporal nature of the senior judge assignments. The petitioners also contend that the senior judge docket is a de facto complex case division which cannot be established by administrative order, but must be established through a local rule which is approved by this Court.[FN3] The petitioners note that the administrative judge who handles requests for transfer to the senior judge docket in the Seventeenth Judicial Circuit has described the docket as "our complex litigation division," handling "cases that take more than three weeks to try."

> FN3. Article V, section 7 of the Florida Constitution provides that "[a]ll courts except the supreme court may sit in divisions as may be established by general law." Section 43.30, Florida Statutes (2001), provides that divisions may be created by a local rule which is approved by this Court. Thus, a special division may not be created by means of the temporary appointment power of the chief justice which is delegated to the chief judges of the circuit courts.

[14] Pursuant to Florida Rule of Judicial Administration 2.050(b), chief judges of the circuit courts issue administrative orders to coordinate administrative matters within their jurisdiction. Unlike local rules, administrative orders generally do not have to be approved by this Court. As explained in *In re Report of Commission on Family Courts*, 646 So.2d 178, 181 (Fla.1994), divisions of Florida courts are to be established through local rules approved by this Court. *See also* art. V, § 7, Fla. Const.; § 43.30, Fla. Stat. (2001). Under the provisions of rule 2.050, local rules must be approved by a majority

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of the judges in a circuit, must be noticed and advertised, and must be approved by this Court.

Thus, if the senior judge docket is deemed a "division" it would need to be created by local rule and approved by this Court. However, this Court has approved the creation of a drug "division" of the criminal court created by administrative order in the Thirteenth Judicial Circuit. *See* *Mann v. Chief Judge of the Thirteenth Judicial Circuit*, 696 So.2d 1184 (Fla.1997). As this Court explained, despite its characterization as a division, the drug court was "more properly viewed as a specialized section or subdivision of the criminal division of the circuit court." *Id.* at 1185. In *Mann*, we cited our previous opinion in *Administrative Order Fourth Judicial Circuit (Division of Courts)*, 378 So.2d 286, 286 (Fla.1979), for the proposition that the Florida Constitution "only requires the establishment of subject matter divisions, i.e., criminal, civil, juvenile, probate, and traffic." Accordingly, we concluded that the drug court division at issue in *Mann* was properly created by administrative order. 696 So.2d at 1185. We further noted that it would place "too great a burden upon the efficient administration of justice ... [t]o require every specialized section of the major subject-matter divisions of a court to be approved by local rule." *Id.*

In light of our reasoning in *Mann* and the senior judge utilization statistics for the circuit, we conclude that the use of senior judges to relieve overcrowding of the civil and criminal dockets in the Seventeenth Judicial Circuit does not constitute a complex case division that requires approval***1137** by local rule. Thus, the senior judge assignments are proper via administrative order of the chief judge.

[15][16] Next the petitioners argue that the assignment of a retired judge who resides in a different judicial circuit violates the constitutional eligibility requirements of article V, section 8 of the Florida Constitution. This section provides in pertinent part that "[n]o person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court." Despite this seeming constitutional restriction, this Court has ruled that a circuit judge may be assigned temporarily to serve in a circuit other than the one in which he or she was elected. *See* *Card v. State*, 497 So.2d 1169 (Fla.1986); *see also* *Judges of Polk County Court v. Ernst*, 615 So.2d 276 (Fla. 2d DCA 1993) (concluding that a county judge may be temporarily assigned to serve outside the county where elected). Based upon these cases, we find no impediment to a similar temporary assignment of a senior judge. Further, as we explained in *In re Report & Recommendations of the Committee on Appointment & Assignment of Senior Judges*, 847 So.2d 415, 2003 WL 1987980 (Fla. May 1, 2003), "the accountability for senior judges rests with the chief justice rather than the voters of a particular circuit or district. Because the chief justice's authority and responsibility extend throughout the state, the chief justice can assign a senior judge to duty without limitation to the jurisdiction of the senior judge's prior service." op. at 423. Thus, we find no merit to this challenge.

[17] The petitioners argue that the assignment of complex cases to the senior judge docket results in delay which constitutes an unconstitutional restraint on access to courts. *See* art. I, § 21, Fla. Const. ("The courts

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shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."). However, most of the petitioners' delay arguments seem to be addressed to the crowded civil docket and the resulting delay of civil litigation in general. The petitioners have made no convincing arguments that these cases would be resolved any more quickly if they remained on the regular civil docket. Statistics indicate that the Seventeenth Judicial Circuit is very efficient in its management and administration of judges and the conduct of its jury trials. It is counterintuitive to assume judicial efficiency would improve if we reduced the number of judges handling cases in the circuit by eliminating the use of senior judges. As noted above, senior judges currently perform the work of approximately thirty-five full-time judges statewide. Our judicial system would be severely hamstrung without these services. *See, e.g., In re Certification of Judicial Manpower*, 592 So.2d 241, 246 (Fla.1992) ("Florida trial courts have continued to address workload pressures by relying heavily on the temporary assignment of senior judges."). We would all like to see cases disposed of expeditiously. However, limited judicial resources and burgeoning court dockets require that the chief judges retain the freedom to manage the resources for "the efficient and proper administration of all courts within [the] circuit." Fla. R. Jud. Admin. 2.050(b)(3). "[A]s the administrative officer of all courts within a judicial circuit, the chief judge is best equipped to assess the needs of each trial court and to allocate the judicial labor available within the circuit accordingly." *Wild*, 672 So.2d at 17-18 (footnote omitted).

[18] The petitioners make two challenges relating to the definition of a "retired judge." First, they argue that only ***1138** those judges who have reached the constitutional age of retirement, seventy years of age, meet the definition of a retired judge who may be temporarily appointed to judicial service under article V, section 2(b). The petitioners rely upon the judicial eligibility provision in article V, section 8 of the Florida Constitution, which provides, in pertinent part, that "[n]o justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served." The petitioners contend that when the mandatory retirement provision in article V, section 8 is read in pari materia with the judicial appointment power in article V, section 2(b), we must conclude that only those judges who have reached retirement age are eligible for temporary appointment. Second, the petitioners contend that only those judges who are eligible for retirement benefits under the state retirement system qualify as retired judges who may be temporarily appointed to judicial service under article V, section 2(b). Thus, the petitioners argue, persons who have resigned from judicial office or have chosen not to seek reelection to judicial office are not qualified for appointment as senior judges. The petitioners argue that these eligibility restrictions on the appointment of senior judges diminish the intrusion on the constitutional right to suffrage as the judges who have performed the required years of judicial service have withstood the challenge of election and reelection and have a demonstrated history of support by their electors.

[19] We are not persuaded by either argument. The Florida Constitution gives the chief justice authority to assign "retired justices or judges" to temporary duty. Art. V, §

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2(b), Fla. Const. For the purpose of judicial administration, a retired judge is defined as "a judge not engaged in the practice of law who has been a judicial officer of this state." Fla. R. Jud. Admin. 2.030(a)(3)(B). Florida Statutes also define a retired judge as "*any* former justice or judge" who has not been defeated in seeking reelection or retention in his or her last judicial office and is not engaged in the practice of law. *See* § 25.073(1), Fla. Stat. (2001) (emphasis added). Thus, under both the Rules of Judicial Administration and the Florida Statutes there are only two restrictions on the eligibility of retired judges who may be assigned to temporary judicial duty: they may not be engaged in the practice of law; and they may not have been defeated for reelection or retention in their last judicial office.

In our recent review of the Report and Recommendations of the Committee on the Appointment and Assignment of Senior Judges, we concluded that "deference to the constitutional electoral process dictate[s]" that "judges or justices who fail to win reelection or retention in their last judicial position are not eligible for senior judge service." *In re Report & Recommendations of the Committee on Appointment & Assignment of Senior Judges*, op. at 6, 847 So.2d 415, 418, 2003 WL 1987980 (Fla. May 1, 2003). However, the same concerns do not attend the temporary assignment of qualified and competent judges who have chosen to resign from judicial office before reaching the constitutional age of retirement or who are not yet eligible for retirement benefits under the state retirement system. Thus, we find no merit to the definition challenges raised by the petitioners.

Finally, the petitioners argue that senior judges may not be appointed for matters of convenience and instead all senior judge appointments must be measured by an "emergency of public business" standard. The petitioners cite our opinion in *Spector v. Glisson*, 305 So.2d 777 (Fla.1974), to ***1139** support the "emergency of public business" standard. *Spector* involved the question of whether a Supreme Court justice's resignation tendered for a future date created a current vacancy that should be filled during an upcoming general election. In concluding that a present vacancy had been created and that the vacancy could be filled in the upcoming election,[FN4] this Court stated:

> FN4. At the time of our decision in *Spector*, appellate judges and Supreme Court justices were subject to election by the voters. In November 1976, Florida voters approved an amendment whereby appellate judges and justices are subject to merit selection and retention. *See* art. V, § 10(a), Fla. Const.

> It has been said that the only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business and that when an elective office is made vacant the policy of the law is to give the people a chance to fill it as soon as possible.
> *Id.* at 781 (quoting 63 Am.Jur.2d, *Public Officers and Employees* § 128). When considered in its proper context, this opinion neither addressed the chief justice's constitutional power to assign judges to temporary duty nor created an "emergency of public business" before that power could be exercised.

[20] The express language of the constitu-

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tional provision which gives the chief justice the power to appoint judges does not restrict the power to "emergencies." Indeed, this Court has consistently measured the power to make temporary assignments by a standard of flexibility and efficiency. *See, e.g.,* *Rivkind,* 672 So.2d at 820-21 ("We find that the judicial assignments at issue constitute a logical and lawful means to ensure the *expeditious and efficient* resolution of domestic violence issues in the Eleventh Circuit.") (emphasis added); *Wild,* 672 So.2d at 18 ("When a chief judge exercises this delegated assignment authority, the judge is acting under the Chief Justice's constitutional power to make temporary judicial assignments *to ensure the speedy, efficient, and proper administration of justice* within the various circuits.") (emphasis added); *Holsman,* 667 So.2d at 772 ("The assignment ... is used to maximize the efficient administration of justice...."); *Crusoe,* 472 So.2d at 1165 ("Flexibility must be given the chief judge to utilize effectively judicial manpower in the mutual assistance of each trial court."). Thus, we conclude that an assignment which meets the constitutional requirement of "temporary duty" need not be based on an emergency of public business.

For the reasons discussed above, we conclude that the assignment of cases to the senior judge docket in the Seventeenth Judicial Circuit is constitutional and in accord with applicable law. Thus, we deny the petitions for writ of prohibition, lift the stay on further proceedings below, and remand this cause to the Seventeenth Judicial Circuit.

It is so ordered.

ANSTEAD, C.J., WELLS, J., and SHAW and HARDING, Senior Justices, concur.

WELLS, J., concurs with an opinion.

LEWIS, J., concurs in part and dissents in part with an opinion.

PARIENTE and QUINCE, JJ., concur in result only.WELLS, J., concurring.

I concur with the majority's decision.

I write to express my view, however, that it is clearly necessary to the proper administration of justice in our trial courts for the chief judge and trial counsel in each circuit to have an ongoing meaningful ***1140** discussion about the type of problems which have been raised in these proceedings and before our Committee on the Appointment and Assignment of Senior Judges. We on this Court are very dependent on the chief judges of the circuits to exercise their discretion in the administration of the circuits because each circuit has different problems which can only be effectively worked upon by those who have daily experience at the local level. The chief judges and their administrative judges benefit from regular and substantive meetings with trial counsel. Many of our chief judges presently do this. However, I believe that there needs to be a regularly working committee in each circuit for this purpose. I urge that in each circuit a bench-bar committee be established and that there be a meeting of this committee at least once every three months. This committee should consist of the chief judge of the circuit, all administrative judges in the circuit, and selected counsel participants who are active trial lawyers in the circuit. I suggest that the counsel participants be either some or all of the circuit's representatives on the Board of Governors of The Florida Bar or their nominees.

LEWIS, J., concurring in part and dissenting in part.

While I agree with the rejection of several

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challenges presented here, I write to express my disagreement with the majority's determination that the assignments of senior judges in the Seventeenth Judicial Circuit are indeed "temporary," and that the circuit has not effectively created a special senior division for the purpose of trying complex civil cases.[FN5] I believe that the pattern of assigning such cases in that circuit exceeds the constitutional parameters permitting the assignment of senior judges for temporary service. In approving this *de facto* division, I believe this Court has permitted the concept of temporary assignment-conceived to serve important public interests-to evolve into a constitutionally impermissible broad rule of convenience. Moreover, I believe a separate "complex case" or "senior judges' " docket has been created in violation of this State's constitutionally mandated court structure. Thus, for the reasons articulated herein, I must dissent from the majority's determination that the assignment process in the Seventeenth Judicial Circuit is constitutionally proper.

> FN5. While the problem presented here may be unique to the Seventeenth Judicial Circuit, that fact, standing alone, does not relieve this Court of its responsibility to ensure that the circuit adhere to constitutional constructs governing judicial assignments.

The ability of the Chief Justice of this Court to make temporary judicial assignments is grounded in the need to ensure the speedy, efficient, and proper administration of justice. *See Wild v. Dozier*, 672 So.2d 16, 18 (Fla.1996). Senior judges are a vital part of achieving this important goal. By appointing senior judges, judicial circuits can increase case disposition, address court emergencies, and solve calendar conflicts in a cost-effective manner. However, neither the need for efficiency nor the corresponding ability of senior judges to meet that objective justifies exceeding the constitutional requirement that nonelected judges receive assignment on a temporary basis, only. *See* art. V, § 2(b), Fla. Const. We cannot allow the goal of judicial efficiency, however laudable it may be, to trammel clear and direct constitutional directives. *See Wild*, 672 So.2d at 21 (Kogan, J., concurring in part and dissenting in part).

In reaching its decision, the majority must engage in a "judicial wink" as it considers the true definition of "temporary." As recognized by this Court, "[t]emporary is an antonym for permanent." ***1141** *Crusoe v. Rowls*, 472 So.2d 1163, 1165 (Fla.1985) (internal quotation marks omitted). A temporary assignment, by definition, cannot "usurp, supplant, or effectively deprive circuit court jurisdiction of a particular type of case on a permanent basis." *Id.* Our decision in *Payret v. Adams*, 500 So.2d 136 (Fla.1986), compels us to be wary against circumstances rendering de facto permanency to allegedly temporary assignments. *See id.* at 138 (invalidating an assignment that was successive and repetitive, having been renewed annually for a period of five years). Thus, we must examine the judicial assignment's duration as well as its nature, the type of cases covered, and the practical effect of the assignment on circuit court jurisdiction over a particular type of case. *See Wild*, 672 So.2d at 19.

The regularized process of assigning complex civil cases to senior judges in the Seventeenth Circuit effectively supplants the

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jurisdiction of active judges over those matters. The invalidity of this process is not mitigated by the fact that not every complex civil litigation matter is assigned to the senior judges' docket. A substantial percentage are, with consequent impact on the rights of the parties involved. There is no corresponding emergency, such as a violation of the speedy trial rules, to justify consistent reassignment of these cases. Indeed, the only justification offered is the mantra of judicial efficiency, which, however noble, cannot create its own constitutional foundation that so clearly violates constitutional strictures.

In determining that no special division has been created in the Seventeenth Judicial Circuit, the majority, in my opinion, glosses over the practical de facto effect of the process in operation there. By giving notice that the trial of a case will likely exceed two-and-a-half weeks, attorneys can almost ensure placement on the docket slated for hearing by a senior judge. The process effectively allocates cases to a distinct group of judges-not by subject matter-but by the complexity of the case and projected length of trial. *Cf.* *Mann v. Chief Judge of the Thirteenth Judicial Circuit*, 696 So.2d 1184, 1185 (Fla.1997). Thus, a distinct de facto "complex case" division has been created in the Seventeenth Judicial Circuit without issuance of a local rule in accordance with proper procedure.

In Broward County, senior judges have become a de facto permanent circuit division for the trial of complex civil cases not by the method authorized by the Florida Constitution, but by judicial direction. While I understand the demands placed upon those responsible for the administration of the local system and the current status of resources, a de facto system such as this exists beyond constitutional parameters, and I must respectfully dissent from the majority opinion as outlined herein.

Fla.,2003.
Physicians Healthcare Plans, Inc. v. Pfeifler
846 So.2d 1129, 28 Fla. L. Weekly S370

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida Corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF APPEARANCE

YOU ARE HEREBY NOTIFIED that the undersigned attorney on behalf of the Intervening Defendant, BOB GRAHAM, makes this appearance and requests that copies of all pleadings, motions, and notices be supplied to the firm of DOBSON, DAVIS & SMITH at the address shown below.

DATED this 8th day of July, 2010.

7-8-10

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via United States Mail and by electronic mail this 8th day of July, 2010, to:

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation.

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing before the Honorable Jackie Fulford, Circuit Judge, will be held **Thursday, July 8, 2010, beginning at 2:00 P.M.** in courtroom 3G, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida, on the following motions and responses thereto:

- Defendant's Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction;
- Graham's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition; and
- FairDistrictsFlorida.org, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition.

(90 minutes have been reserved.)

If you are a person with a disability who needs accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Doug Smith, Office of Court Administration, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301, Telephone (850) 577-4401, Facsimile (950) 487-7947, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the schedule appearance is less than 7 days. If you are hearing or voice impaired, call 711.

Dated this 6th day of July, 2010.

TANNER BISHOP

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I HEREBY CERTIFY that on this 6th day of July, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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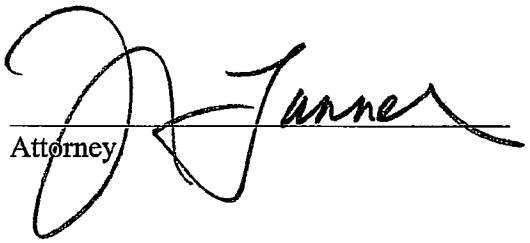

Attorney

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO BOB GRAHAM'S EMERGENCY MOTION TO QUASH SUBPOENA OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER

Intervening Plaintiffs, the Florida House of Representatives (the "Florida House"), responds to Bob Graham's Emergency Motion to Quash Subpoena or, in the Alternative, Motion for Protective Order, dated July 9, 2010.

1. Graham states that he will be in New Orleans, Louisiana, on Tuesday, July 13, 2010, and therefore unavailable to attend his schedule deposition. The Florida House is willing to accommodate Graham's schedule—and it so informed Graham's counsel two weeks ago.

2. On June 25, 2010, counsel for the Florida House emailed a notice of deposition to Graham's counsel,[1] together with a letter that invited Graham to provide alternative dates that might be more agreeable to his schedule: "We are happy to consider alternative dates no later than the week beginning on July 12, 2010, provided they are mutually acceptable and reasonably fit within the existing schedule." *See* Exhibit A. Graham's counsel never responded to the letter.

3. The Florida House remains willing to reschedule the deposition. Graham's meetings in New Orleans, Louisiana, are scheduled to conclude at 4 p.m. on July 13, 2010. *See* Exhibit B. The Florida House offers to accommodate Graham and take his deposition at any time between Tuesday, July 13, 2010, and Saturday, July 17, 2010. Graham's deposition will not require more than 90 minutes and can be conducted either by telephone or videoconference.

4. The scheduling issue raised in Graham's Motion might conveniently have been resolved—without taxing this Court's time and attention—had Graham responded to the letter that accompanied the notice of deposition, consistent with usual custom in similar circumstances.

WHEREFORE, Intervening Plaintiff, Florida House of Representatives, requests that the Court deny Graham's Emergency Motion to Quash Subpoena or, in the Alternative, Motion for Protective Order.

---

[1] At the time, Graham was represented by only two law firms: Meyer, Brooks, Demma and Blohm, P.A., and Messer, Caparello & Self, P.A. The letter was emailed to attorneys with these firms. Graham's newest counsel did not file a notice of appearance until yesterday, thirteen days after the letter was sent.

Respectfully submitted,

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I certify that a true and correct copy of the foregoing has been furnished by United States Mail this ninth day of July 2010, to the following:

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FORT LAUDERDALE
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June 25, 2010

SENT VIA E-MAIL

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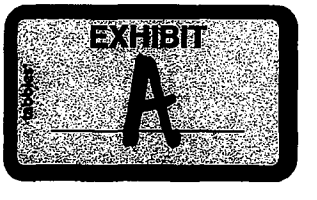
Re: *Brown v. Roberts*, Case No. 2010-CA-1824 (Fla. 2d Cir. Ct.)

Dear Counsel:

The Florida House seeks to depose a corporate representative of Defendant, Fair Districts; Ellen Freidin, the Chair of Fair Districts; and Intervening Defendant, Bob Graham. The Secretary of State and Bob Graham have moved to stay discovery pending resolution of their motions to dismiss. It is our understanding that Fair Districts and Graham object to any depositions occurring before the Court rules on the motions to stay.

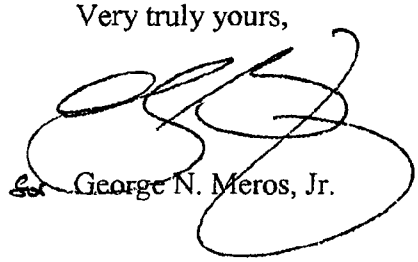
Obviously, given the expedited nature of this case and imminent election deadlines, delay is not an option. Therefore, we enclose notices of deposition of the three witnesses, to take place in Miami on July 13, 2010. We are happy to consider alternative



dates no later than the week beginning on July 12, 2010, provided they are mutually acceptable and reasonably fit within the existing schedule.

Please contact us with any concerns.

Very truly yours,



George N. Meros, Jr.

National Commission on the
BP DEEPWATER HORIZON OIL SPILL
AND OFFSHORE DRILLING

SHARE

Meeting 1 Press Release

STATEMENT FROM COMMISSION CO-CHAIRS

THE HONORABLE BOB GRAHAM AND THE HONORABLE WILLIAM K. REILLY

July 3, 2010

The Commission will convene its first public meeting in New Orleans July 12 and 13. The purpose of this meeting is to hear directly from the people of the Gulf Coast whose l and livelihoods have been so profoundly affected by the BP Deepwater Horizon spill. Their experiences will be the foundation for our recommendations to the American peop President, and the Congress.

Our thoughts and prayers are with the families of those who have lost their lives in this disaster, and with all of the many people who have been harmed. We recognize and e the frustrations -- and the outrage -- of the people of the Gulf and all Americans. We will reach out to the public, affected parties, and technical experts to make an independe determination of what went wrong and to develop recommendations to avoid a disaster of this magnitude from happening again.

The Commission will rely upon the best available advice on regulatory, technical, legal, scientific and risk-management issues to ensure that any offshore drilling is done safe with all due regard for the long-term economic and environmental health of the Gulf Coast.

What: First Commission Meeting
When: **Monday, July 12, 2010, 9 a.m. - 6 p.m.,**
with public comment from 4 p.m. - 6 p.m.
Tuesday, July 13, 2010, 9 a.m. - 4 p.m.,
with public comment from 3 p.m. - 4 p.m.
Location: Hilton Riverside Hotel
Two Poydras Street, New Orleans, Louisiana
On-site registration for those who want to attend the meeting opens at 7 a.m. each day. Attendees must register on-site each morning of the meeting. Seats are limited and public attendees will be taken on a first come, first serve basis. Large bags are discouraged and bags will be checked at the discretion of security.
Details:
Public comments will be heard from 4 p.m. to 6 p.m. on Monday, July 12th, and from 3 p.m. to 4 p.m. on Tuesday, July 13th. Registration for public comments opens at 7 a.m. each day and is also on a first come, first serve basis. Comments will be limited to 3 minutes per person so that the Commission can hear from as many individuals as possible.

The Press: Please confirm plans to attend with David Cohen, Commission Press Secretary, by e-mailing to Dave.Cohen@oilspillcommission.gov. Include your name and th name of your organization. Credentials required at door.
Cameras and broadcast equipment need to be set up by 6:45 a.m. both days. Doors will open for media at 6 a.m..

As more detailed information about the meeting becomes available, it will be posted at www.oilspillcommission.gov.

EXHIBIT B

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY DIRECTED TO FAIRDISTRICTS AND ELLEN FREIDIN

Intervening Plaintiffs, the Florida House of Representatives (the "Florida House"), responds to the Motion for Protective Order Regarding Discovery Directed to FairDistricts and Ellen Freidin, dated July 9, 2010 (the "Motion").

1. Most of the Motion is political rant, invective, and re-argument of Defendants' Motions to Dismiss. The remainder argues that FairDistrictsFlorida.org, Inc., the sponsor of the challenged amendments, and its Chairperson, Ellen Freidin (collectively, "Fair Districts"), have no discoverable information to provide at their depositions. This position cannot be sustained.

2. In the interpretation of initiative petitions, courts look to several sources, including the "explanatory materials available to the people as a predicate for their decision." *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 885-86 (Fla. 1996) (quoting *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979). Fair Districts has promulgated such "explanatory materials," *see* Exhibit A, and Plaintiffs are entitled to inquire into it and any other "explanatory materials" that might have been presented to the public as a basis for its decision. While such materials are not dispositive of the meaning of initiative petitions, they are certainly relevant.

3. The intent of the petition sponsor is also relevant to the interpretation and meaning of the proposed amendments. While "the intent of the framers should be accorded less significance than the intent of the voters," *Williams v. Smith*, 360 So. 2d 417, 420 n.5 (Fla. 1978); *accord Myers v. Hawkins*, 362 So. 2d 926, 930 (Fla. 1978) ("[T]he intent of the framer of a constitutional provision adopted by initiative petition will be given less weight in discerning the meaning of an ambiguous constitutional term that the probable intent of the people . . . ."), *less* significance does not equal *zero* significance. Thus, the sponsor's intent is unquestionably probative. And the meaning of the amendments challenged in this case is critically important.

4. To be discoverable, the information sought must only be "reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280(b)(1). This is a broad and inclusive right. The meaning of the challenged amendments is central to Plaintiffs' claims in this case. All matters relevant to their meaning and interpretation are discoverable.

5. Fair Districts accuses the undersigned of "unprofessional" conduct, claiming that the depositions were scheduled "on extremely short notice with no effort whatsoever being made to coordinate the times." Not true. On June 25, 2010—on the very same day the Florida

House added Fair Districts as a defendant—counsel for the Florida House emailed a notice of deposition to Fair Districts counsel,[1] together with a letter that invited alternative dates: "We are happy to consider alternative dates no later than the week beginning on July 12, 2010, provided they are mutually acceptable and reasonably fit within the existing schedule." *See* Exhibit B.

6. Fair Districts had advance notice of eighteen days—even under the expedited schedule entered by the Court—and was expressly invited to coordinate the times. It did not. It ignored the letter and did not propose another date. It certainly did not take the position that it should never have to offer testimony—a position it offers for the first time on a Friday afternoon before a 6:45 a.m. Monday hearing. The claim that there was no effort to coordinate is false.

WHEREFORE, Intervening Plaintiff, Florida House of Representatives, requests that the Court deny the Motion for Protective Order Regarding Discovery Directed to FairDistricts and Ellen Freidin, dated July 9, 2010.

Respectfully submitted,

George N. Meros, Jr.
Florida Bar No. 263321
Andy Bardos
Florida Bar No. 822671
Allen C. Winsor
Florida Bar No. 016295
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-3189
Attorneys for Intervening Plaintiff, Florida House of Representatives

[1] At the time, Fair Districts was represented by only two law firms: Meyer, Brooks, Demma and Blohm, P.A., and Messer, Caparello & Self, P.A. The letter was emailed to attorneys with these firms. Fair Districts' newest counsel newest counsel did not file a notice of appearance until yesterday, thirteen days after the letter was sent.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail and email this ninth day of July 2010, to the following:

Stephen M. Cody
16610 SW 82 Court
Palmetto Bay, Florida 33157
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Lynn C. Hearn
Meyer, Brooks, Demma and Blohm, P.A.
Post Office Box 1547
Tallahassee, Florida 32302
Attorneys for Defendant, FairDistrictsFlorida.org, and Intervening Defendant, Bob Graham

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Attorneys for Intervening Plaintiff, Florida House of Representatives

How will the FairDistrictsFlorida.org Amendments Work?

Jon Mills, Dean Emeritus, University of Florida Levin College of Law; Florida House of Representatives (1978-1988); Speaker (1987-88); Professor of Florida Constitutional Law; Style and Drafting Chair of the 1998 Florida Constitution Revision Commission

What do the amendments say?

- Legislative and Congressional districts may not be drawn with intent to favor a party or incumbent.
- Districts must maintain the equal opportunity of minority communities to elect representatives of their choice and participate fully in the political process.
- Districts must be contiguous and to the extent possible must be compact and adhere to existing local boundaries.
- Districts must be roughly equal in population.

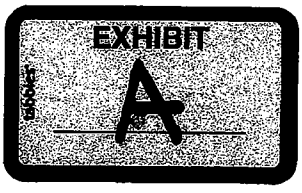
How will the amendments work to prevent political gerrymandering while preserving minority voting rights?

- They establish rules the legislature must follow when it draws Congressional and Legislative district lines.
- The public, the press and non-governmental organizations will have the opportunity to publicly comment before and after the Legislature draws the initial maps and will be able to notify the Legislature of any failure to comply with the standards before the maps are finalized. (The notices will be part of the public record.)
- Then the legislature will have two choices: either ignore the deficiencies or correct them.
    - If the Legislature corrects them, then the constitutional provisions will have worked.
    - If the Legislature ignores the deficiencies, then there is evidence on the record that the Legislature was on notice of the defects and nevertheless it drew the district(s) with intent to favor a party or incumbent.
- Any deficiencies in the districting that are not corrected after public debate can be challenged in court and the courts will be able to enforce the constitutional standards.

How will the standards prevent political gerrymandering?

- It is difficult or impossible for a drafter to draw districts to achieve a particular political result if the districts have to be compact and adhere to local boundaries.
- Districts that are not compact or community based – ones that are bizarrely shaped – will have to be justified. An odd looking district that favors a particular party should be presumed to be unconstitutional.

Paid political advertisement paid for and approved by FairDsitrictsFlorida.org



- The use of registration or performance data when drawing the district lines would be discoverable and could be evidence of a violation of the standards.

How are the proposed standards different from the existing law?

- There is presently no prohibition in the Florida law against political gerrymandering.
- There is presently no requirement that districts be compact or that they adhere to existing local boundaries.
- While minority voting rights are presently guaranteed by federal statute, the new standards will enshrine them in the Florida Constitution and they will be difficult to repeal. These standards will not change current law but they will ensure that the law is permanent in Florida.
- In the 2002 redistricting litigation, there was a political gerrymandering challenge to the plan on the basis that the districts were not compact or community based. The Florida Supreme Court rejected the challenge because compactness and adherence to community boundaries "**are not constitutionally required.**" *In re Constitutionality of House Joint Resolution 1987*, 817 So.2d 819, 832 (Fla. 2002) (emphasis added). The 2002 challengers would have had strong grounds for their challenges if the proposed standards had been in the Florida Constitution.

Won't the Legislators just ignore the standards or find a way around them?

- Legislators will, because of public scrutiny and pressure, find it necessary to acknowledge and honor the new constitutional requirements.
- If, after notice of non-compliance from the public, they ignore the standards, that will provide evidence that the resulting political favoritism was intended.
- Courts will enforce the new constitutional requirements.

Will there be any other advantages?

- The standards will increase the role and effectiveness of public comment.
- The enhanced public involvement will provide a very potent incentive for following the rules.
- Public comment and debate of redistricting plans will now have real meaning. In fact the new standards will define the debate on redistricting.

In summary, the standards proposed in the two FairDistrictsFlorida.org amendments will have a real and substantial impact in bringing fairness and partisan equity to redistricting in Florida. They are far more than litigation standards. They will be drafting guidelines. They will be the basis for public comment and objections. If legislators fail to follow the rules after of the public has pointed out violations of those standards, that failure will provide evidence that the districts or plans have been drawn with intent to favor a party or incumbent. There will be a constitutional framework for court challenges on the basis of unfair political gerrymandering.

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ATTORNEYS AT LAW

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FORT LAUDERDALE
JACKSONVILLE
KEY WEST
LAKELAND
MELBOURNE
MIAMI
NAPLES
ORLANDO
TALLAHASSEE
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June 25, 2010

SENT VIA E-MAIL

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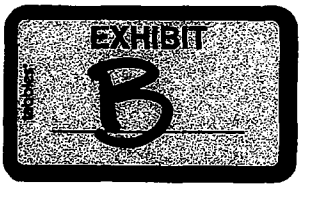
Re: *Brown v. Roberts*, Case No. 2010-CA-1824 (Fla. 2d Cir. Ct.)

Dear Counsel:

The Florida House seeks to depose a corporate representative of Defendant, Fair Districts; Ellen Freidin, the Chair of Fair Districts; and Intervening Defendant, Bob Graham. The Secretary of State and Bob Graham have moved to stay discovery pending resolution of their motions to dismiss. It is our understanding that Fair Districts and Graham object to any depositions occurring before the Court rules on the motions to stay.

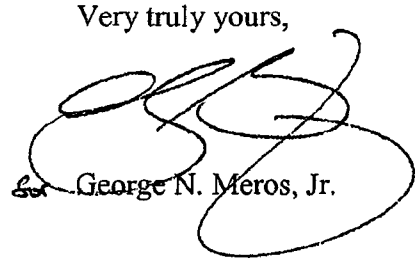
Obviously, given the expedited nature of this case and imminent election deadlines, delay is not an option. Therefore, we enclose notices of deposition of the three witnesses, to take place in Miami on July 13, 2010. We are happy to consider alternative



dates no later than the week beginning on July 12, 2010, provided they are mutually acceptable and reasonably fit within the existing schedule.

Please contact us with any concerns.

Very truly yours,



George N. Meros, Jr.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida Corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF EMERGENCY HEARING

PLEASE TAKE NOTICE that this cause will come on for hearing on Intervening Defendant, Bob Graham's Emergency Motion to Quash Subpoena or in the Alternative, Motion for Protective Order, before the Honorable Jackie L. Fulford, in Courtroom 3G at the Leon County Courthouse, Tallahassee, Florida beginning at **6:45 a.m., Monday, July 12, 2010,** or as soon thereafter as counsel may be heard.

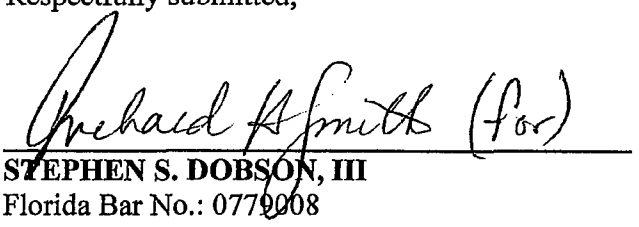
One hour has been set aside for said hearing.

GOVERN YOURSELVES ACCORDINGLY.

7-9-10

DATED this 9th day of July, 2010.

Respectfully submitted,



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Attorneys for Intervening Defendant,
BOB GRAHAM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via United States Mail and by electronic mail this 9th day of July, 2010, to:

Counsel for Intervening Defendant, Bob Graham:

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The Florida Senate:

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Attorney

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida Corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

EMERGENCY MOTION TO QUASH SUBPOENA OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER

COMES NOW, Bob Graham, the intervening defendant, by and through his undersigned counsel, and moves this Court to quash the subpoena issued by counsel for intervening plaintiff, the Florida House of Representatives, and served on Bob Graham at approximately 8:20 p.m. on June 28, 2010 (attached as Exhibit "A"). As grounds therefore, the undersigned states the following:

1. The undersigned was retained on July 7, 2010 to represent the interests of Bob Graham with regard to the above-referenced subpoena.

7-10-10

2. Bob Graham is a former two-time Governor of the State of Florida and served three terms as a Senator for the State of Florida in the United States Senate.

3. The President of the United States has previously appointed Senator Graham as co-chair of the Presidential Commission on the Deepwater Horizon Oil Spill and Deepwater Oil Exploration.

4. As part of the responsibility and duties of this Presidential Commission, Senator Graham and the other members have scheduled field hearings of the Commission in various cities along the Gulf region.

5. On July 13, 2010, Senator Graham is scheduled to be chairing a field hearing in New Orleans, Louisiana as part of his duties and responsibilities involving this Presidential Commission. This is the same date that counsel for the Florida House of Representatives have subpoenaed Senator Graham for a videotaped deposition in Miami, Florida. Prior to subpoenaing Senator Graham, this date was not cleared or approved by Senator Graham or his counsel and was scheduled without regard for Senator Graham's already scheduled Presidential Commission field hearing in New Orleans, Louisiana.

6. This motion is being submitted on an emergency basis due to time constraints and the aforementioned facts.

WHEREFORE, the intervening Defendant, Bob Graham, respectfully requests this Court to quash the subpoena issued for his videotaped deposition on July 13, 2010, or, in the alternative moves for a protective order prohibiting his deposition from being taken on July 13, 2010.

DATED this 9th day of July, 2010.

Respectfully submitted,

STEPHEN S. DOBSON, III
Florida Bar No.: 0779008

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Attorneys for Intervening Defendant, BOB GRAHAM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via United States Mail and by electronic mail this 9th day of July, 2010, to:

Counsel for Intervening Defendant, Bob Graham:

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JENNIFER S. BLOHM
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General Counsel
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Counsel for Intervening Plaintiff,
The Florida Senate:

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Attorney

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

CORRINE BROWN AND MARIO DIAZ-BALART,

PLAINTIFFS, AND

FLORIDA HOUSE OF REPRESENTATIVES,
AND FLORIDA SENATE, INTERVENING PLAINTIFFS,

V. CASE NO.: 2010 CA 001824

DAWN K. ROBERTS, IN HER CAPACITY AS
INTERIM SECRETARY OF STATE OF THE STATE OF
FLORIDA, AND FAIRDISTRICTSFLORIDA.ORG, INC.,
A FLORIDA NOT-FOR-PROFIT CORPORATION,

DEFENDANTS, AND

BOB GRAHAM, INTERVENING DEFENDANT.
_____/

6/20/10
8:20p
PT 12PY

SUBPOENA FOR VIDEOTAPED DEPOSITION

TO: BOB GRAHAM
14814 Breckness Place
Miami Lakes, FL 33016-1458

YOU ARE COMMANDED TO APPEAR before a person authorized to take depositions at GrayRobinson, P.A. 1221 Brickell Avenue, Suite 1600, Miami, Florida 33131, **on July 13, 2010 at 9:00 a.m.**, for the taking of your deposition in this action.

If you fail to appear, you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

Dated on June 25, 2010.

For the Court

Andy Bardos

\255036\8 - # 227116 v1

Exhibit "A"

Subpoena issued by:
George N. Meros Jr.
Florida Bar No. 263321
Allen C. Winsor
Florida Bar No. 016295
Andy Bardos
Florida Bar No. 822671
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Florida House of Representatives

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

Case No.: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

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ORDER ON MOTIONS TO DISMISS

THIS CAUSE came on to be heard on July 8, 2010, on the Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction filed by Defendant, Dawn K. Roberts, on June 22, 2010, and the Motions to Dismiss for Lack of Subject Matter Jurisdiction filed by Defendants, Bob Graham and FairDistrictsFlorida.Org, Inc., on June 24, 2010, and June 29, 2010, respectively. The Court, having reviewed the motions and responsive pleadings filed by the parties, and being otherwise fully advised in the premises, finds as follows:

1. In this case, Plaintiffs' and Intervening Plaintiffs' complaints allege that the ballot summaries for Amendment 5 and Amendment 6 (the "Amendments") are misleading. The Senate additionally claims the Amendments violate federal and Florida law. The Plaintiff(s)

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and Intervening Plaintiff's seek declaratory and injunctive relief. The Circuit Court has authority to grant declaratory and injunctive relief pursuant to sections 26.012 (3) and 86.011, Florida Statutes.

2. With the exception of the limited circumstances where jurisdiction is expressly denied by the Constitution or Florida Statutes, Circuit Courts have plenary jurisdiction over all matters. *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 895 (Fla. 2003); *Dep't of Revenue v. Kuhnlein*, 646 So.2d 717, 720 (Fla. 1994). One such exception was created in 1986, in the adoption of Article IV, Section 10 and Article V, Subsection (3)(b)(10) of the constitution (the "Advisory Opinion Process").

Specifically, Article IV, Section 10 provides:

> The Attorney general shall as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously.

Article V, Subsection 3(b)(10) provides that the supreme court:

> Shall, when requested by the attorney general pursuant to the provisions of Section 10, Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

These provisions established the Supreme Court's present mandatory and exclusive jurisdiction to issue an "advisory opinion" upon the request of the attorney general, on voter initiative petitions to amend the Constitution.

3. Here, the Florida Attorney General requested an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes. The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued an advisory opinion

holding that "the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to the Attorney General Re Standards for Establishing Legislative District Boundaries*, 3 So.3d 175 (Fla. 2009).[1]

4. The defendants and intervening defendant argue that adoption of the Advisory Opinion Process established the Supreme Court's present mandatory and exclusive jurisdiction over *all* pre-election challenges to voter initiative petitions to amend the Florida Constitution. Based on the clear and unambiguous language in the constitution, as well as the opinions of the Florida Supreme Court following adoption of the Advisory Opinion Process, this court cannot so conclude. The Supreme Court has held that creation of the advisory opinion process did not restrict the right to challenge petitions according to precedent:

> When [the] provisions [creating the advisory process] were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised. This necessarily implies that other legal challenges would continue to be permissible under existing precedent; and our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution.

Fla. League of Cities v. Smith, 607 So.2d 397, 398-99 (Fla. 1992) (emphasis added); *Smith v. American Airlines, Inc.*, 606 So.2d 618 (Fla. 1992). Therefore, any challenges permissible under existing precedents survived the creation of the Advisory Opinion Process in 1986. Those

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[1] The complaints now pending in circuit court contain eight counts alleging the ballot titles and summaries are misleading. At least two of these were arguably addressed in the advisory opinion by the Supreme Court. The allegation by the Florida Senate that the proposed amendments violate federal and Florida law, was not previously considered by the Florida Supreme Court.

precedents recognized not only mandamus actions, but also challenges to initiative petitions in Circuit Court. *See Carroll v. Firestone*, 497 So.2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So.2d 1351 (Fla. 1984).

Further, after the Advisory Opinion Process was established, the Supreme Court was presented with the opportunity to rule on the issue of whether a circuit court has jurisdiction to address a challenge to a ballot summary in an initiative petition case. In *Lane v. Chiles*, 698 So.2d 260, the Supreme Court affirmed a final summary judgment of the Circuit Court in Leon County upholding the constitutionality of Article X, Section 16, of the Florida Constitution, limiting marine net fishing. Among other things, the court agreed with the circuit court that the ballot summary claim was untimely filed in circuit court, as it was brought "eight months after it was adopted by a vote of the people and less than two weeks before the amendment was to be effective.." *Id* at 265. Although it did note that it had specifically approved the ballot summary by advisory opinion, the Supreme Court did not hold that a challenge in circuit court thereafter would have been improper. To the contrary, it agreed that the challenge in circuit court was untimely.

Thus, the Supreme Court's exclusive jurisdiction to render advisory opinions under Article V, Section 3(b)(10), Florida Constitution does not deprive Circuit Courts of jurisdiction of all challenges to ballot summaries in initiative petition challenges under Section 101.161(1), Florida Statutes. This Court, however, will certainly consider the advisory opinion previously issued by the Supreme Court with respect to the Amendments at issue here as persuasive authority.

5. If a proposed amendment specifically violates some provision of the Federal Constitution or some paramount federal law, such that it is wholly void and inoperative, it should

not be submitted to the electorate of the state for approval or rejection. *See Gray v. Moss*, 156 So. 262 (Fla. 1934); *Gray v. Winthrop*, 156 So. 270 (Fla. 1934).

6. The Court previously granted an *ore tenus* motion to add FairDistrictsFlorida.Org as a defendant. Thereafter the Plaintiff filed an Amended Complaint, and the House of Representatives filed an Amended Motion to Intervene. In the Court's review of all of the amended pleadings, however, there appears to be no relief sought against them by any of the Plaintiffs. Where no relief is sought against a party in an action for declaratory judgment, dismissal is appropriate. *McLaughlin v. Metropolitan Dade County*, 191 So.2d 615, 616 (Fla. 3d DCA 1966).

Accordingly, it is

ORDERED and ADJUDGED as follows:

1. The Defendants' motions to dismiss for lack of subject-matter jurisdiction are DENIED. This Court has jurisdiction to determine whether the ballot titles and summaries for the Amendments meet the requirements of Section 101.161, Florida Statutes, and whether the Amendments on their face, but not as applied, violate the Constitution, federal law or Florida law.

2. The Defendant's motion to dismiss FairDistrictsFlorida.Org, as a party to this case is GRANTED.

DONE and ORDERED this 12th day of July, 2010, at Tallahassee, Leon County, Florida.

JACKIE L. FULFORD
Circuit Judge

Copies to All Counsel of Record

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

CIRCUIT CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v.

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Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

CASE NO.: 2010-CA-1824

MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY DIRECTED TO FAIRDISTRICTS AND ELLEN FREIDIN

Defendant FairDistrictsFloirda.org, Inc. (FairDistricts) and Ellen Freidin move for a protective order from discovery requests propounded by the Plaintiffs. FairDistricts was sued after entry of the scheduling order and never agreed to any discovery. FairDistricts and Ms. Freidin contend that discovery in this action is totally inappropriate and show the Court:

1. Any factual disputes asserted in this *pre-election* litigation are not "ripe" for resolution. All the implementation issues raised by the Plaintiffs deal with the interaction

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between Amendments 5 and 6 – which have not and may never become the law – and whatever unknown federal voting rights act may be in effect at the time of redistricting in 2012. It is a hypothetical academic enterprise initiated by incumbent politicians solely to disrupt the FairDistricts campaign, to require that it spend money and time on this litigation instead of educating voters and to discover internal campaign documents and testimony that can be twisted and distorted for political advantage. This Court should not require the disruption of the campaign, the expenditure of tens of thousands of dollars in attorneys' fees and hours of judicial effort on factual discovery regarding the implementation of Constitutional Amendments that may never become law.

2. Likewise discovery is not appropriate for the facial challenges that are asserted. Article V, Section 10 of the Florida Constitution sets forth a mechanism for reviewing the pre-election validity of Citizen Initiatives such as Amendments 5 and 6. The procedure requires that the Supreme Court resolve such challenges before April 1st so that the citizen proponents can campaign for the amendments free from the distractions of litigation and confident that they will at least have an opportunity to appear on the ballot. In this case, the Plaintiffs seek to do exactly the opposite; disrupt the campaign and abuse the Court's discovery procedures for political advantage. Why else would they wait 16 months from the Supreme Court's decision to bring this challenge? Why else would they time this litigation so that they could demand "expedited" discovery and claim "prejudice" if such discovery is delayed – prejudice of their own making since they sat on their hands for more than a year?

3. Obviously such time should not be wasted, which is why the procedures of Article V, Section 10 are limited; there is no reason to litigate non-facial challenges to a

proposed amendment. Regardless of how the Court rules on the jurisdictional challenges, the law is clear that only facially validity challenges are allowed *pre-election.* This is why a stay is required, and at the very least why the proponents of the Amendments should not be harassed by burdensome mid-election discovery demands.

4. Regarding the challenge to the ballot summary, there are no factual disputes and no basis for seeking discovery. The Supreme Court has already "approved" the ballot summary. Over $4,000,000 has been raised and spent in reliance on that decision. The intentions, legal opinions and motivations of those who prepared the amendments are totally irrelevant to their construction or constitutionality – if adopted the proposed amendments will say what they say, and it is for the Courts to interpret the language. Furthermore, the only possible purpose in cross examining Ms. Freidin, a Fair District's volunteer, regarding press releases or public communications is to create campaign propaganda. Mr. Meros' angry and dramatic claims that he needs to "cross examine under oath" these volunteer citizens on their understanding of campaign laws and their campaign materials is exactly why this type of politically motivated case should not be allowed in the first place.

5. The entire purpose of this litigation is the discovery fishing expedition they seek to launch, an effort to obtain snippets of testimony (on videotape!) that can be used politically. This is an abuse of the courts and of the discovery process.

6. Whatever the Court decides regarding the Motion to Dismiss, there will be an expedited appeal. Either the Plaintiffs will appeal the dismissal or the Defendants will file a Writ of Prohibition. The Supreme Court will decide the fate of this case and they are ready and waiting for the opportunity – at the very least this Court should stay

discovery until the Supreme Court rules. Otherwise Defendants will suffer irreparable harm from having to stop their campaign, spend valuable time and waste limited resources on irrelevant discovery.

7. The depositions set for next Tuesday were set on extremely short notice with no effort whatsoever being made to coordinate the times. This is both unprofessional and unreasonably burdensome. The undersigned counsel for FairDistricts is out of state on vacation next week and is not available to attend the depositions. Ellen Freidin has medical appointments and campaign responsibilities. Again, the alleged time constraints are artificial and of the Plaintiffs own making – there is absolutely no reason these issues could not have been raised a year ago and resolved in the ordinary course of business. If a broader stay is not entered, a protective order is required to postpone the discovery set for next week until it can be rescheduled for a time when everyone can appear. It is unfair that the Plaintiffs have fabricated a crisis and now seek to benefit from the sense of urgency they alone are responsible for creating. They have presumably known for months what discovery they want, but have made no effort to coordinate their requests with Defendants.

8. The specific items of discovery requested are irrelevant to any issue in the case and production would be an undue burden. If discovery is to be allowed, a hearing should first be held requiring that the Plaintiffs specify exactly what relevant factual dispute is related to each item of discovery sought.

9. The Florida Supreme Court approved the ballot initiatives in January 2009. The Plaintiffs delayed fling this case for more than a year, until the eleventh hour, in order to create a crisis and force this discovery on a short schedule without due notice

and proper procedures being followed. Defendants and their counsel should not be forced to suffer the consequences of this calculated tactic; such abuse of the system should not be rewarded. Discovery should be quashed, stayed or in the alternative a protective order granted as to FairDistricts and Ellen Freidin.

WHEREFORE FairDistricts and Ellen Freidin request that the Court enter an order finding there are no factual issues ripe for consideration that require discovery and quashing all pending discovery requests. In the alternative the Court should stay discovery pending final disposition of the Motion to Dismiss and should grant a protective order as to the depositions scheduled next Tuesday.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to the following on this 9th of July, 2010, by: [ ] Facsimile [✓] U.S. Mail [ ] Hand Delivery. + Email

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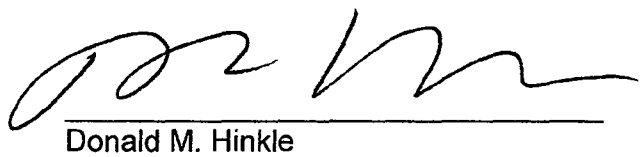

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CASE NO.: 2010-CA-1824

NOTICE OF APPEARANCE

COMES NOW Donald M. Hinkle of Hinkle & Foran and files this Notice of Appearance as Co-Counsel on behalf of the Defendants, FAIRDISTRICTSFLORIDA.ORG, INC., in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent to the following on this 8th of July, 2010, by: [ ] Facsimile [X] U.S. Mail [ ] Hand Delivery.

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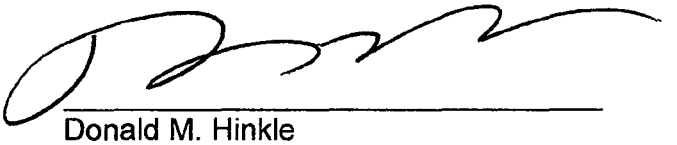

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**FLORIDA HOUSE OF REPRESENTATIVES'
SUPPLEMENTAL RESPONSE TO MOTION TO STAY DISCOVERY
AND RESPONSE TO THE COURT'S QUESTIONS AT JULY 12, 2010 HEARING**

Intervening Plaintiffs, the Florida House of Representatives (the "Florida House"), submits this supplement to its response to the Motion to Stay Discovery. The Florida House further responds to the questions raised by the Court at this morning's hearing.

On June, 22, 2010, the Defendant moved to stay discovery "until its challenge to the Court's subject matter jurisdiction asserted in its Motion to Dismiss is addressed and ruled upon." The Court has now ruled on that issue. At this morning's hearing, the Court temporarily stayed discovery and *sua sponte* questioned whether a trial is necessary. The Court suggested that the claims should be resolved on the papers without the need for testimony. Although the

Florida House agrees with the Court's suggestion with respect to *some* of the asserted claims, the resolution of certain other claims will require evidence. This Court should proceed with the trial scheduled to begin July 26, 2010.

I. THIS COURT'S BLANKET DENIAL OF DISCOVERY WOULD BE ERROR.

The Fourth DCA—just last month—granted *certiorari* after a circuit court entered an order prohibiting all discovery. In *Herman v. J.P. Morgan Securities, Inc.*, 35 So. 3d 188 (Fla. 4th DCA 2010), the trial court entered an order that "constituted a blanket denial of discovery requests." *Id.* at 188. The Petitioner argued "that this left him unable to defend respondents' declaratory judgment action and unable to prosecute his counterclaim." *Id.* The appellate court agreed and concluded that the trial court departed from the essential requirements of law. *Id.*; *accord Giacalone v. Helen Ellis Memorial Hosp. Foundation, Inc.*, 8 So. 3d 1232 (Fla. 2d DCA 2009) ("[T]he circuit court departed from the essential requirements of the law in making a blanket denial of [the] discovery requests.").

In this case, the blanket denial of discovery would likewise be error. Whether a ballot summary is misleading is not a purely legal issue in all cases. The accuracy or inaccuracy of the summary—like the accuracy or inaccuracy of any statement or representation—might easily depend on facts extrinsic to the summary. *See* § 16.061(1), Fla. Stat. (2009) (authorizing the Attorney General, when petitioning the Florida Supreme Court for an advisory opinion, to "enumerate any specific factual issues that the Attorney General believes would require a judicial determination"). If so, there must be a right to discover relevant facts. And if those facts are disputed, there must be a right to prove them at trial—as in any other case. This has been done before.

In *Wadhams v. Board of County Commissioner of Sarasota County*, 501 So. 2d 120, 123 (Fla. 2d DCA 1990), *quashed by* 567 So. 2d 414 (Fla. 1990), the trial court heard the testimony of a linguist, an attorney, and two voters who found the language of a ballot measure confusing. The trial court and appellate court upheld the ballot language, but the Supreme Court concluded that the ballot was misleading. 567 So. 2d at 418 ("Deception of the voting public is intolerable and should not be countenanced."). Neither the District Court of Appeal nor the Supreme Court took any exception to the receipt of evidence by the trial court.

Where facts have any potential relevance, a categorical prohibition against all discovery is inappropriate. The Florida Rules of Civil Procedure, including the rules authorizing discovery, apply to "all actions of a civil nature," *see* Fla. R. Civ. P. 1.010, and contemplate a broad right of discovery, *see Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) ("Our rules of civil procedure broadly allow parties to obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending action, whether the discovery would be admissible at trial, or is merely reasonably calculated to lead to the discovery of admissible evidence."). Discovery is essential to the ability of a plaintiff to prove its claims—either at the summary judgment stage or, if genuine issues of material fact remain or no motion for summary judgment is filed, at trial.

This case should proceed as any other. If the Court concludes at the summary judgment stage—or on a motion for judgment on the pleadings—that no trial is necessary, then it should so order. Otherwise, the parties should proceed to trial as in any other case.[1]

[1] The fact that the plaintiffs seek a declaratory judgment does not compel a different result. *See* § 86.071, Fla. Stat. ("When an action under this chapter concerns the determination of an issue of fact, the issue may be tried as issues of fact are tried in other civil actions in the court in which the proceeding is pending.").

II. THE PRESENTATION OF EVIDENCE AT TRIAL IS NECESSARY FOR SOME—BUT NOT ALL—CLAIMS.

From the outset of this case, the parties stipulated to a trial. The Florida House has been preparing for that trial and for its presentation of evidence. Some of the pending claims likely will not require resolution at trial, and the Florida House planned a summary judgment motion as to those.[2] For example, Count I claims the ballot summary promises equality of representation, which the amendment text does not deliver. This is a purely legal claim. Next, Count III claims that districts are *already* equal in population and that the summary deceives by suggesting otherwise. This also should not require evidence.[3] Count IV considers the meaning of "drawn to," which also is unlikely to require evidence (although it might be a subject of inquiry at the FairDistrictsFlorida deposition, if permitted).

On the other hand, certain claims *will* require the presentation of evidence. For example, the Florida House's claim relating to the ability of the Supreme Court to consider such fact-intensive claims within the existing 30-day constitutional requirement will depend on expert and other testimony. The manner in which the process takes place, the nature of challenges, and the evidence that would relate to such challenges are all matters on which the Court needs evidence.

Likewise, Count II, which alleges that minority protections are being "oversold" to the public, requires evidence. The Florida House plans to present the expert testimony of R. Keith Gaddie, a professor at the University of Oklahoma who has been qualified as an expert witness

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[2] The Florida House has not planned to move for summary judgment on all claims, because it believes some need factual development. If the Court cancels the trial, though, the Florida House will move for summary judgment on additional claims and will present substantial affidavit testimony. This would constitute a departure from the current plan, which anticipated a final trial. If the Court cancels the trial, the Florida House respectfully seeks a one-week extension of the summary judgment deadline, which is currently this Friday.

[3] It is likely the parties will stipulate that redistricting plan put in place in 2002 included districts as nearly equal in population as practicable. If not, only limited statistical evidence would be necessary.

in numerous redistricting cases. Professor Gaddie understands the impact these amendments would have on minority districts, and he will testify that if these amendments were in place in 2002, the current maps would provide fewer minority access seats. In other words, the amendments would harm minority interests—not promote them. This result cannot be discerned merely from the summary or the amendment text, and requires evidence. Furthermore, Professor Gaddie can testify as to the impact of the intervening U.S. Supreme Court decision in *Bartlett v. Strickland*, and its practical effect on the redistricting process, particularly with respect to protecting minority districts.

Professor Gaddie can also provide additional evidence relevant to the operation of the amendments, including about the various methods by which compactness might be measured. And he can testify as to the importance of considering incumbency in complying with the federal Voting Rights Act and how that process would be impacted by the amendments.

In addition to ballot summary issues, the amendments constitute a due process violation because the existing thirty-day requirement would provide insufficient time for appropriate review. The Florida Supreme Court has already said that this type of fact-intensive review is "impossible" in thirty days. *See In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 282 (Fla. 1992) ("[I]t is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, within the [30-day] time constraints of article III, section 16(c)."). And Professor Gaddie will provide testimony confirming this position.

Other witnesses could include Robert West and John Guthrie—staff members of the Florida House and Senate, respectively—who have vast experience in redistricting matters. These witnesses could testify to how the map-drawing process works, the considerations that go

into maps and plans, and how the entire process would be affected by the amendments. Only with the proper context and factual basis can this Court rule on all of the pending claims.

It is critical that the parties be permitted to present evidence to support their claims. But the Florida House has no intention of burdening any party with unnecessary discovery. In fact, **the Florida House now seeks only one deposition and no written discovery**. That limited discovery is necessary and should be permitted. But even if the Court denies any discovery, the Florida House still requests that it be allowed to present its evidence at the final hearing.

III. SOME DISCOVERY IS NEEDED, BUT IT IS VERY LIMITED.

The Florida House noticed for deposition only the sponsors of the amendments and Intervening Defendant Graham. It does not plan any further depositions. It seeks no written discovery.[4] Graham is apparently not available, and the Florida House will no longer pursue his deposition at this time. This leaves only the sponsor.[5] Thus, the Florida House currently seeks only one brief deposition, which can be completed remotely, and can be scheduled at the witness' convenience. It would be limited in scope. All that the Florida House seeks is the sponsor's interpretation, and the related inquiries regarding materials or statements offered by the sponsor.[6] This is not asking too much.

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[4] The Florida House served FairDistrictsFlorida with some limited interrogatories, but because this Court dismissed FairDistrictsFlorida as a party, those interrogatories are no longer at issue.

[5] The Florida House separately noticed the corporate entity, FairDistrictsFlorida.org, and Ellen Frieden, its chairwoman. If the entity itself selects a corporate witness other than Ms. Frieden, the Florida House will not pursue Ms. Frieden's separate deposition. The Florida House does not seek, and has not sought, discovery from the Defendant Secretary of State.

[6] The intent of the sponsor and "explanatory materials available to the people"—although not controlling—are tools the Court uses to determine an amendment's proper interpretation. *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 885-86 (Fla. 1996) (quoting *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979)); *see also Williams v. Smith*, 360 So. 2d 417, 420 n.5 (Fla. 1978); *Myers v. Hawkins*, 362 So. 2d 926, 930 (Fla. 1978).

The sponsor has offered the public conflicting statements regarding their intent. At this morning's hearing, the Court saw the paper entitled "How will the FairDistrictsFlorida.org Amendments Work?", which the Florida House filed. Although the paper is marked "Paid political advertisement paid for and approved by FairDistrictsFlorida.org," counsel for the sponsors at this morning's hearing quickly dismissed its effect. That FairDistrictsFlorida is so unwilling to publicly commit to the amendments' purpose—even unwilling to accept their own paid statements—demonstrates the need for the deposition. The Florida House is entitled to this simple, limited discovery.

IV. THE SUMMARY JUDGMENT PROCESS WILL BE INSUFFICIENT IN THIS CASE.

At this morning's hearing, the Court indicated it would permit affidavits in support of motions for summary judgment. If no trial is permitted, the summary judgment process will be unworkable. It is nearly certain that Defendants will dispute some or all of the facts proffered by Plaintiffs. Those facts will require resolution at trial.

WHEREFORE, the Florida House of Representatives respectfully asks that this Court enter an order:

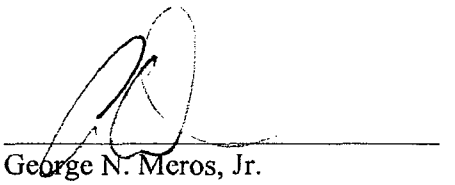
1. Denying the request to stay discovery.

2. Permitting the parties to present evidence at the trial scheduled for this month.

3. Permitting the deposition of FairDistrictsFlorida (through a corporate representative).

* Further, only in the event the Court cancels the trial, the Florida House of Representatives requests entry of an order extending by one week the current deadline for summary judgment motions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

CASE NO: 2010 CA 001824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

FILED
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BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

BRIEF MOTION FOR EXTENSION OF TIME

Intervenor-Defendant, the Florida Senate, by and through its undersigned counsel, hereby files its Brief Motion for Extension of Time, and in support thereof states as follows:

1. The Florida Senate is requesting a 4-day extension of time (*i.e.* to July 20, 2010) to file its dispositive motion in the instant matter.

2. The dispositive motion deadline is currently set for July 16, 2010.

3. However, the Florida Supreme Court has just ordered Defendants in this action to respond to Plaintiffs' writ petitions by the close of business July 19, 2010.

4. Hence, the Florida Senate needs the extra time to prepare both sets of pleadings properly.

5. All of the other parties to the instant matter have been notified of the request herein.

6. The Florida Senate has no objection to the opposing parties also getting a 4-day extension until July 27, 2010 to file responsive pleadings. This will allow the Court to keep the current trial schedule while being fair to all sides.

S IN COMPUTER R.B.

WHEREFORE, respectfully requests an extension of time until July 20, 2010, to file its dispositive motion in the instant matter and such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished via email to Stephen M. Cody, Esq., Attorney for Plaintiffs, 16610 S.W. 82 Court, Palmetto Bay, FL 33157, George Meros, Esq., Attorney for Intervenor, Gray Robinson, P.A., 301 South Bronough Street, Suite 600, P.O. Box 11189 (32302-3189), Tallahassee, Florida 32301 and Michael J. Tanner, Esq., Attorney for Defendant, Tanner Bishop, The Modis Building, One Independent Drive, Suite 1700, Jacksonville, Florida 32202, this 13th day of July, 2010.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

BOB GRAHAM'S REPLY TO THE FLORIDA HOUSE OF REPRESENTATIVES' SUPPLEMENTAL RESPONSE TO MOTION TO STAY DISCOVERY AND RESPONSE TO THE COURT'S QUESTIONS AT JULY 12, 2010 HEARING

Intervening Defendant BOB GRAHAM files this reply to Intervening Plaintiff Florida House of Representatives' Supplemental Response to Motion to Stay Discovery and Response to the Court's Questions at July 12, 2010 Hearing[1] and states as follows:

Although Graham maintains that this Court lacks subject matter jurisdiction over this matter and does not waive any of his arguments on the jurisdictional question, he

[1] Graham joins with the Florida House's request that an order be entered extending by one week the deadline for filing dispositive motions.

replies to the Florida House's supplemental response in light of this Court's ruling denying the Defendants' and Graham's motions to dismiss, but limiting this proceeding to facial challenges. This Court's granting a stay of discovery and limiting this proceeding to facial challenges is amply supported by an extensive line of constitutional amendment cases, and the Florida House's arguments to the contrary are unavailing.[2]

While the Florida House has cited to general cases relating to discovery, it has not cited to a single case involving a pre-election challenge to a constitutional amendment in which discovery and an adjudication of factual issues was permitted. Graham also has not found any such case and posits that it is because no such case exists. The Florida House's reliance upon *Wadhams v. Board of County Commissioners of Sarasota County*, 501 So. 2d 120 (Fla. 2d DCA 1987) is misplaced. The *Wadhams* case was a post-election, not pre-election, case and it involved an amendment to a county charter, not a citizen initiated constitutional amendment. Thus, it provides no support for the Florida House's contentions.

In a pre-election challenge to enjoin election officials from placing a proposed amendment on the ballot, the question before the court is limited to whether the requirements for placing the amendment on the ballot have been met. *Crawford v. Gilchrist*, 59 So. 963, 966 (1912). One such requirement, section 101.161(1), Florida Statutes, requires a ballot summary to state the "chief purpose" of the proposed amendment. "In evaluating an amendment's chief purpose, a court must look not to

[2] The mere fact that the initial scheduling order contemplated discovery is an insufficient basis to permit such discovery. While the Florida House brandishes the scheduling order as if it is set in stone, it is within this Court's discretion to alter the order when circumstances arise warranting such alteration as has occurred in this case.

subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself, such as the amendment's main effect." *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000). To meet this requirement, the ballot summary "need not explain every detail or ramification of the proposed amendment." *Advisory Opinion to the Attorney General Re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 974 (Fla. 2009).

All the evidence that the Florida House seeks to introduce relates to the implementation, merits and wisdom of the amendments and, at this time, is purely speculative. The Florida Supreme Court has repeatedly held that such claims are not properly considered pre-election. *See Fine v. Firestone*, 448 So. 2d 984, 992 (Fla. 1984)(stating "it is not our responsibility to address the wisdom or merit of this proposed initiative amendment and we have not done so"); *Advisory Opinion to the Attorney General Re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006)(holding "we will not address the merits or wisdom of the proposed amendment"); *Advisory Opinion to the Attorney General Re 1.35% Property Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 971 (Fla. 2009)("the Court will not address the merits or wisdom of the proposed amendment"). Where, as here, the Court examines a facial challenge to be determined as a matter of law, the consideration of evidence is inappropriate. *See Dep't of Revenue v. Fla. Home Builders Assoc.*, 564 So. 2d 173, 175 (Fla. 1st DCA 1990)(finding that in a facial challenge to the constitutionality of a statute, factual assertions regarding the statute's effect on specific contracts were irrelevant and that the court properly declined to consider them).

Courts have repeatedly rejected challengers' pre-election claims that would require detailed examinations of an amendment's interaction with existing provisions. In *Smathers v. Smith,* 338 So. 2d 825 (Fla. 1976), the Court approved a proposed amendment because there was a reasonable basis to find the amendment was germane to the provisions it amended. *Id.* at 831. But as to the challengers' claims that the amendment conflicted with other provisions of the constitution, the court stated:

> . . . *if* the amendment should be adopted by the voters, it may then become our responsibility, in an appropriate case, to harmonize its reach and meaning with other provisions of the Constitution. To attempt at this time an interpretation of the proposal as it relates to other constitutional provisions would be premature.

Id. (emphasis added).

In *Gray v. Moss,* 156 So. 262 (Fla. 1934), the challengers asserted a proposed amendment providing for a homestead exemption from real estate taxes would reduce the property subject to taxation so substantially as to impair the ability of school districts to pay their outstanding bonds, thus violating the contract clause of the U.S. Constitution. *Id.* at 705-706. The court found the proposed amendment should be placed on the ballot because it did not "expressly, specifically, and inevitably" violate the Federal Constitution such that it was wholly void and in such circumstances "the courts are not authorized to interfere with the processes prescribed by the Constitution for proposing and adopting amendments to the Constitution." *Id.* at 706. The Court explained:

> an adjudication of the extent to which the amendment may legally operate, if at all should not be had before its submission for adoption, since it might not be adopted; and, if adopted, its illegal operation in whole or in part upon organic rights might be waived or be obviated by other laws or by controlling circumstances.

Id.; see also Dade County v. Dade County League of Municipalities, 104 So. 2d 512, 518 (Fla. 1958) (stating, "[a]ny effort on our part to attempt to reconcile the provisions of the existing charter with the proposed amendment prior to the approval of the latter would be an encroachment on the political functions of the electorate. . ."); *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla. 1982)(finding that "Appellants' argument that the substance of the amendment is unconstitutional is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented"); *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270 (Fla. 1934).

It also is premature for this Court to consider the sponsor's intent in drafting these amendments. Indeed, the fact that the Florida House seeks discovery as to FairDistricts' intent is further evidence of the post-election nature of its claims. A sponsor's intent becomes relevant only if an amendment is adopted and even then, is not the first consideration in interpreting an amendment. It is well settled that in interpreting constitutional amendments, courts "begin with the amendment's plain language." *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d 566, 570 (Fla. 2008). Only if the language in an amendment is ambiguous does intent become an issue, and even then, it is the voters' intent, not the intent of the sponsor, that is the "touchstone for determining the meaning of a constitutional amendment adopted by initiative." *Advisory Opinion to the Governor – 1996 Amendment 5(Everglades)*, 706 So. 2d 278, 282 (Fla.

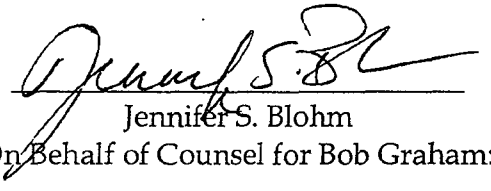
1997). The intent of the sponsor is of little significance in the interpretation of a citizen initiated constitutional amendment. *See Florida Hospital Waterman, Inc. v. Buster*, 984 So. 2d 478, 499 (Fla. 2008) (holding that the Court's precedent "emphasizes that whether a drafter intended a certain effect does not matter nearly as much as the probable intent of the voters. . ."); *Myers v. Hawkins*, 362 So. 2d 926 (Fla. 1978); *Williams v. Smith*, 360 So. 2d 417, 420 n. 5 (Fla. 1978)(explaining that the sponsor's intent is of less significance because to hold otherwise would "allow one person's private documents to shape constitutional policy as persuasively as the public's perception of the proposal" which the Court could not permit). Because the voters' intent is central to any interpretation of an ambiguous term in a citizen initiated constitutional amendment, it is axiomatic that these cases were all considered and decided post-election.

No discovery or trial is warranted in this limited facial proceeding. The Florida House's assertions, while couched in terms of misleading ballot summary, are in reality attacks on the merits of the amendments and their application. While as applied challenges to the merits may be ripe for consideration upon specific facts if the amendments are adopted, they are not justiciable in the current pre-election proceeding. Therefore, no adjudication of factual matters is necessary or appropriate in this proceeding.

WHEREFORE, Bob Graham respectfully requests that this Court permanently stay discovery in accordance with its Order on Motions to Dismiss and prohibit the introduction of factual matters, affidavits or other evidence that is not appropriately before this Court in a facial challenge. Bob Graham respectfully joins with the Florida

House's request that the parties be afforded an extra week to complete their dispositive motions.

Respectfully submitted,



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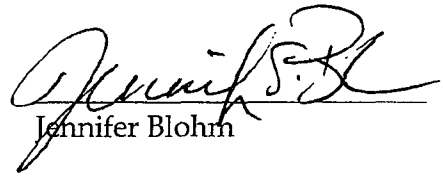

Jennifer Blohm

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

CORRINE BROWN and MARIO DIAZ-BALART,
Plaintiffs, and FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE, Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, INC., Defendants,
and BOB GRAHAM, Intervening Defendant.
_____/

ORDER GRANTING DEFENDANTS' AND INTERVENING DEFENDANT'S MOTIONS FOR STAY OF DISCOVERY AND DENYING DEFENDANT'S MOTION FOR STAY PENDING REVIEW

This cause came before the Court on the Defendants' and Intervening Defendant's Motions for a Stay of Discovery and the Defendant Roberts' *ore tenus* Motion for Stay Pending Review. Upon consideration of the motions, the responses and reply, having heard argument of counsel and being otherwise fully advised, the Court orders as follows:

The Defendants' and Intervening Defendant's Motions for Stay of Discovery are **GRANTED** until further order of this Court. The Defendant's Motion for Stay Pending Review is **DENIED.**

DONE and ORDERED this 12th day of July, 2010, in Leon County, Florida.

Jackie L. Fulford
Circuit Judge

Copies to Counsel of Record

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant, and

BOB GRAHAM,

Intervening Defendant.
_____/

ORDER TERMINATING DISCOVERY AND CANCELING TRIAL

This cause came before the Court on the Defendants' and Intervening Defendants' Motions to Stay Discovery. The Court has considered the motions, the parties' responses, and argument of counsel. The Court finds and orders the following:

1. The Court will not hold a trial in this case or consider live testimony.

2. Discovery is therefore terminated.

7-13-10

ORDERED this 30th day of July, 2010, at Leon County, Florida.

Jackie L. Fulford
Circuit Judge

Copies to Counsel of Record

Supreme Court of Florida

TUESDAY, JULY 13, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

Petitioner has filed a petition for writ of all writs. Respondent is hereby requested to **file** a response to the above-referenced petition on or before July 19, 2010, by 5:00 P.M. The petitioner may **file** a reply on or before July 22, 2010, by 5:00 P.M.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

FILED
2010 JUL 14 A 11:16
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA
C-04

ab
Served:

CHARLES BURNS UPTON, II
JOHN STEWART MILLS
GEORGE N. MEROS, JR.
BRADY JAMES COBB
RONALD GUSTAV MEYER
ROBERT J. TELFER, III
ANDY VELSOY BARDOS
STEPHEN MICHAEL CODY
MIGUEL A. DEGRANDY
HON. JACKIE LEE FULFORD, JUDGE

THOMAS EDWARD BISHOP
MICHAEL GRANT TANNER
ALLEN C. WINSOR
LYNN C. HEARN
JAMES A. SCOTT
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MARK HERRON
EDWARD J. POZZOLI, III
HON. BOB INZER, CLERK

COMPUTER L.J.W.

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

CASE NO: 2010 CA 001824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING FLORIDA SENATE'S BRIEF MOTION FOR EXTENSION OF TIME

THIS CAUSE having come before the Court and the Court, being otherwise fully apprised in the premises, it is hereby

ORDERED AND ADJUDGED that the Florida Senate's Brief Motion For Extension of Time is GRANTED. The parties shall serve dispositive motions on or before July 20, 2010 and any oppositions thereto shall be filed no later than July 23, 2010. @ 3:30 p.m.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida on this 13th day of July, 2010.

CIRCUIT JUDGE

Copies Furnished:

Counsel of record

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation.

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

DEFENDANT DAWN K. ROBERTS' EXHIBIT LIST

Pursuant to the Court's Scheduling Order dated June 11, 2010, Dawn K. Roberts, in her capacity as Florida Interim Secretary of State (the "Secretary"), hereby provides the following exhibit list.

Preliminary Statement

The Secretary re-asserts her position that any issues to be decided by this Court involve only matters of law. Therefore, because there are no factual issues to be adjudicated by this Court, the introduction of exhibits or evidence is unnecessary and inappropriate.

Exhibit List

Should the Court permit the parties to introduce exhibits during any trial of this case, the Secretary identifies the following as exhibits she may rely upon:

1. All pleadings and memoranda of law filed in this case.

2. All documents produced by parties or non-parties to this case.

3. All transcripts, including exhibits, of depositions taken in this case.

4. All expert reports filed on behalf of any party in this case.

5. All interrogatories or requests for admission, and answers and responses thereto served by any party in this case.

6. All documents submitted by FairDistrictsFlorida.Org, Inc. to the Florida Department of State in support of its voter initiative petitions to amend the Florida Constitution which are now known as Amendment 5 and Amendment 6.

7. The advisory opinion entered by the Florida Supreme Court styled *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175 (Fla. 2009) and all documents and pleadings submitted or utilized by any party or interested party in this proceeding.

8. Relevant Florida law, including Article IV, Section 10, Article V, Subsection 3(b)(10), and Article XI, Section 3 of the Florida Constitution and Section 101.161, Florida Statutes.

9. The Staff Analysis of the Florida House of Representatives Committee on Judiciary for CS/HJR 71 (1986).

10. The materials filed by the proponents of Amendments 5 and 6, including the draft ballot language, requests for placing the Amendments on the ballot, and the evidence of voter signatures gathered and submitted.

11. All exhibits listed by Plaintiffs, Intervening Plaintiffs, Defendant FairDistrictsFlorida.Org, Inc., and Intervening Defendant.

The Secretary reserves the right to utilize any exhibits listed on Plaintiff's Exhibit List, Witness List, and Expert Witness Disclosure, the Florida House of Representatives' Witness List, Exhibit List, and Expert Witness Disclosures, the Florida Senate's Exhibit List, and the relevant exhibit lists filed by Intervening Defendant Bob Graham. The Secretary further reserves the right to supplement her exhibit list, as permitted by the Court, and utilize any additional exhibits which are identified through additional discovery that may continue after the submission of this exhibit list.

Dated this 12th day of July, 2010.

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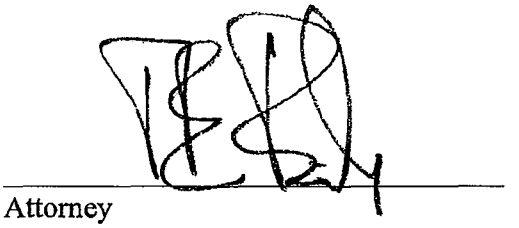

Attorney

00018009

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation.

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

DEFENDANT DAWN K. ROBERTS' EXPERT WITNESS LIST

Pursuant to the Court's Scheduling Order dated June 11, 2010, Dawn K. Roberts, in her capacity as Florida Interim Secretary of State (the "Secretary"), hereby provides the following expert disclosure.

Preliminary Statement

The Secretary re-asserts her position that any issues to be decided by this Court involve only matters of law. Furthermore, the use of expert testimony in this case is not necessary to assist the Court in understanding the issues to be adjudicated in these proceedings. Therefore,

because there are no factual issues to be resolved by this Court the introduction of testimony from any expert witness is unnecessary and inappropriate.

Expert Witness List

Should the Court permit the parties to introduce expert witness testimony during any trial of this case, the Secretary identifies the following as persons whom she may call as expert witnesses:

1. All expert witnesses listed by Plaintiffs, Intervening Plaintiffs, Defendant FairDistrictsFlorida.Org, Inc., and Intervening Defendant.

The Secretary reserves the right to call any persons listed on Plaintiff's Exhibit List, Witness List, and Expert Witness Disclosure, the Florida House of Representatives' Witness List, Exhibit List, and Expert Witness Disclosures, the Florida Senate's Witness List, and the relevant expert witness lists filed by Intervening Defendant Bob Graham. The Secretary further reserves the right to supplement her expert witness list, as permitted by the Court, and call any additional expert witnesses that may be necessary at trial, or which are identified through additional discovery that may continue after the submission of this expert witness list.

Dated this 12th day of July, 2010.

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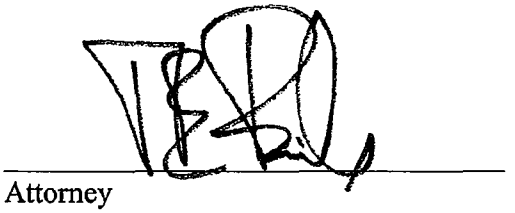

Attorney

00018006

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation.

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

DEFENDANT DAWN K. ROBERTS' WITNESS LIST

Pursuant to the Court's Scheduling Order dated June 11, 2010, Dawn K. Roberts, in her capacity as Florida Interim Secretary of State (the "Secretary"), hereby provides the following list of witnesses.

Preliminary Statement

The Secretary re-asserts her position that any issues to be decided by this Court involve only matters of law. Therefore, because there are no factual issues to be adjudicated by this Court, the introduction of evidence from any witness is unnecessary and inappropriate.

Witness List

Should the Court permit the parties to introduce testimony during any trial of this case, the Secretary identifies the following as persons whom she may call as witnesses:

1. Sarah Jane Bradshaw, Assistant Director, Division of Elections, Florida Department of State, Room 316, R.A. Gray Building, 500 Bronough Street, Tallahassee, Florida 32399-0250.

2. All witnesses listed by Plaintiffs, Intervening Plaintiffs, Defendant FairDistrictsFlorida.Org, Inc., and Intervening Defendant.

The Secretary reserves the right to call any persons listed on Plaintiff's Exhibit List, Witness List, and Expert Witness Disclosure, the Florida House of Representatives' Witness List, Exhibit List, and Expert Witness Disclosures, the Florida Senate's Witness List, and the relevant witness lists filed by Intervening Defendant Bob Graham. The Secretary further reserves the right to supplement her witness list, as permitted by the Court, and call any additional witnesses that may be necessary, or which are identified through additional discovery that may continue after the submission of this witness list.

Dated this 12th day of July, 2010.

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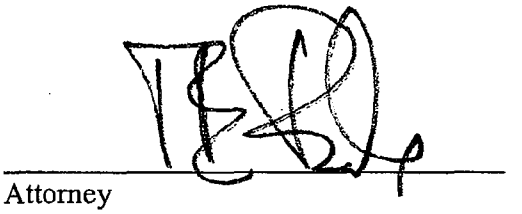

Attorney

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES'
MOTION TO AMEND OPERATIVE PLEADING

Intervening Plaintiff, the Florida House of Representatives (the "Florida House"), pursuant to Florida Rule of Civil Procedure 1.190, submits this motion to amend its operative pleading. The Florida House seeks this amendment for precautionary purposes only; it believes the legal argument described below is already adequately framed by the operative pleading. *See* Florida Rule of Civil Procedure 1.110(b) (requiring only "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief"). In support of the motion, the Florida House respectfully shows the Court the following:

1. The Plaintiffs initiated this action by filing their Complaint on May 24, 2010. The Florida House moved to intervene as a Plaintiff, and this Court accepted the motion to intervene

as the Florida House's operative pleading. (*See* Order, June 11, 2010.) The Florida House subsequently amended that operative pleading to include an additional defendant. The Defendant Secretary of State (the "Secretary") filed a response to the Florida House's operative pleading on June 29, 2010.

2. In the Florida House's operative pleading, styled an amended motion to intervene, the Florida House alleged generally that "the amendments' impacts are deliberately hidden from the electorate asked to approve them." (Operative Pleading "OP" ¶ 1.) It further alleged that the amendments "mislead, obfuscate, hide the ball, and fly under false colors." (OP ¶ 2.) And it made clear that "the ballot summaries are misleading for numerous reasons." (OP ¶ 16.) The Florida House adopted several arguments raised by Plaintiffs, and it added others. Based on recent developments, it now asserts an additional infirmity with the ballot summaries that was not specifically identified or argued in the operative pleading. The House already alleged that the ballot summaries are misleading, and it need not identify every specific problem or argument. Therefore, this amendment is unnecessary. Nonetheless, the Florida House seeks it in an abundance of caution.

3. The summaries for Amendments 5 and 6 state: "Districts must be contiguous." The text, though, provides for contiguity as one of several standards to be balanced. The text specifically states that "[t]he order in which the standards . . . [including contiguity] are set forth shall not be read to establish any priority of one standard over the other." Because the amendments expressly state there is no priority with respect to conflicting standards, there will be no mandatory contiguity requirement. This not only conflicts with the summaries, but is also a deviation from current law which provides that state legislative districts must absolutely be contiguous.

4. This Court, in another case, recently concluded that Amendment 7 suffered a similar defect. Specifically, the Court interpreted Amendment 7 to likewise repeal the existing contiguity requirement and it therefore found the ballot summary misleading for not disclosing this purported repeal. The House strongly disagrees with that ruling, and its appeal is pending. Nevertheless, if the Amendment 7 ballot summary is fatally misleading, the summaries for Amendments 5 and 6 suffer the same defect.

5. This amendment involves only additional arguments and purely legal issues. It will not delay the case and will not prejudice the parties. "Leave of court [to amend] shall be given freely when justice so requires." Fla. R. Civ. P. 1.190(a). Because of this generous standard, a court abuses its discretion if it denies leave to amend "unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." *Spradley v. Stick*, 622 So. 2d 610, 613 (Fla. 1st DCA 1993). None of these exceptions is applicable here, and this Court should grant the Motion.

6. The House requests that the Court enter an order accepting the additional argument in this Motion as if it were repeated verbatim in the House's operative pleading and denied by all Defendants and Intervening Defendants. Although no further formal pleading should be necessary, the House will—if the Court requests—file an interlineated operative pleading or other paper laying out its additional argument.

WHEREFORE, the Florida House of Representatives respectfully asks that this Court enter an order granting leave to amend the operative pleading.

Respectfully submitted,

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Attorneys for Intervening Plaintiff, Florida House of Representatives

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

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ•BALART,

Plaintiffs,

and FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant, and

BOB GRAHAM,

Intervening Defendant.

SECOND AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND MANDAMUS RELIEF

Plaintiffs, Corrine Brown and Mario Diaz-Balart, sue Defendant, Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida, and allege:

1. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by Defendant FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition has since obtained the necessary number of signatures and has been certified for placement on the November 2010 general election ballot.

7-15-10

2. The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175 (Fla. 2009).

3. The ballot title and summary for the proposed Congressional Amendment is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Id.

4. Pursuant to Article IV, section 10, Florida Constitution, the Florida Supreme Court reviewed the Petitions and rendered an advisory opinion that their summaries are clear and unambiguous and that the proposed amendments are limited to a single subject. *Id.*

5. The Congressional Amendment's ballot summary violates the strict standard for ballot clarity. Because the ballot summary misrepresents the legal effect and major ramifications of the Congressional Amendment, the Congressional Amendment must be withheld from the 2010 General Election Ballot.

6. The ballot summary overstates the protections afforded to minorities. The summary states that districts shall not be drawn to deny minorities the equal opportunity to elect representatives of their choice. In fact, the Congressional Amendment guarantees only that minorities' ability to elect representatives of their choice — whether equal or unequal — will not be diminished.

7. The ballot summary also misleads by omission. It gives no hint that the Congressional Amendment's compactness and political and geographical boundary requirements will constrain the Legislature's ability to promote minority rights.

8. The ballot summary also purports to require that districts be as nearly equal in population as practicable. But the United States Constitution already imposes this requirement, and all of Florida's congressional districts comply with it. The negative implication that this requirement does not exist, or that Florida's Congressional districts are not as nearly equal in population as practicable, is false and misrepresents the legal impact of the Congressional Amendment.

9. The ballot summary is loaded with vague and ambiguous terms that even their sponsor of the Congressional Amendment is unable or unwilling to define. As a result, the courts will draw the districts, and voters will have no say. To the extent the sponsor has attempted to clarify the Congressional Amendment's unworkable criteria, its statements have been evasive and contradictory.

The Parties

10. Plaintiff Corrine Brown is a citizen of the State of Florida and is registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3.

11. Plaintiff Mario Diaz-Balart is a citizen of the State of Florida and is registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than 60 percent of the voting-age population in Congressional District 25.

12. Defendant Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida (the "Secretary"), is the chief elections officer of the State. It is her duty under Florida law to certify the items, including proposed constitutional amendments, that will be included on the statewide, general election ballot.

Jurisdiction and Venue

13. This Court has jurisdiction pursuant to section 26.012(2), Florida Statutes.

14. Venue is proper in this Court because the Secretary is headquartered in Leon County, Florida.

15. This Court has authority to grant declaratory and injunctive relief pursuant to sections 26.012(3) and 86.011, Florida Statutes. This Court also has authority to grant relief via mandamus pursuant to Article V, Section 5(b) of the Florida Constitution of 1968, as amended.

16. Under *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of the Congressional Amendment, *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009), is no impediment this challenge.

General Allegations

17. All petitions to amend the Florida Constitution must be accompanied by a clear and unambiguous summary of the proposed amendment. § 101.161(1), Fla. Stat. (2009). The summary may not exceed 75 words. Id. The text of a proposed amendment will not appear on the ballot — only the title and summary of the amendment are placed on the ballot. *Id.* It is the responsibility of the sponsor to prepare a clear and unambiguous summary. *Id.* § 101.161(2).

18. An initiative petition can only be submitted to the voters if the proposed amendment concerns a single subject and matter directly connected therewith, *see* Art. XI, § 3, Fla. Const., and the ballot summary is clear and unambiguous, *see* Art. XI, § 5(a), Fla. Const.; § 101.161(1), Fla. Stat. (2009). A proposed amendment involves multiple subjects if, without disclosure to the voters, it substantially affects preexisting constitutional provisions or multiple branches of government. A ballot summary is not clear and unambiguous if it is misleading.

19. A ballot summary that omits material information and thus precludes the voters from casting their ballots intelligently violates the accuracy requirement. *In re Adv. Op. to Att'y Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

20. Further, if a proposed amendment specifically violates some provision of the Federal Constitution or some paramount federal law, such that it is wholly void and inoperative, it should not be submitted to the electorate of the state for approval or rejection. *See Gray v. Moss*, 15 So. 262 (Fla. 1934); *Gray v. Winthrop*, 156 So. 270 (Fla. 1934).

COUNT I – MISLEADING BALLOT SUMMARY

21. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

22. The Congressional Amendment contains two, distinct requirements that relate to the voting rights of racial and language minorities:

> • Districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of minorities to participate in the political process; and
>
> • Districts shall not be drawn to diminish the ability of minorities to elect representatives of their choice. The guarantee of an "equal opportunity" applies only to minorities' participation in the political process—not to the ability of minorities to elect representatives of their choice. The Florida

23. The Supreme Court has made clear that these are two separate and distinct requirements. *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d at 188-89.

24. The ballot summary mischaracterizes the second of these requirements (the "Non-Diminishment Provision"). The actual text of the Congressional Amendment provides: Districts shall not be drawn . . . to diminish [the] ability [of racial and language minorities] to elect representatives of their choice. But the ballot summary describes the Non-Diminishment Provision as follows:

25. Districts shall not be drawn to deny racial or language minorities the equal opportunity to . . . elect representatives of their choice.

26. The summary is misleading. The Congressional Amendment does not guarantee minorities an equal opportunity to elect representatives of their choice. It provides only that minorities' ability to elect representatives of their choice — equal or unequal — will not be diminished.

27. There is a material difference between a guarantee of equality and a mere protection against diminishment. A guarantee of equality would require the practical attainment of an objective

ideal. A protection against diminishment only guards against a worsening in the existing ability of minorities to elect representatives of their choice. In its promise of equality, the summary grandly overstates the actual — and less protective — effect of the Congressional Amendment.

28. In a series of statements made to a committee of the Florida House of Representatives, the Ellen Frieden, Chairwoman of FairDistrictsFlorida.org, Inc. (hereinafter the "Sponsor") repeatedly asserted that the Non-Diminishment Provision merely prevents future "harm" to the present ability of minorities to elect representatives of their choice:

- That last phrase prohibits the drawing of any district or plan that will reduce the ability of minorities to elect minority representatives. Plain and simple.
- Minorities' ability, the ability of minority voters to elect representatives of their choice is not going to be diminished with this amendment.
- What I do know is that these amendments will very clearly by their language forbid any legislator or any Legislature I should say, to adopt any plan that diminishes the ability of minority voters to elect representatives of their choice.
- The . . . language says that districts cannot be drawn or plans cannot be drawn to diminish the ability of minority voters to elect representatives of their choice.
- However, given that and given the language that is in our amendment, you cannot diminish the ability of . . . minority voters to elect representatives of their choice. So that is a protection that will be in the Florida Constitution. You will be violating the Constitution if you diminish the ability of minority voters to elect representatives of their choice.
- What our language says is that you cannot . . . make districts or create a plan that diminishes the ability of minority voters to elect representatives of their choice.

- What our amendments say is that . . . with regard to ability to elect representatives of choice, the Legislature cannot do anything to diminish that ability.
- And we want to make sure that in doing all that there is no harm done and no diminution of . . . the rights of minority voters.
- The language of the amendment says that you can't draw districts to diminish the ability to elect representatives of choice and that is—that is the prohibition.
- In fact, that is the reason that the language is in there to ensure that . . . the ability of minority voters to elect representatives of their choice will not be diminished.

Emphasis added.

29. Conceptually and practically, non-diminishment is different from equality. Contrary to the promise of the ballot summary, the Congressional Amendment does not require that the ability of minorities to elect representatives of their choice be affirmatively enhanced until equality is achieved. They merely prevent backsliding in relation to the status quo—equal or unequal.

30. The Congressional Amendment's sentence construction makes clear that minorities are not ensured an equal opportunity to elect representatives of their choice. The Congressional Amendment does ensure an "equal opportunity . . . to participate in the political process," and the drafter might have completed the sentence: "and to elect representatives of their choice." "Equal opportunity" would then have applied to the ability to elect the representatives of choice. This was not done.

31. As the Florida Supreme Court explained, "the negative verb 'shall not be drawn' in the proposed amendment[] modifies both clauses 'with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process' and 'to diminish their ability to elect representatives of their choice.'" *Adv. Op. to Att'y Gen. re Standards for Establishing*

Legislative Dist. Boundaries, 2 So. 3d at 189. The phrase "equal opportunity" does not modify both clauses—except in the erroneous ballot summary.

32. The Sponsor has stated that the Non-Diminishment Provision is "somewhat similar to what is in Section 5" of the federal Voting Rights Act. Where it applies, Section 5 ensures that no voting change "has the purpose or will have the effect of diminishing the ability of any citizen of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section 5 does not guarantee equality, but merely prevents backsliding, or "retrogression." The benchmark for comparison is the status quo, and not the ideal of equality.

33. Like Section 5 of the VRA, the Congressional Amendment's Non-Diminishment Provision prohibits backward steps. It prohibits the undoing or reversal of gains already achieved by minorities. It does not, however, ensure an "equal opportunity . . . to elect representatives of their choice." Thus, a redistricting plan that neither diminishes the ability of minorities to elect representatives of their choice, nor accords minorities an equal opportunity to elect representatives of their choice, would not violate the Non-Diminishment Provision.

34. In stating that the Congressional Amendment guarantees minorities the "equal opportunity to . . . elect representatives of their choice," the ballot summary misrepresents the legal impact of the Congressional Amendment and gives voters a wrong and materially misleading impression.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT II – MISLEADING BALLOT SUMMARY

35. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

36. The ballot summary is deceptive and misleading because it does not tell voters that the Congressional Amendment, through its compactness and political and geographical boundaries requirements, restrains the Legislature's ability to draw districts in which minority voters will have the ability to elect representatives of their choice.

37. Currently, the Equal Protection Clauses of the United States and Florida Constitutions are the only legal constraints that act as a ceiling on the Legislature's discretion to draw districts in which minority voters will have the ability to elect candidates of their choice.

38. If the Congressional Amendment is enacted, the Legislature will be subject to two new legal constraints: the requirements that districts be compact and that districts, where feasible, utilize existing political and geographical boundaries.

39. To avoid these new requirements, the Legislature would have to show that they conflict with the following, superior standard, which is also contained in the Congressional Amendment: "Districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

40. Except to the extent necessary to comply with this requirement and the federal Voting Rights Act, the Legislature's discretion to create districts that promote minority representation will be subject to the limitation that districts be compact and follow political and geographical boundaries.

41. The ballot summary does nothing to inform voters of the Congressional Amendment's significant effect on the Legislature's discretion under current law to promote minority representation.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT III – MISLEADING BALLOT SUMMARY

42. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

43. The ballot summary states that, under the Congressional Amendment, districts must be "as equal in population as feasible." Thus, the summary suggests that current law does not already require districts to consist of populations as nearly equal as practicable, or that districts in Florida in fact consist of unequal populations. Both of the inferences that flow from the summary are false.

44. Federal law already requires that congressional districts be as nearly equal in population as practicable. *Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

45. Florida's current congressional plan, adopted in 2002, has a total deviation of one person. Twenty-two of the State's twenty-five congressional districts have zero deviation and the other three districts only deviate by a single resident.

46. The ballot summary, therefore, misleads voters about the existing requirements applicable to the redistricting process and the legal effect of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General

Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT IV – MISLEADING BALLOT SUMMARY

47. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

48. The ballot summary confuses and misleads voters because the summary uses the same phrase—"drawn to" —inconsistently to mean no fewer than three different things.

49. First, the ballot summary provides that districts may not be "drawn to" favor or disfavor an incumbent or political party. In this case, the phrase "drawn to" means that districts may not be drawn with the intent to favor or disfavor an incumbent of political party.

50. Second, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to participate in the political process. In this case, the phrase "drawn to" means that districts may not be drawn with either the intent or result of denying the equal opportunity of minorities to participate in the political process.

51. Third, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to elect representatives of their choice. In this case, the phrase "drawn to" means that districts may not be drawn with the result of diminishing the ability of racial or language minorities to elect representatives of their choice.

52. Thus, the phrase "drawn to" has three different meanings in the summary: (i) intent, as applied to the prohibition against favoring or disfavoring incumbents or political parties; (ii) intent or result, as applied to the prohibition against denying minorities an equal opportunity to participate in the political process; and (iii) result, as applied to the prohibition against diminishing the ability of minorities to elect representatives of their choice.

53. The inconsistent use of terminology within the ballot summary is misleading. The summary fails to inform the voters, clearly and unambiguously, whether the Congressional Amendment prohibits an intent, a result, or both, in the three instances to which the phrase "drawn to" applies. In using the identical phrase to denote three different and clearly distinguishable legal standards, the ballot summary confuses and dissembles the true legal impact of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT V – MISLEADING BALLOT SUMMARY

54. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

55. The ballot summary suggests that the Legislature will be required to ignore incumbency. Under the VRA, it cannot do so. The Legislature must consider incumbency — and may favor an incumbent — to protect minority rights. By suggesting that the Congressional Amendment prohibits an intent to favor incumbents, the summary promises more than can be delivered.

56. Section 5 of the VRA, which applies to changes in electoral practices and procedures in five Florida counties (Collier, Hardy, Hendry, Hillsborough, and Monroe), prohibits changes that "lead to retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Whether a change will result in retrogression "depends on an examination of all the relevant

circumstances," including "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479.

57. One component of the opportunity to participate in the political process is the preservation of minority incumbents in positions of legislative influence and leadership. *Id.* at 483. Thus, the VRA requires the Legislature to weigh incumbency when it assesses compliance with Section 5, and permits it to favor minority incumbents as one means of compliance.

58. The Congressional Amendment, however, purports to deprive the Legislature of this important mechanism to ensure compliance with the VRA. Because it is foreseeable that the Legislature will intend to favor minority incumbents to ensure compliance with the VRA, the summaries' unqualified representation that an intent to favor incumbents is prohibited is inaccurate.

59. For the same reason, the Congressional Amendment itself contains an internal contradiction. The Congressional Amendment requires that districts not be drawn to deny or abridge "the equal opportunity of racial or language minorities to participate in the political process." The preservation of minority incumbents in positions of power is relevant to the requirement that districts maintain the equal opportunity of racial minorities to participate in the political process. This requirement thus conflicts with the prohibition against favoring incumbents.

60. The Legislature cannot fully assess and protect racial minorities' opportunity to participate in the political process unless it assesses and protects the achievements of minority incumbents. Because the conflicting requirements in subsection (1) claim equal dignity in the hierarchy of requirements, the Congressional Amendment creates an irreconcilable contradiction. This internal conflict will prevent full compliance with all requirements contained in the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting

Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VI – MISLEADING BALLOT SUMMARY

61. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

62. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, and predictably. The Congressional Amendment expresses broad and subjective concepts in undefined terms — terms which voters can reasonably construe in an endless number of differing, conflicting ways.

63. The Congressional Amendment does not define "compact" or enable voters to distinguish between compact and non-compact districts. The Congressional Amendment does not define "political and geographical boundaries" or explain when it is "feasible" and when it is not "feasible" to utilize them. The Congressional Amendment prescribes no standard by which courts can determine the "intent" of a legislative body and of the Governor.

64. Events subsequent to the Florida Supreme Court's initial, advisory review prove that the Amendment flies under false colors. Despite confusion about the Congressional Amendment, the Sponsor has refused to answer specific questions or provide voters needed clarification.

65. Long after the petition for proposed Amendment 6 was approved for circulation, the United States Supreme Court revisited its interpretation of Section 2 of the VRA. In *Bartlett v. Strickland*, ___ U.S. ___, 129 S. Ct. 1231 (2009), the Court concluded that Section 2 does not protect any minority population is not sufficiently numerous to comprise a numerical majority in a single district.

66. In *Bartlett*, Section 2 did not supersede a state constitutional requirement that county boundaries be adhered to in drawing legislative districts, although adherence to county boundaries fractured a minority community into separate districts, weakening its voting strength.

67. The ballot summaries are, therefore, misleading. Prior to *Barltett*, subsection (1) of the Petitions would arguably have protected compact minority communities too small to comprise a majority in a single district. Now, such communities are unprotected. Where such communities exist, the criteria in subsection (2) of the Congressional Amendment apply without exception. These include the mandate that district lines adhere to political and geographical boundaries. As in *Bartlett*, this mandate would fracture unprotected minority communities, undermining their voting strength.

68. The ballot summary for proposed Amendment 6 inaccurately suggesta that minority voting strength will not be diminished by adherence to political and geographical lines, and nowhere do they inform voters of the Petitions' harmful effects on minority voting rights.

69. In fact, the Sponsor's public statements have, if possible, only created more uncertainty. Notwithstanding differences in wording between the Congressional Amendment and the VRA, the Sponsor initially informed the public that the Congressional Amendment's voting-rights provisions are "identical" to and would "enshrine" in the Florida Constitution the protections in the VRA. See How Will the FairDistrictsFlorida.org Amendments Work?, Sponsor's Advertisement (Mar. 5, 2009); Stop

Protecting Politicians, TCPalm (Nov. 26, 2008); Leaning Republican, Again, Florida Trend (Sep. 1, 2008).

70. But after *Bartlett*, the Sponsor reversed course, suggesting that the Amendment affords minorities "enhanced" rights and "greater protection than exists today in federal law." See Plan to Redraw State Districts Called Unfair, Tampa Tribune (Jan. 12, 2010); Race Enters Debate Over Redrawing Florida Political Districts, Florida Times-Union (Dec. 14, 2009); Two Ballot Proposals Stir Fears, Sarasota Herald-Tribune (Nov. 27, 2009); Initiative Prompts Questions of Racial Fairness, Daytona Times (Nov. 19, 2009).

71. At the committee meeting on February 11, 2010, Ellen Freidin, the Chairwoman of Fair Districts Florida noted that the language of the Amendment and the VRA is not identical, while she refused to state that the language of the Congressional Amendment and the VRA are not identical in legal effect. She stated simply that the Legislature must use all possible means at its disposal to ensure that the ability of minorities to elect representatives of their choice is not diminished, but it refused to identify any measure of the "ability" of groups to elect their preferred representatives. Nor did Ms. Freidin explain how the Legislature should measure the "opportunity of racial or language minorities to participate in the political process."

72. The meaning of the Congressional Amendment is pure conjecture. The ballot summary for the Congressional Amendment itself offers the voters no clarity and does not enable voters to cast an informed and well-advised ballot. And the recent public statements of the Chairwoman of the Congressional Amendment's sponsor have only increased voter confusion.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General

Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VII – MISLEADING BALLOT SUMMARY

73. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

74. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, predictably, and systematically.

75. The Congressional Amendment expresses broad and subjective concepts in undefined terms—terms which the voters can reasonably construe in an endless number of differing and conflicting ways. The Congressional Amendment does not define "language minorities," or state how large a group would have to be in order to qualify as a language minority, and thus does not identify the groups that will benefit from the new voting rights created by the Congressional Amendment.

76. On February 11, 2010, at a joint meeting of the Senate Committee on Reapportionment and the House Select Policy Council on Strategic and Economic Planning, Ellen Frieden, Chairwoman of the Sponsor, refused to provide guidance. And, asked to define "language minorities," she referenced the VRA, which defines "language minorities" to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 42 U.S.C. § 1973l(c)(3), but then stated that "language minorities" only means "Hispanics," contrary both to the VRA and to the definition espoused

by three Justices of the Florida Supreme Court. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

77. The ballot summary's use of the phrase "language minorities" in the plural will cause voters to believe that more than a single language minority group is intended to be protected by the Congressional Amendment.

78. If the intent of the Congressional Amendment was to merely protect those persons who are Spanish speakers, then the ballot summary could have been written to state that directly.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VIII – MISLEADING BALLOT SUMMARY

79. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

80. The ballot language also leads voters to believe that Legislature will be able to determine with certainty where members of language minorities reside and to take that into consideration when crafting districts.

81. The questionnaire sent out during the 2010 Census to every Florida household only asks 10 questions: (1) the number of people living in the dwelling; (2) additional people staying in the dwelling as of April 1, 2010 who were not counted in answer to question (1); (3) whether the dwelling is owned, rented, or occupied without paying rent; (4) the dwelling's telephone number; (5) the names of persons who occupy the dwelling; (6) the sex of persons occupying the dwelling; (7) the age and date of

birth of persons occupying the dwelling; (8) whether any person occupying the dwelling is of "Hispanic, Latino, or Spanish origin" and, if so, whether they are "Mexican, Puerto Rican, Cuban, or other Hispanic origin"; (9) the race of the persons occupying the dwelling; and (10) whether any occupant occasionally stays elsewhere. There are no questions on the form about language, nor is any required by United States Public Law 94-171, the enactment that directs the Census Bureau to make Census data available to the states for purpose of redistricting and reapportionment.

82. Accordingly, there will be no bloc-level count of language use available at the time the Legislature draws the legislative and congressional districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that language minorities will have an "equal opportunity to participate in the political process and elect representatives of their choice."

83. The Census Bureau will no longer send a long-form to 1 out of 6 households asking about languages. See "2010 Census Constituent FAQs", Census Bureau, http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf. Accordingly, there will be no Census block level count containing data on language available at the time the Legislature draws the Congressional Districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that they will have "the equal opportunity to participate in the political process and elect representatives of their choice" as stated in the proposed Congressional Amendment.

84. In lieu of the long Census form, the Census Bureau will be using its American Community Survey ("ACS"). Like a political poll, the ACS will use a random sample of U.S. residents. The annual results of the ACS will be available for all areas with populations of 65,000 or more. Areas

with populations less than 65,000 require the use of multiyear estimates to reach an appropriate sample size for data publication.

85. However, the sample size will not permit disaggregating the Census data down to the level of a Census block, the lowest geographic level used in redistricting. For instance, the 2006 ACS only surveyed 152,155 of Florida's estimated population of 18,328,340. With such a small sample size it will be impossible for the Legislature to precisely determine how many minority language speakers are spread throughout the hundreds of thousands of Census blocks, block groups, and tracts in the State of Florida.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT IX – MISLEADING BALLOT SUMMARY

86. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

87. The United States Constitution delegates the task of setting the time, place, and manner of setting Congressional elections to the Legislatures of each of the several States.

88. Article I, Section 4, Clause 1 specifically provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

89. The authority to draw Congressional Districts falls within the ambit of "time, place and manner" authority found in Article I, Section 4, Clause 1. *See Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) ("Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.")

90. Congress has exercised the authority reserved to in Article I, Section 4, Clause 1. In The Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." Congress again imposed these requirements in The Apportionment Act of 1862, 12 Stat. 572, and in 1872 further required that districts "contai[n] as nearly as practicable an equal number of inhabitants," 17 Stat. 28, § 2. In The Apportionment Act of 1901, Congress imposed a compactness requirement. 31 Stat. 733. The requirements of contiguity, compactness, and equality of population were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued. Today, only the single member-district requirement remains. *See* 2 U. S. C. § 2c.

91. The power that belongs to the Legislature may only be limited or circumscribed by the Congress and not by way of an amendment to the Florida Constitution.

92. The ballot summary for the Congressional Amendment fails to inform voters that the Congressional Amendment will not be immediately and unconditionally enforceable and, if Congress fails to authorize circumscription of the Legislature's power to set the time, place and manner of Congressional elections, including drawing districts, it will never be enforceable. The ballot summary for the Congressional Amendment, therefore, fails to provide voters material information necessary to enable them to cast well-informed ballots.

93. Further, because proposed Amendment 6 will not be fully "operative" upon an affirmative vote of the electorate because of its conflict with Article I, Section 4 of the United States Constitution, it must be pulled from the ballot.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; entry of a writ of mandamus directing the Secretary not be placed on the ballot; an award of costs; and such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the persons on the attached service list by U.S. Mail and email this 15th day of July 2010.

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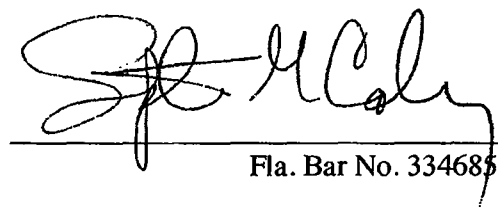

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation.

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

DEFENDANT DAWN K. ROBERTS' RESPONSE TO PLAINTIFFS' MOTION TO FILE SECOND AMENDED COMPLAINT

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), responds to and opposes the Plaintiffs' Motion to File a Second Amended Complaint (the "Motion") served herein on July 15, 2010 on the following grounds.

1. The Motion comes too late. Plaintiffs filed their original complaint on May 24, 2010 and, at Plaintiffs' request, the Court entered a very accelerated scheduling order providing for the filing of early responses to the complaint.

2. Pursuant to the scheduling order, Defendant filed its answer to the Plaintiffs' complaint on June 22, 2010.

7-16-10

3. Subsequently, Plaintiffs filed an Amended Complaint on June 23, 2010, to which the Defendant filed an answer on June 29, 2010.

4. Now, less than one week prior to the dispositive motion deadline, the Plaintiffs seek to file yet another complaint which, *inter alia*, adds new allegations to Count VI and a new Count IX.

5. Although Rule 1.190, Florida Rules of Civil Procedure, requires that "[l]eave of court [to file an amended pleading] shall be freely given when justice so requires," this provision is not without limitations. Specifically, leave should be denied where it has been delayed and/or would prejudice the interests of opposing parties. *Spradley v. Stick*, 622 So. 2d 610, 613 (Fla. 1st DCA 1993) ("Under Florida Rule of Civil Procedure 1.190(a), refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." (citation omitted)).

6. The grounds Plaintiffs seek to assert in their Second Amended Complaint are not new and could have been asserted in either of their two prior complaints. Additionally, to allow Plaintiffs to file a new complaint now – on or after July 16, 2010 – less than two business days prior to the dispositive motion deadline[1] would be manifestly prejudicial to the Defendant. This would require Defendant to file both an answer to the new complaint and a dispositive motion as to the new allegations with, at most, two business days' notice.

7. Collectively, the Plaintiffs and the Intervening Plaintiffs have raised a myriad of claims against Amendments 5 and 6 and their ballot summaries. To deny Plaintiffs leave to assert yet one further ground will not materially prejudice their positions. Additionally, the

[1] The new dispositive motion deadline of July 20, 2010 was set by the Court during a telephone hearing on July 13, 2010.

constitutional challenge which Plaintiffs seek to assert in their new Count IX is non-justiciable in this pre-election facial review of the ballot summaries' compliance with section 101.161, Florida Statutes. *See Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002).

For the foregoing reasons, the Defendant asks the Court to deny the Motion.

Dated this 16th day of July, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2010, a true and correct copy of the foregoing was mailed and emailed to the following:

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Supreme Court of Florida

FRIDAY, JULY 23, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC., ET AL. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

The motion to appear pro hac vice filed in the above cause by Paul M. Smith and Michael B. DeSanctis, on behalf of amici curiae Florida State Conference of Branches of NAACP Branches and Democracia Ahora, is hereby granted contingent upon each counsel's payment of the $100.00 fee required by section 25.241(3), Florida Statutes (2004), within ten days from the date of this order. FAILURE TO TIMELY COMPLY WITH THE PAYMENT REQUIREMENT COULD RESULT IN THIS ORDER BEING VACATED AND THE MOTION BEING DENIED.

A True Copy
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ANDY VELOSY BARDOS
ALLEN C. WINSOR
MIGUEL A. DE GRANDY
HON. BOB INZER, CLERK
HON. JACKIE LEE FULFORD, JUDGE
JAMES WILLIAM GUSTAFSON, JR.
PAUL M. SMITH
CHARLES BURNS UPTON, II
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STEPHEN MICHAEL CODY
BRADY JAMES COBB
ALICIA HANCOCK APFEL
CHARLES GILBERT BURR
DOUGLAS F. EATON
MICHAEL B. DESANCTIS

IN COMPUTER

Supreme Court of Florida

TUESDAY, JULY 27, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC., ET AL. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

The Florida Senate's Motion to Strike Amicus Briefs or, Alternatively, for Leave to File Reply is hereby denied.

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HON. JACKIE LEE FULFORD, JUDGE
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STEPHEN MICHAEL CODY
BRADY JAMES COBB
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IN
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

ORDER OF DISMISSAL

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendants,

and

BOB GRAHAM,

Intervening Defendant.

THIS CAUSE coming upon the order of the Supreme Court of Florida, directing this Court to dismiss these proceedings for lack of subject matter jurisdiction.

It is thereupon ORDERED AND ADJUDGED that this case is DISMISSED.

DONE AND ORDERED in Chambers in Tallahassee, Leon County, Florida, this 31st day of September, 2010.

CIRCUIT COURT JUDGE

Copies furnished to
counsel of record

IN COMPUTER

FLORIDA SUPREME COURT

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Petitioner,

v. Case No. SC10-1362

CORRINE BROWN and MARIO DIAZ-BALART,

Respondents.

PETITION FOR CONSTITUTIONAL WRIT

From the Circuit Court of the Second Judicial Circuit
In and For Leon County, Florida
Case No. 2010-CA-001824

DOCKET

SHEET

Florida Supreme Court Case Docket

Case Number: SC10-1362 - Closed

DAWN K. ROBERTS, ETC., ET AL. vs. CORRINE BROWN, ET AL.

Lower Tribunal Case(s): 37-2010-CA-001824

03/09/2011 12:49

Date Docketed	Description	Filed By	Notes
07/13/2010	PETITION-ALL WRITS	PT Hon. Dawn Kimmel Roberts 985618 BY: PT John Stewart Mills 107719	FILED AS "PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION (O&1 & E-MAIL)
07/13/2010	No Fee - State		
07/13/2010	APPENDIX	PT Hon. Dawn Kimmel Roberts 985618 BY: PT John Stewart Mills 107719	TO PETITION-ALL WRITS (2 VOLUMES) (O&1 & E-MAIL)(07/15/2010: REC'D 7 COPIES)
07/13/2010	REQUEST-ORAL ARGUMENT	PT Hon. Dawn Kimmel Roberts 985618 BY: PT John Stewart Mills 107719	O&1 & E-MAIL
07/13/2010	NOTICE	PT Hon. Dawn Kimmel Roberts 985618 BY: PT John Stewart Mills 107719	FILED AS "NOTICE OF PRIORITY STATUS" (O&1 & E-MAIL)
07/13/2010	MOTION-STAY (PROCEEDINGS BELOW)	PT Hon. Dawn Kimmel Roberts 985618 BY: PT John Stewart Mills 107719	FILED AS "MOTION FOR REVIEW OF ORAL ORDER DENYING STAY" (O&1 & E-MAIL) (07/15/2010: REC'D EMERGENCY SUPPLEMENT TO PETITIONER'S MOTION FOR REVIEW OF ORAL ORDER DENYING STAY PENDING REVIEW" O&8)
07/13/2010	ORDER-HIGH PROFILE		Because of significant public and media interest in this matter, counsel for the parties are directed to hereafter file an original and eight copies of all pleadings filed with this Court. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all

			documents, including any attachments and appendices, in an electronic format as required by the provisions of that order. All electronic documents filed shall be accessible to persons with disabilities in the manner required by Section 508 of the Federal Rehabilitation Act, the Americans with Disabilities Act, sections 282.601 through 282.606, Florida Statutes, and any related regulations or guidelines. FOR GENERAL FILING INFORMATION AND ADMINISTRATIVE ORDER NO. AOSC04-84, PLEASE VISIT THE CLERK'S OFFICE WEBSITE AT http://www.floridasupremecourt.org/clerk/index.shtml.
07/13/2010	ORDER-RESPONSE/REPLY REQUESTED		Petitioner has filed a petition for writ of all writs. Respondent is hereby requested to file a response to the above-referenced petition on or before July 19, 2010, by 5:00 P.M. The petitioner may file a reply on or before July 22, 2010, by 5:00 P.M.
07/13/2010	NOTICE-JOINDER	PT Senator Bob Graham BY: PT Jennifer Suzanne Blohm 106290	O&1(07/14/2010: REC'D 8 COPIES)
07/14/2010	APPENDIX	PT Hon. Dawn Kimmel Roberts 985618 BY: PT John Stewart Mills 107719	SUPPLEMENTAL APPENDIX TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION (O&1) (07/15/2010: REC'D 7 COPIES)
07/15/2010	RESPONSE	RS Corrine Brown, Representative BY: RS Stephen Michael Cody 334685	TO MOTION FOR REVIEW OF ORAL ORDER DENYING STAY PENDING REVIEW (O&8)
07/19/2010	ORDER-STAY PROCEEDINGS BELOW GR		Petitioner's "Motion for Review of Oral Order Denying Stay Pending Review" filed in the above cause is granted and proceedings in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, are hereby stayed pending disposition of the petition for review filed herein. (07/19/2010: CORRECTED TO SHOW THE PROPER PANEL)
07/19/2010	RESPONSE	RS Corrine Brown, Representative BY: RS Stephen Michael Cody 334685	TO ORDER DATED 07/13/2010 (O&7 & E-MAIL)
07/19/2010	RESPONSE	RS Florida Senate SENATE BY: RS James A. Scott,Ii 109120	TO ORDER DATED 07/13/2010 (O&8 & E-MAIL)
07/19/2010	APPENDIX	RS Florida Senate SENATE BY: RS James A. Scott,Ii 109120	O&8 & E-MAIL TO RESPONSE FILED BY FLORIDA SENATE
07/19/2010	RESPONSE	RS Florida House Of Representatives HOUSE BY: RS George N. Meros, Jr. 263321	TO ORDER DATED 07/13/2010 (O&8 & E-MAIL)
07/21/2010	LETTER-CANON NOTIFICATION RE: JUSTICE		RE: FLORIDA SUPREME COURT
07/22/2010	REPLY TO RESPONSE	PT Hon. Dawn Kimmel Roberts 985618 BY: PT Michael Grant Tanner 261300	TO ORDER DATED 07/13/2010 (O&8 & E-MAIL)
07/22/2010	MOTION-COUNS PRO HAC VICE (FOREIGN COUNSEL)	MP Florida State Conference Of Branches Of Naacp BY: MP Paul M. Smith	O&7
07/22/2010	MOTION-COUNS PRO HAC VICE (FOREIGN COUNSEL)	MP Florida State Conference Of Branches Of Naacp BY: MP Michael B. Desanctis	O&7

07/22/2010	AMICUS CURIAE INITIAL BRIEF-MERITS	MP Florida State Conference Of Branches Of Naacp BY: MP James William Gustafson, Jr. 8664	O&7
07/22/2010	MOTION-AMICUS CURIAE	MP Florida State Conference Of Branches Of Naacp BY: MP James William Gustafson, Jr. 8664	O&7
07/22/2010	APPENDIX	PT Hon. Dawn Kimmel Roberts 985618 BY: PT John Stewart Mills 107719	SECOND SUPPLEMENTAL APPENDIX TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION (O&8)
07/22/2010	MOTION-AMICUS CURIAE	MP The League Of Women Voters Of Florida BY: MP Douglas F. Eaton 129577	O&8
07/22/2010	AMICUS CURIAE INITIAL BRIEF-MERITS	MP The League Of Women Voters Of Florida BY: MP Douglas F. Eaton 129577	O&8
07/22/2010	REPLY TO RESPONSE	PT Senator Bob Graham BY: PT Jennifer Suzanne Blohm 106290	TO ORDER DATED 07/13/2010 (O&8 & E-MAIL)
07/22/2010	APPENDIX	PT Senator Bob Graham BY: PT Jennifer Suzanne Blohm 106290	TO REPLY RESPONSE (FILED AS "REPLY BRIEF OF PETITIONER BOB GRAHAM TO RESPONDENTS' RESPONSES TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION") O&8 & E-MAIL
07/23/2010	ORDER-AMICUS CURIAE GR		The motion for leave to file brief as amici curiae filed by Florida State Conference of Branches of NAACP Branches and Democracia Ahora and the motion for leave to file brief as amicus curiae filed by League of Women Viters of Florida is hereby granted and they are allowed to file briefs only in support of petitioners. The briefs by the above referenced amici curiae were filed with this Court on July 22, 2010.
07/23/2010	ORDER-COUNSEL PRO HAC VICE GR (FOREIGN COUNSEL)		The motion to appear pro hac vice filed in the above cause by Paul M. Smith and Michael B. DeSanctis, on behalf of amici curiae Florida State Conference of Branches of NAACP Branches and Democracia Ahora, is hereby granted contingent upon each counsel's payment of the $100.00 fee required by section 25.241(3), Florida Statutes (2004), within ten days from the date of this order. FAILURE TO TIMELY COMPLY WITH THE PAYMENT REQUIREMENT COULD RESULT IN THIS ORDER BEING VACATED AND THE MOTION BEING DENIED.
07/26/2010	MOTION-STRIKE	RS Florida Senate SENATE BY: RS James A. Scott,Ii 109120	AMICUS BRIEFS, OR ALTERNATIVELY, FOR LEAVE TO FILE REPLY (O&8 & E-MAIL)
07/27/2010	Pro Hac Vice	2010 - 1013758 Amount: $100	
07/27/2010	Pro Hac Vice	2010 - 1013759 Amount: $100	
07/27/2010	ORDER-STRIKE DY		The Florida Senate's Motion to Strike Amicus Briefs or, Alternatively, for Leave to File Reply is hereby denied.
07/27/2010	LETTER		TRANSMITTAL OF PRO HAC VICE PAYMENT
07/28/2010	MOTION-BRIEF AMENDMENT	MP The League Of Women Voters Of Florida BY: MP Douglas F. Eaton 129577	FILED AS; "MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA AS AMICUS CURIAE IN

			SUPPORT OF PETITIONERS" (ORIGINAL ONLY)
07/28/2010	NOTICE-SCRIVENER'S ERROR	MP The League Of Women Voters Of Florida BY: MP Douglas F. Eaton 129577	ORIGINAL ONLY (FILED AS "NOTICE OF SCRIVENER'S ERROR AND NOTICE OF FILING CORRECTED AMICUS CURIAE BRIE OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA IN SUPPORT OF PETITIONER)
07/28/2010	AMICUS CURIAE INITIAL AMD BRIEF-MERITS	MP The League Of Women Voters Of Florida BY: MP Douglas F. Eaton 129577	O&8
07/28/2010	ORDER-BRIEF AMENDMENT GR		The League of Women Voters of Florida's motion to file amended amicus brief is granted and said amended brief was filed with this Court on July 28, 2010. The amicus brief filed with this Court on July 22, 2010, is hereby stricken.
08/31/2010	DISP-ORIG PETITION GR		Accordingly, we grant the petition and utilize our jurisdiction under article V, section 3(b)(7) of the Florida Constitution to preclude the circuit court from taking any further pre-election action in this matter other than to dismiss the proceedings below. We trust that the circuit court will comply with our direction, and therefore, we withhold issuance of the writ. NO MOTION FOR REHEARING WILL BE ALLOWED.
11/17/2010	ARCHIVES		file

IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

Case No. _____
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

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Attorneys for Dawn K. Roberts, Florida Interim Secretary of State

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INTRODUCTION

This petition presents the question of whether a circuit court may consider a lawsuit seeking to prevent a citizen initiated proposed amendment to the Constitution of the State of Florida from being placed on the ballot based on claims that the ballot summary is misleading and that the proposed amendment would violate federal law or be unworkable. The Petitioner, Dawn K. Roberts, in her capacity as Interim Secretary of State of Florida (the "Secretary"), contends that a pre-ballot challenge on the first ground can only be made in this Court and that a pre-ballot challenge on the second ground cannot be made in any state court. She therefore seeks a writ in aid of this Court's jurisdiction or, alternatively, for prohibition directed to the Honorable Jackie Lee Fulford, Circuit Judge, Second Judicial Circuit in and for Leon County, Florida.

The Secretary is supported in making this argument by Florida Governor Charlie Crist, retired United States Senator and former Florida Governor Bob Graham, and FAIRDISTRICTSFLORIDA.ORG, Inc. ("Fair Districts"). Collectively, they challenge the propriety of a declaratory action brought by United States Representatives Corrine Brown and Mario Diaz-Balart (collectively, the "Plaintiffs"), the Florida House of Representatives (the "House"), and the Florida Senate (the "Senate," and collectively with the House, the "Legislature").

BASIS FOR INVOKING JURISDICTION

The Secretary invokes this Court's jurisdiction to "issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction" pursuant to Article V, section 3(b)(7) of the Florida Constitution. *See also* Florida Rule of Appellate Procedure 9.030(a)(3) ("The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.").

Often referred to as a "constitutional writ," a writ necessary to the complete exercise of a court's jurisdiction is "a form of ancillary power that is used to protect the court's ultimate jurisdiction conferred elsewhere in the constitution." Philip J. Padovano, *Florida Appellate Practice* § 29:7 at 740 (2010 ed.) (citing *Bedford v. State*, 633 So. 2d 13 (Fla. 1994)). A constitutional writ is used "to preserve the power of the court to fully and effectively decide cases that have been, or will be, presented on independent jurisdictional grounds." *Id.* at 740-41. A constitutional writ is appropriate in this case to preserve this Court's power to fully and effectively decide both a case that has been presented in this Court before and a case that may be presented here in the future.

First, as argued in Part I(A) below, the proceedings below directly conflict and interfere with this Court's prior decision that the specific ballot summaries at issue here are not misleading. *Advisory Opinion to Attorney Gen. re Standards*

For Establishing Legislative Dist. Boundaries, 2 So. 3d 175, 181 (Fla. 2009) (hereinafter, the "*Redistricting Advisory Opinion*").

Second, as argued in Part I(B), the only way that this Court has indicated that an advisory opinion on a voter initiative's ballot summary may be revisited before an election is through a mandamus proceeding filed in this Court. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992). Thus, the attacks on the ballot summaries by the Plaintiffs and the Legislature might be brought in this Court in the future. *See* Padovano, *supra*, at 541 ("A constitutional writ may be issued in connection with a case that will become the subject of the jurisdiction of the appellate court in the future.").

Alternatively, if a constitutional writ is somehow not an appropriate remedy, the Secretary seeks a writ of prohibition. A writ of prohibition is appropriate "when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction." *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). Although a writ of prohibition directed to a circuit court may often be more appropriately filed in the relevant district court of appeal, this Court has recognized its jurisdiction to issue a writ of prohibition directly to a circuit court in any case where "it is most likely that some provision of the state or federal constitution would be construed." *Moffitt v. Willis*, 459 So. 2d 1018, 1020 (Fla. 1984); *see also Florida Senate v. Fla. Public Employees Council 79, AFSCME*, 784 So. 2d 404,

406 (Fla. 2001) (holding that article V, section 3(b)(7) grants this Court jurisdiction to enter a writ of prohibition against a circuit court entering a temporary restraining order in violation of the separation of powers). The Secretary's motion to dismiss in the lower tribunal and this petition depend on a proper interpretation of article IV, section 10 and article V, section 3(b)(10), Florida Constitution, so the *Moffitt* test is clearly satisfied.

Finally, this is a case of exceptional public importance and urgency that warrants immediate attention from this Court. Requiring this issue to be first decided by the district court of appeal would create undue delay that could interfere with the State's general election in 2010.[1] Accordingly, this petition is properly filed directly in this Court and should not be transferred to the district court of appeal.

STATEMENT OF THE FACTS

In 2007, the Florida Department of State, Division of Elections (the "Department"), approved the form of two citizen initiative petitions to amend the Florida Constitution to establish criteria for state legislative reapportionment and

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[1] The ballots for the 2010 general election must go to the printer by September 2, 2010, for elections officials to meet their statutory obligations. *See* § 101.62(4)(a), Fla. Stat. (2009) (requiring absentee ballot to be mailed no later than 45 days before each election). The Secretary files herewith a notice of priority status pursuant to Fla. R. Jud. Admin. 2.545(c)(1).

criteria for United States congressional redistricting. (1 Petitioner's Appendix ("App.") at 1; 26.) The petitions were sponsored by Fair Districts. (1 App. at 1; 26.) "The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations." *Redistricting Advisory Opinion*, 2 So. 3d at 181.

After Fair Districts obtained ten percent of the required voter signatures for the petitions, the Attorney General of Florida requested an advisory opinion as to the validity of the petitions from this Court, as he was required to do pursuant to article IV, section 10 of the Florida Constitution. *Id.* at 178 (Fla. 2009).

As they were permitted to do by article IV, section 10, Fair Districts was heard by the Court in support of the petitions, and the House and Senate were heard in opposition. *Id.* The Legislature argued "multiple claims" that the ballot titles and summaries of the proposals violated section 101.161(1), Florida Statutes (2008).[2] *Id.* at 185.

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[2] Specifically, the Legislature argued that (1) the titles are misleading because they did not indicate that the courts, in addition to the legislature, would have to comply with the redistricting standards; (2) the summary does not distinguish between the intent to favor an incumbent or party, which the amendments prohibit, and the effect of favoring an incumbent or party, which they do not prohibit; (3) the summaries do not advise that the amendments would, in the view of the Legislature, transfer authority for redistricting from the Legislature to the courts; (4) the summaries refer to existing "city, county and geographical boundaries," while the amendments refer to "existing political and geographic

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As it was required to do pursuant to article V, section 3(b)(1) of the Florida Constitution, this Court considered the arguments of all interested persons and rendered an advisory opinion on the issue on January 29, 2009. *Id.* at 178-79. The Court held "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Id.* at 191. Accordingly, this Court "approve[d] the amendments for placement on the ballot."[3] *Id.*

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boundaries"; (5) the summaries indicate that districts cannot be drawn to deny minorities an equal opportunity to participate in the political process "and" to elect representatives of their choosing, while the amendments prohibit districts from being drawn to limit minorities ability to participate in the political process "or" to elect representatives; (6) the summaries' use of the term "language minorities" would confuse voters; and (7) the summaries fail to inform voters that, in the view of the Legislature, the amendments would prohibit multi-member legislative districts *Id.* at 185-90.

It also made several arguments that that the proposals violated the single-subject requirement of article XI, section 3 of the Florida Constitution. *Id.* at 181, 183-84.

[3] Justice Lewis authored the opinion quoted above and was joined by Chief Justice Quince and Justice Anstead. *Id.* at 191. Justices Wells, Canady, and Polston concurred in the result only. *Id.* Justice Pariente recused. *Id.* Thus, the Court unanimously rejected the Legislature's arguments that the ballot summaries were misleading, but only a plurality agreed with the specific reasoning articulated by Justice Lewis.

On May 24, 2010, the Plaintiffs, who apparently had decided not to avail themselves of their opportunity to be heard in the *Redistricting Advisory Opinion* proceeding, as they were entitled to do by article IV, section 10, filed a complaint in circuit court in Leon County, which was assigned case number 37-2010-CA-1824, demanding relief that was directly contrary to this Court's ruling. (1 App. at 1-22.) Specifically, they are asking the circuit court to declare that the ballot summary for the amendment regarding congressional redistricting violates section 101.161(1), Florida Statutes, and to enjoin the Secretary from placing the amendment on the 2010 general election ballot. (1 App. at 1-22.)

They have since amended the complaint to add Fair Districts as an additional defendant, but still seek the same relief. (1 App. at 120-141.) The only new facts that they allege have occurred since this Court's *Redistricting Advisory Opinion* is that the citizen initiative petition sponsored by Fair Districts has obtained the necessary number of signatures and has been certified for placement on the November 2010 ballot. (1 App. at 120-121.) The Plaintiffs make eight arguments as to why the ballot summary is, in their view, misleading and therefore in violation of section 101.161(1).[4]

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[4] Specifically, they argue that the summary (1) advises that districts will not be drawn to "deny" minorities the equal opportunity to elect representatives, while the amendment would only prohibit districts from being drawn to "diminish"

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The trial court granted motions to intervene as plaintiffs by the House and Senate. (1 App. at 53; 54.) The House did not file a separate complaint and instead set forth its claims in its motion to intervene. (1 App. at 25-40 n.4.) It noted that the Secretary has not only approved the congressional redistricting amendment challenged by the Plaintiffs, which is now known as "Amendment 6," for the November 2010 ballot, but also approved the state legislative redistricting amendment, now known as "Amendment 5." (1 App. at 25-26.) The House levels eight claims that the ballot summaries are misleading.[5] It amended its claims to add Fair Districts as a defendant. (1 App. at 150-166.)

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minorities' ability to do so; (2) fails to advise that the effect of the amendment would be to restrain the ability of the Legislature to give minorities the ability to elect representatives; (3) falsely suggests that current law does not require districts to be as equal in population as feasible; (4) confusingly uses the phrase "drawn to" in three different ways; (5) suggests that the Legislature must ignore incumbency even though federal law, according to the Plaintiffs, requires incumbency to be considered and favored to protect minority rights; (6) repeats a problem the Plaintiffs have with the underlying amendment – that the criteria are too vague and open to conjecture; (7) repeats another problem the Plaintiffs have with the underlying amendment – that it refers to "language minorities" in the plural even though its intent is only to refer to Spanish speaking minorities; and (8) falsely suggests that the Legislature will be able to determine where language minorities reside to take into consideration in crafting districts. (1 App. at 120-141.)

[5] Specifically, the House adopts the first six claims of the Plaintiffs, contending that they apply equally to both amendments. (1 App. at 31.) It additionally asserts that the summaries are misleading "because the true purpose of

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The Senate filed its own complaint that begins by adopting and incorporating the claims raised by the Plaintiffs and the House regarding the ballot summaries. (1 App. at 57.) In addition, the Senate levels two new claims directed at the amendments themselves: (1) that the amendments would violate the federal Voting Rights Act, 42 U.S.C. § 1971 and (2) that the amendments are "vague, conflicting, and unworkable." (1 App. at 57-70.)

The Secretary and Fair Districts filed motions to dismiss all of the claims for the reasons stated in this petition. (1 App. at 71-87; 2 App. at 195-198.) The circuit court also granted Senator Graham's motion to intervene as a defendant and Governor Crist's motion for leave to appear as an amicus curiae. (1 App. at 119; 2 App. at 204-205.) Senator Graham filed his own motion to dismiss on largely the same grounds (1 App. at 142-145), and Governor Crist filed a memorandum in support of the Secretary's motion to dismiss (1 App. at 106-118).

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the amendments is to remove the redistricting process from the Legislature and deliver it to the Florida Supreme Court." (1 App. at 31-32.) It asserts as a final claim as to Amendment 5 only that the summary fails to disclose the "inevitable and dramatic effect" the House believes the amendment will have on this Court's review of legislative redistricting plans under article III, section 16(c), of the Florida Constitution. (1 App. at 32.)

The House and the Plaintiffs have sought discovery, including issuing subpoenas and notices of depositions of Senator Graham and representatives of Fair Districts and written discovery requests to Fair Districts. (1 App. at 172-174; 175-178; 187-194; 2 App. at 206-222.) The Secretary, Fair Districts, and Senator Graham moved for stays of discovery and asked the circuit court to expedite its consideration of the motions to dismiss. (1 App. at 88-94; 95-101; 142-145; 146-149; 2 App. at 195-198; 199-203.)

After conducting an expedited hearing,[6] the circuit court denied the Secretary's motion to dismiss by order issued the morning of July 12, 2010. (2 App. at 323.) The court concluded that it had jurisdiction pursuant to sections 26.012(3) and 86.011, Florida Statutes (2009). (2 App. at 323-327.) The court also noted that none of the claims in this case sought relief against Fair Districts, and it therefore granted Fair District's motion to dismiss. (2 App. at 327.)

When the court announced its ruling at an early morning hearing on July 12, 2010, the Secretary announced her intention to file this petition today and made an ore tenus motion under Florida Rule of Appellate Procedure 9.310(a) for the court to stay further proceedings pending this Court's review of this petition. The court

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[6] The transcript of the July 8 hearing on the motion to dismiss has been ordered and will be filed in a supplemental appendix as soon as possible.

orally denied that motion.[7] The Secretary files herewith a motion to review that order and stay the circuit court's proceedings pending disposition of this petition.

NATURE OF RELIEF SOUGHT

The Secretary asks this Court to issue a writ that either (1) directs the Honorable Jackie Lee Fulford, Circuit Judge, Second Judicial Circuit in and for Leon County, Florida, to dismiss Case No. 37-2010-CA-1824 or (2) transfers that proceeding to this Court.

ARGUMENT

The challenges made in this case against Amendments 5 and 6 fall into two categories, neither of which may be entertained on a pre-election basis by a Florida circuit court.[8] First, all of the claims by the Plaintiffs and the House and all but two of the claims by the Senate attack the validity of the ballot summaries, but that is a matter that the Florida Constitution and sound judicial policy place before this Court. Second, the Senate challenges both the constitutionality and advisability of

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[7] A transcript of that hearing has also been ordered and will be included in a supplemental appendix.

[8] Whether these challenges could be lodged in circuit court if and when the amendments are passed is an issue that is not before the Court. Because the Secretary's interest in this case is solely about what goes on the ballots the Department must distribute for the 2010 general election, the Secretary takes no position on this matter.

the proposed amendments themselves, but those are non-justiciable claims beyond the authority of any Florida court at this pre-election stage.

I. Further Proceedings on the Challenges to the Ballot Summaries Should Either Be Prohibited or Transferred to This Court.

The pre-election challenges to the ballot summaries in the circuit court directly conflict and interfere with this Court's exclusive jurisdiction under article IV, section 10 and article V, section 3(b)(10) of the Florida Constitution. While the Court has the discretion to transfer the challenges to this Court to decide them on the merits, the better course would be to terminate the challenges as they were either determined or waived in the *Redistricting Advisory Opinion* proceedings.

A. The Plaintiffs and Legislature's Claims Below Directly Interfere With This Court's Jurisdiction to Determine Pre-Election Challenges to the Validity of an Initiative Petition and Arguably Exceed the Circuit Court's Subject-Matter Jurisdiction.

While no constitutional or statutory provision expressly forbids a circuit court from entertaining a pre-election challenge to an initiative petition's ballot summary, a brief review of the historical context of two 1986 amendments to the Florida Constitution demonstrates why this appears to be the case. And even if those amendments did not technically eliminate the circuit court's subject matter jurisdiction over such claims, their underlying history and policies conclusively demonstrate that a circuit court proceeding on this issue directly interferes with this Court's mandatory original jurisdiction to consider these challenges.

In 1984, this Court decided *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), in which it affirmed the trial court's grant of an injunction striking a voter initiative amendment from the ballot on grounds that the amendment violated the single subject requirement of article XI, section 3 of the Florida Constitution and that the ballot summary did not comply with section 101.161, Florida Statutes. *Evans*, 457 So. 2d at 1353-55. This was the second time the Court struck a voter initiative proposed amendment from the ballot. *See Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984) (striking a proposed amendment on single-subject grounds).

The unavoidably anti-democratic implications of a court striking a citizen-initiated effort to amend the Constitution shortly before the election caused at least one member of this Court serious concern. In an opinion fully agreeing with the majority's conclusion that the proposed amendment in *Evans* violated the single-subject requirement and had a misleading ballot summary, Justice Overton reiterated the point he had made two years earlier that "the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." 457 So. 2d at 1356 (Overton, J., concurring) (quoting *Askew v. Firestone*, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J., concurring)); *see also id.* at 1357 (arguing that a legislative fix "should be accomplished at the next legislative session"). After reviewing several

guidelines for drafting ballot summaries gleamed from prior case law, Justice Overton concluded:

> Hopefully, with these guidelines, and legislation that would allow the correction of misleading ballot language, this Court will not again be faced with the problem of having to remove a constitutional amendment from the ballot because of inartful drafting.

Id. at 1358.

Justice Overton was not alone in this view; Justices Ehrlich and McDonald joined his concurring opinion in *Askew*, which first recommended legislative action. In *Evans*, Justice Ehrlich bemoaned the fact that the Legislature had not followed this "strong recommendation." 457 So. 2d at 1359 (Ehrlich, J., concurring).

The recommendations from this Court that the Legislature do something to prevent initiative petitions from being stricken from the ballot based on defective summaries did not go unheeded much longer after *Evans*. The Legislature put forward just such a process when it proposed for adoption article IV, section 10 and article V, section 3(b)(10) of the Florida Constitution, which were approved in the 1986 general election (collectively, the "1986 Amendments"). These amendments work in tandem to place the question of the validity of the form of an initiative petition under general law squarely before this Court on a specific timeline.

First, the attorney general is required to seek an advisory opinion from this Court as to the validity of the petition and all "interested persons" are entitled to be heard on the issue:

> The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.

Art. IV, § 10, Fla. Const. Pursuant to general law, an initiative petition is submitted to the Attorney General once certain requirements are met, including the sponsor of the amendment having obtained at least ten percent of the signatures required to place it on the ballot. § 15.21, Fla. Stat. (2009). The Attorney General must then petition this Court for an advisory opinion within thirty days. § 16.061(1), Fla. Stat. (2009).

Second, this Court's constitutional grant of jurisdiction was expanded to not just authorize, but require the Court to render an advisory opinion on the issue.

> The supreme court ... [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Art. V, § 3(b)(10). The issues "provided by general law" are the single-subject requirement from article XI, section 3, Florida Constitution, the requirements for the ballot title and summary found in section 101.161(1), Florida Statutes (2009),

and the requirements for a financial impact statement found in article XI, section 5(c), Florida Constitution, and section 100.371(5)(c), Florida Statutes (2009). *E.g., Advisory Opinion to Attorney Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 971 (Fla. 2009).

Together, the 1986 Amendments established the Court's present mandatory jurisdiction over pre-election challenges to voter initiative petitions to amend the Florida Constitution. The accompanying legislative staff summaries explained the purpose of these provisions is "to provide a method by which an initiative's proposal's compliance with constitutional and statutory requirements could be ascertained expeditiously." Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla. H.R. Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986). (2 App. at 320-322; 317-319.) This Court has further explained:

> The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot.

Armstrong v. Harris, 773 So. 2d 7, 14 n.18 (Fla. 2000) (citing William A. Buzzett & Deborah K. Kearney, *Commentary (1986 House Joint Resolution 71),* 26 Fla. Stat. Ann., Art. IV, § 10, Fla. Const. (West Supp. 2000)).

Just a few months ago, this Court used very absolute terms to explain how its review process is an important "mechanism[] that directly promote[s] ballot integrity and the reduction of fraud":

> [W]ell before any referendum, this Court reviews ballot titles and summaries to *ensure* compliance with the single-subject limitation and to *guarantee* that Florida's electors are not misled "with regard to the true effect of a [proposed] amendment" or revision.

Browning v. Florida Hometown Democracy, Inc., PAC, 29 So. 3d 1053, 1072 (Fla. 2010) (quoting *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008)) (emphasis added).

Although the Court has not articulated much analysis in a published opinion as to whether the 1986 Amendments deprived circuit courts of jurisdiction to entertain pre-election challenges to the form of initiative ballot language, it has strongly signaled that this is the case.

First and most directly, in *Advisory Opinion to Attorney General Fee on Everglades Sugar Products*, 681 So. 2d 1124 (Fla. 1996) (hereinafter, the "*Sugar Products Advisory Opinion*"), the Court noted that after the Attorney General filed a petition for an advisory opinion, four entities filed an action for declaratory judgment against the initiative's sponsor. *Id.* at 1126-1127. The Court did not analyze the jurisdictional issue, but it noted that it had "ordered [the declaratory action] transferred to this Court." *Id.* This begs the question of what authority this

Court would have had to do that if the circuit court had jurisdiction over the declaratory action.

Second, on at least two occasions, this Court has noted that its jurisdiction to review the form of initiative amendment ballot language before an election is exclusive. *See Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) ("The Attorney General of Florida has requested this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. In response, we issued an order permitting interested parties to file briefs, and we heard oral arguments on the validity of the proposed amendment. **We have original and exclusive jurisdiction.**." (emphasis added and citations omitted)); *Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994) ("The Attorney General of Florida has petitioned this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. **We have original and exclusive jurisdiction.**" (emphasis added and citations omitted)). *See also Fla. Senate v. Fla. Ass'n of Realtors, Inc.*, 829 So. 2d 854, 855 (Fla. 2002) (Pariente, J., concurring) (noting that "this Court has mandatory jurisdiction over citizens' initiative petitions to amend the Constitution").

A review of the history of initiative petitions since the 1986 Amendments casts even further doubt on the propriety, if not the authority, of circuit courts to

consider these kinds of cases. In the more than two decades following the voters' adoption of the 1986 Amendments, there has not been a published opinion in which a Florida court, other than this Court, has attempted to exercise jurisdiction over a pre-election declaratory action seeking to invalidate a voter initiative to amend the Constitution on the basis that the form of the proposed amendment or ballot summary did not conform with general law. As discussed above, the only published opinion mentioning such a declaratory action was transferred to this Court. *Sugar Products Advisory Opinion*, 681 So. 2d at 1126-1127.

The dearth of circuit court challenges does not mean that initiative petitions have not gone unchallenged in the past twenty years. To the contrary, this Court has devoted substantial resources to conducting pre-election review of voter initiatives. The Court has rendered at least sixty advisory opinions in these cases, including thirty-eight in the past ten years alone.[9] In 43 (71.7%) of those cases, at least one party chose to appear and oppose the proposed amendment. Reflecting the amount of time and effort invested by the Court, its opinions demonstrate that it is no rubber stamp. Dissenting opinions and sharp divisions on the Court are common in these cases, and the Court invalidated initiative proposals, at least in

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[9] A table listing the opinions found by the Secretary is included in the appendix. (2 App. at 328.)

part, no fewer than 18 times (one-third of the time), including at least 3 in cases where no party chose to appear in opposition.[10]

Perhaps more importantly, to allow a circuit court to entertain a declaratory action to strike an initiative amendment from the ballot would defeat the entire purpose of the 1986 Amendments and would exacerbate the problems those amendments were designed to remedy. Before the amendments, the sponsors of a grass-roots effort to amend the Constitution faced the daunting prospect of going to the great expense and trouble of gathering the thousands of necessary signatures only to have their efforts defeated right before the amendment would be put on the ballot.

As discussed above, the purpose of the amendments was to allow sponsors to get the form of the amendment, title, and ballot summary in order and have it either approved by this Court or rejected with clarification to allow the form to be fixed before proceeding further. But if a declaratory action in circuit court is allowed to proceed after the 1986 Amendments, the sponsors of initiative petitions will have to undertake the expensive burden of first litigating the matter in this

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[10] Even where no party appears in opposition, the Court is required by the Constitution to "sua sponte examine the issues pursuant to [its] own independent research." *Advisory Opinion to the Atty. Gen.*, 642 So. 2d 724, 725 (Fla. 1994).

Court in an advisory opinion proceeding and still face the same risks and uncertainty they confronted before 1986.

In a slightly different context, this Court has explained why allowing multiple attacks on the same ballot language violates the intent and policy behind the 1986 Amendments. In *Advisory Opinion to Attorney Gen. re Referenda Required For Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006) (hereinafter, the "*Land Use Plans Advisory Opinion*"), the Court considered a claim that language in a ballot summary it had previously rejected in an earlier version of the summary was misleading due to an editorial comment in the first sentence. *Id.* at 505 (citing *Advisory Op. to the Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 902 So. 2d 763 (Fla. 2005)).

After the sponsor removed that sentence but otherwise left the ballot summary unchanged, the Attorney General submitted it for a new advisory opinion, and opponents of the initiative argued that another part of the summary was misleading. *Id.* Because the Court's advisory opinions are "intended to enable proponents to remedy any flaws in the ballot language," the Court held that it had implicitly rejected this argument in its first opinion, even though the opinion did not expressly address it. *Id.* More importantly for present purposes, the Court went on to explain:

> To hold otherwise would allow serial attacks on a proposed amendment, thwarting a proponent's efforts indefinitely.
>
> .... Allowing piecemeal attacks on a proposed amendment would not only be fundamentally unfair to the proponent of an amendment, it would be a misuse of the process for approval of citizen initiatives.

Id. at 505.

The *Land Use Plans Advisory Opinion* did not involve the jurisdictional issue in this case because the challenge to the ballot language was being made in this Court, not a circuit court. But allowing circuit court declaratory actions seeking to prevent the citizenry from considering ballot initiatives that this Court previously approved in an advisory opinion would be a far more serious misuse of the constitutional review process. It would directly interfere with this Court's mandatory jurisdiction under the 1986 Amendments.

Ensuring a fair process for the citizenry to amend the constitution is more than just a policy underlying the 1986 Amendments because "the initiative petition method to amend the constitution is a fundamental right" and the government "must not unduly burden the petitioners' initiative access." *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566 (Fla. 1980), *quoted with approval in Browning*, 29 So. 3d at 1063.

Because of the chilling impact that would be caused by allowing this case to proceed in the circuit court, a constitutional writ is appropriate in this case

regardless of whether the circuit court has subject matter jurisdiction in the technical sense. Thus, the Court need not definitively determine whether the circuit court has jurisdiction. Nonetheless, the Secretary maintains her position advanced below that the circuit court lacks jurisdiction.

The circuit court rejected this argument and concluded that it has jurisdiction under sections 26.012(2) and (3) and 86.011, Florida Statutes. (2 App. at 323-327.) While either statute might have originally provided circuit courts with jurisdiction over these kinds of declaratory actions, the 1986 Amendments preempted them.

Section 26.012(2) defines the "exclusive original jurisdiction" of the circuit courts.[11] Because the 1986 Amendments, specifically article V, section 3(b)(10), grants this Court original jurisdiction over pre-election challenges to the form of

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[11] The Plaintiffs also contended that the court had jurisdiction under § 26.012(3). That section provides, "The circuit court may issue injunctions."

But that cannot mean that a circuit court has jurisdiction to issue an injunction in a case over which it otherwise lacks jurisdiction. *See, e.g., Florida Pub. Serv. Comm'n v. Bryson*, 569 So. 2d 1253 (Fla. 1990) (holding that circuit courts lack jurisdiction to enjoin the Public Service Commission from reviewing complaints about rates because art. V, § 3(b)(2), Fla. Const. grants this Court jurisdiction to review actions of statewide agencies governing utility rates and services).

initiative ballots, such challenges can no longer fall under the exclusive jurisdiction of the trial courts.

Section 86.011 merely grants circuit courts the general authority to render declaratory judgments. The 1986 Amendments, however, provide the specific means for a judicial declaration regarding whether the form of an initiative ballot complies with general law. *See, e.g., McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) ("[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.") *See also Blue Shield of Fla., Inc. v. Woodlief*, 359 So. 2d 883, 885 (Fla. 1st DCA 1978) (holding that it is a misuse of section 86.011 to seek a declaratory judgment to bring a claim in circuit court that would otherwise falls outside of its jurisdiction).

The court also cited *Allstate Insurance Co. v. Kaklamanos*, 843 So. 2d 885, 895 (Fla. 2003), and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994), for the following proposition: "With the exception of the limited circumstances where jurisdiction is expressly denied by the Constitution or Florida Statutes, Circuit Courts have plenary jurisdiction over all matters." (2 App. at 324.) Neither of those cases, however, purport to create a new basis for jurisdiction. Nor do they suggest that constitutional provisions, such as the 1986

Amendments, cannot implicitly remove jurisdiction granted elsewhere. Instead, both cases deal with the entirely separate issue of whether the concepts of limited standing found in federal law and the law of other states apply in Florida.

Finally, the circuit court concluded that in *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992), this Court concluded that the 1986 Amendments did not foreclose challenges to initiative petitions in circuit court. (2 App. at 325-326.) But that decision did not address the issue of the continuing authority of a circuit court to entertain a pre-election challenge to the form of an initiative ballot.

The relevant issue in *Florida League of Cities* was whether an advisory opinion is a bar to reconsidering whether an initiative should be removed from the ballot because of a misleading summary. *Id.* at 398-99. The Court noted that article IV, section 3(b)(10) was "silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction." *Id.* at 398.

The Court then looked at the legislative history behind the 1986 Amendments, which indicated a belief that an advisory opinion would not be binding precedent "as to any other adversarial legal challenge that might later be raised." *Id.* at 399. The Court concluded, "This necessarily implies that other legal challenges would continue to be permissible under existing precedent." *Id.*

But the other legal challenges referred to by the legislative history and the Court were not declaratory actions in circuit court challenging initiative petitions. The legislative history only opines "that an advisory opinion would not be binding on a challenge brought subsequent to the adoption of the proposed amendment." Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla. H.R. Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986). (2 App. at 320-322; 317-319.) It made no mention of such a challenge being brought before an election, as happened here.

And the precedent cited by this in *Florida League of Cities* Court involved challenges to ballot summaries that were not proposed by initiative.[12] *See Smith v. American Airlines, Inc.*, 606 So.2d 618, 619 (Fla. 1992) (challenge to amendment proposed by taxation and budget reform commission); *Askew v. Firestone*, 421 So.2d 151, 153 (Fla. 1982) (challenge to amendment proposed by joint legislative resolution). The 1986 Amendments, on the other hand, apply only to amendments proposed by initiative, so this Court does not have jurisdiction to render advisory

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[12] Amendments to the Constitution may be proposed by initiative petition, constitutional convention, constitutional revision commission, the taxation and budget reform commission, and legislative joint resolution. Art. XI, §§ 1, 2, 3, 4, 6, Fla. Const.

opinions on other proposed amendments.[13] *Fla. Senate v. Fla. Ass'n of Realtors, Inc.*, 829 So. 2d 854, 855 (Fla. 2002) (Pariente, J., concurring). The only pre-election means of challenging the form of an amendment proposed by initiative that the Court has recognized is a mandamus petition filed directly in this Court. *Florida League of Cities*, 697 So. 2d at 399. In short, nothing in *Florida League of Cities* indicates that a circuit court could or should entertain a pre-election challenge to an initiative ballot summary.

The circuit court also cited two precedents where this Court did review pre-election challenges to initiative ballot summaries – *Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986), and *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984). (2 App. at 325-326.) But both of those cases were decided before the 1986 Amendments, so they are not at all relevant to the question of whether those amendments preempted the circuit court's jurisdiction in these circumstances.

Finally, the circuit court cited *Lane v. Chiles*, 698 So. 2d 260 (Fla. 1997), in which this Court affirmed a circuit court's order denying a challenge to an initiative petition that had already been adopted. (2 App. at 326.) But the

---

[13] This is the reason the Secretary has not sought to terminate circuit court litigation involving other proposed amendments that have been certified for the 2010 general election ballot. *See, e.g., Fla. State Conf. of NAACP Branches v. Dep't of State*, Case No. 37-2010-CA-001803 (Fla. 2d Cir.) (challenging Amendment 7, an amendment proposed by joint resolution).

Secretary does not contend that the 1986 Amendments affected the circuit court's jurisdiction to entertain **post-election** challenges to initiative amendments. The Court made clear in *Lane* that the challenge to the ballot summary in that case was made after the amendment was effective. *Id.* at 265.

The court put particular emphasis on this Court's holding that a challenge in *Lane* to the ballot summary was untimely because it was made after the amendment was enacted. (2 App. at 326.) This Court noted that "the general rule is that a challenge to the form of a proposed amendment must be made before the amendment is adopted." *Id.* at 265. But the Court gave no indication whatsoever that the required pre-election challenge could be made in circuit court. It was clearly referring to the advisory opinion process the 1986 Amendments create in this Court.

Thus, the circuit court lacks subject matter jurisdiction over the claims regarding the ballot summaries. If the Court does not issue a constitutional writ, it should therefore issue a writ of prohibition.

B. While the Court Has the Authority and Discretion to Transfer the Proceedings and Consider the Merits of the Challenges to the Ballot Summaries, the Better Course Would Be to Terminate These Proceedings Because the Challenges Were Waived in the *Redistricting Advisory Opinion* Proceeding.

As noted above, the only time since the 1986 Amendments that this Court appears to have confronted a circuit court declaratory action making a pre-election

challenge to the form of an initiative ballot, it transferred the action to consider it along with the Attorney General's petition for an advisory opinion. *Sugar Products Advisory Opinion*, 681 So. 2d at 1126-1127. Although that case is distinguishable because the declaratory action was filed while the Attorney General's petition was still pending in this Court, there is precedent for this Court reconsidering an advisory opinion before the general election.

As noted above, in *Florida League of Cities*, the Court held that in a pre-election mandamus proceeding it could reconsider a determination from a prior advisory opinion that an initiative ballot summary was not misleading. 607 So. 2d at 399. But it made it clear that it would very rarely do this:

> We emphasize, however, that relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction. Renewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion.

Id.

Thus, the Court does have discretionary jurisdiction to entertain a mandamus petition containing a pre-election challenge to an initiative ballot despite a prior advisory opinion approving the ballot language. Subsequent decisions, however, indicate that the Court really meant it when it said such attempts "almost always will result in this Court refusing to exercise discretionary jurisdiction."

For example, in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), the Court reviewed a post-election challenge to an initiative amendment imposing term limits. The opponents of the amendment argued that it violated the single-subject requirement of section 16.061, even though the Court had found to the contrary in its pre-election advisory opinion. *Id.* at 1284. The Court declined to entertain this argument and made two key observations that bear on the issue now before the Court. First, it explained that unlike other advisory opinions, which have less precedential value, an advisory opinion as to whether a ballot complies with section 16.061 has direct consequences that are more akin to a traditional judgment:

> [W]e point out that when our "advisory" opinions conclude that there is a defect in the ballot title and summary or a violation of the single-subject requirement, the effect of our "advice" is the removal of the amendment from the ballot.

Id. Second, the Court reiterated that "only under *extraordinary* circumstances will we revisit an issue decided in our earlier advisory opinions." *Id.* at 1285.

Respectfully, this case does not involve the kind of extraordinary circumstances that would warrant the Court to re-open the issue of whether Amendments 5 and 6 have misleading ballot summaries. As an initial matter, both the House and the Senate appeared in the *Redistricting Advisory Opinion* proceedings and argued that the summaries were misleading. In contrast, the opponents of the amendment in *Florida League of Cities* had not been heard from

in the prior advisory opinion proceeding. *See In re Advisory Opinion to Attorney Gen.--Homestead Valuation Limitation*, 581 So. 2d 586, 586 (Fla. 1991) (indicating that the only appearances were by the Attorney General and the amendment's proponent). While the "advisory" nature of an opinion under article V, section 3(b)(10) might preclude traditional estoppel principles from applying, the Court surely has the discretion to decline to give litigants a second bite at the apple.

And it should do so here to avoid creating a temptation for the Legislature, which regularly appears to challenge proposed initiative amendments, to prejudice the rights of initiative sponsors by holding back challenges to their ballot initiatives until after they have gone to the expense and trouble of getting the necessary signatures to have the initiative placed on the ballot. After all, that is exactly the evil that the 1986 Amendments were enacted to prevent.

Moreover, it is relevant that the Legislature is one of the parties seeking to have an initiative amendment pulled from the ballot. As this Court has often noted, the very purpose of Article XI, section 3 of the Florida Constitution, which authorizes initiative petitions, is "to bypass legislative and executive control and to provide the people of Florida a narrow but direct voice in amending their

fundamental organic law."[14] *Browning*, 29 So. 2d at 1963 (citing *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 962 (Fla. 2002), and *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566 (Fla. 1980)). The Constitution strikes a "delicate symmetric balance" between the right of citizens to petition for amendments and the Legislature to restrict that right. *Id.* (quoting *Citizens Proposition for Tax Relief*, 386 So. 2d at 566). Thus, a second challenge by the Legislature to get around this Court's advisory opinion in another forum should be particularly disfavored. For these reasons, the Court should exercise its discretion to not reconsider its advisory opinion based on the claims by the Legislature.

The Court should reach the same conclusion as to the claims by the Plaintiffs, who did not bother to raise their objections in the advisory proceeding. Although the Court did entertain a pre-election ballot challenge in *Florida League of Cities* by opponents who had not objected in the advisory proceeding, it should not do so here. First, the Plaintiffs are members of the United States Congress,

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[14] Not only are the amendments in this case an attempt by the citizenry to "bypass legislative control" of a constitutional function, they conflict with the natural temptation of incumbent legislators to draw districts that protect their self-interest because the amendments' purpose is to ensure that the Legislature "redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations." *Redistricting Advisory Opinion*, 2 So. 3d at 181.

who presumably are well versed in their legal rights and responsibilities and fully able to protect their interests. As incumbents representing districts that could be directly affected by Amendment 6, they had every reason to stand up and be heard in the advisory proceeding and not prejudice the process by waiting until the last minute to bring this challenge in the wrong court.

Shortly after *Florida League of Cities* clarified that the Court had discretion to entertain a mandamus petition seeking reconsideration of an advisory opinion, the Court warned that failing to make an objection during the advisory proceeding can have consequences. In *Advisory Opinion to the Atty. Gen.*, 642 So. 2d 724 (Fla. 1994), the Court noted that it had published an order authorizing all interested parties to file briefs and then advised:

> Despite this notice, no interested party ... has filed a brief of any kind, requested oral argument, or appeared before this Court on the date set. As a result, all parties who may have had an interest in this proceeding have waived any rights they may have had to advise this Court of their viewpoints and legal analyses of the issues.

Id. at 725.

Finally, the Court should decline to exercise its discretion to entertain the claims by the Plaintiffs and the Legislature because they waited until the last minute to raise them. Although they have known of Fair District's petitions since 2007, they waited until the summer of 2010 to bring this lawsuit. But the millions of ballots at issue in this case must go to the printer before September 2, 2010, in

order for elections officials to meet their statutory obligations. *See* § 101.62(4)(a), Fla. Stat. (2009) (requiring absentee ballot to be mailed no later than 45 days before each election).

Members of this Court have repeatedly warned of the obvious institutional problems caused by such last-minute litigation. *See Fla. Senate v. Fla. Ass'n of Realtors, Inc.*, 829 So. 2d 854, 855-56 (Fla. 2002) (Pariente, J., concurring) (addressing the problem presented to the Court by "artificial emergencies when objectors wait until shortly before the scheduled elections to file lawsuit challenging the proposed ballot language); *Florida League of Cities*, 607 So. 2d at 401 (Overton, J., dissenting) ("I am continually troubled that this Court is placed in the position of determining at the last minute the validity of proposed constitutional amendments and, as a result, is requested to remove proposals from the ballot.") Respectfully, it is time for those warnings to result in consequences, lest these tactics continue to be attempted.

For the foregoing reasons, although the Court has the discretion to transfer this proceeding from the circuit court, the more appropriate remedy is to direct that the challenges to the ballot language in the circuit court be dismissed.

II. The Senate's Pre-Election Challenges to the Enforceability or Advisability of the Proposed Amendments Should Be Prohibited as Non-Justiciable Issues Beyond the Jurisdiction of Florida Courts.

Once the ballot challenges are removed for this case, all that is left are two claims by the Senate: (1) that the proposed amendments violate the federal Voting Rights Act and therefore will not be enforceable if enacted and (2) that the proposed amendments would be unworkable if enacted. But the amendments have not been enacted, and at this pre-election stage, these claims are not justiciable by Florida courts.

The Senate contends that the circuit court has jurisdiction to determine that the amendments purported "contradictions with federal law will render them futile and incapable of being made operative under any circumstances." (1 App. at 59.) It relies on *Gray v. Winthrop*, 156 So. 270 (Fla. 1934). (*Id.*) Remarkably, this is the very argument Justice Overton made in his dissent – rejected by the majority – in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229-30 (Fla. 1991) (Overton, J., concurring in part and dissenting in part) (hereinafter, the "*Limited Terms Advisory Opinion*").

In that case, Justice Overton argued that pursuant to *Gray v. Winthrop*, *Gray v. Moss*, 156 So. 262 (Fla. 1934), and *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976), a proposed amendment must be stricken from the ballot if:

> by its terms [it] specifically and necessarily violates a command or limitation of the Federal Constitution ... in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances.

The *Limited Terms Advisory Opinion*, 592 So. 2d at 229 (J. Overton, dissenting) (quoting *Winthrop*, 156 So. at 272).

But that argument was rejected by the majority, which held that "we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989)." 592 So. 2d at 227 & n.2 (citing *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla. 1982) (holding that the question of whether an amendment proposed by the Legislature violated due process is not justiciable in a challenge to a ballot summary)).

Likewise, in *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002), this Court reaffirmed its holding in the *Limited Terms Advisory Opinion*, and once again rejected the argument made by Justice Overton in his dissent – and by the Senate here:

> In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment. Moreover, **other constitutional challenges are not justiciable in this type of proceeding.**

816 So. 2d 580, 582 (emphasis added and citation omitted) (citing the *Limited Terms Advisory Opinion*], 592 So. 2d at 227). By "this type of proceeding," the

Court meant a **pre-election proceeding**, over which, for the reasons previously discussed, the Florida Supreme Court has original and exclusive jurisdiction.

In *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 804-05 (Fla. 1998) (hereinafter, the "*Term Limits Advisory Opinions*"), Justice Overton once again argued, this time in a concurrence joined by no other Justice, that

> it is a fraud on the public to indicate that this initiative provision could be properly placed on the ballot if the ballot summary was not misleading. I find this entire provision to be unconstitutional on its face under *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). I still adhere to the view that I expressed in [the *Limited Terms Advisory Opinion*] that ... in considering whether or not the proposed amendment to [the Florida] constitution meets constitutional requirements of validity under the Constitution of the United States.

718 So. 2d at 804 (Overton, J., concurring in the result only). Once again, the majority of the Court rejected the argument. 718 So. 2d at 801 & n.1.

The Secretary does not dispute that if the voters approve the Amendments, the Senate may assert – post-election – the arguments it attempts to make in the circuit court.[15] But the pre-election scope of review of initiative proposed

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[15] *Ray* is an example of this procedure. There, the amendment opponents filed a post-election circuit court case to prevent enforcement of a voter-approved amendment to the Florida Constitution on the ground that the amendment was invalid under federal law. *Ray*, 742 So. 2d at 1277, 1278, 1280. This is precisely the claim the Senate makes in this case.

amendments is "limited to two legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary of the proposed amendment are misleading, in violation of section 101.161(1), Florida Statutes." The *Term Limits Advisory Opinions*, 718 So. 2d at 801.

The rationale for this limitation is simple and compelling; as stated in *Advisory Opinion to the Attorney General Re: Tax Limitation*, 644 So. 2d 486 (Fla. 1994):

> This Court's role in these matters is strictly limited to the legal issues presented by the constitution and relevant statutes. **This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments, and we have not done so. Infringing on the people's right to vote** on an amendment is a power this Court should use only where the record shows the constitutional single-subject requirement has been violated or the record establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment and its effect on the present constitution.

Id. at 489 (emphasis added).

Even as to the narrow issues which the Court does consider in pre-election advisory cases, "'[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.'" *Advisory Opinion to Attorney General Re: 1.35% Property Tax Cap*, 2 So. 3d 968, 971 (Fla. 2009) (quoting *Askew*, 421 So. 2d at 156). "[W]here voter initiatives are concerned, the Court has no authority to inject itself in the process, unless the laws

governing the process have been clearly and conclusively violated." *Id.* (internal quotation and citation omitted).

As aptly put by the Third District Court of Appeal:

> The law is well-settled that a court of equity as a general rule will not restrain the holding of an election because a free election in a democracy is a political matter to be determined by the electorate and not the courts. Limited exceptions to this rule have been recognized but only on the narrowest of grounds. One such exception is where the election is being held in violation of an applicable legislative enactment. Another is where the ballot question on a referendum is misleading and deprives the voter of an opportunity to know and to be on notice as to the proposition on which he is to cast his vote.

Metropolitan Dade County v. Shiver, 365 So. 2d 210, 212 (Fla. 3d DCA 1978), *affirmed*, 394 So. 2d 981 (Fla. 1981) (internal citation omitted).

In sum, this Court has consistently applied its limited authority to review initiative amendments to infringe as little as possible on the people's right to vote. Allowing an amendment opponent to simply sidestep this Court and seek broader review in a pre-election challenge in a Florida circuit court would render that limited scope of review meaningless.

CONCLUSION

For the foregoing reasons, this Court should issue a writ that either (1) directs the Honorable Jackie Lee Fulford, Circuit Judge, Second Judicial Circuit in and for Leon County, Florida, to dismiss Case No. 37-2010-CA-1824 for lack of subject-matter jurisdiction or (2) transfers that proceeding to this Court.

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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.100(*l*), Florida Rules of Appellate Procedure.

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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

Case No. _____
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, and BOB GRAHAM,

Respondents.

APPENDIX TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

VOLUME I

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

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CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA
C-05

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v.

Case No.: 2010CA1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Corrine Brown and Mario Diaz-Balart, sue Defendant, Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida, and allege:

1. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition has since obtained the necessary number of signatures and has been certified for placement on the November 2010 general election ballot.

2. The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their

ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

(Exhibit A.)

3. The ballot title and summary for the proposed Congressional Amendment is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

(*Id.*)

4. Pursuant to Article IV, section 10, Florida Constitution, the Florida Supreme Court reviewed the Congressional Amendment and rendered an advisory opinion that its summary is clear and unambiguous and that it is limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

5. The Congressional Amendment's ballot summary violates the strict standard for ballot clarity. Because the ballot summary misrepresents the legal effect and major ramifications of the Congressional Amendment, the Congressional Amendment must be withheld from the 2010 General Election Ballot.

6. The ballot summary overstates the protections afforded to minorities. The summary states that districts shall not be drawn to deny minorities the equal opportunity to elect representatives of their choice. In fact, the Congressional Amendment states only that minorities' ability to elect representatives of their choice — whether equal or unequal — will not be diminished.

7. The ballot summary also misleads by omission. It gives no hint that the Congressional Amendment's compactness and political and geographical boundary requirements will constrain the Legislature's ability to promote minority rights.

8. The ballot summary also purports to require that districts be as nearly equal in population as practicable. But the United States Constitution already imposes this requirement, and all of Florida's congressional districts comply with it. The negative implication that this requirement does not exist, or that Florida's Congressional districts are not as nearly equal in population as practicable, is false and misrepresents the legal impact of the Congressional Amendment.

9. The ballot summary is loaded with vague and ambiguous terms which even the sponsor of the Congressional Amendment is unable or unwilling to define. As a result, the courts ultimately will be forced to draw the districts, and voters will have no say.

The Parties

10. Plaintiff, Corrine Brown, is a citizen of the State of Florida and is registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3.

11. Plaintiff, Mario Diaz-Balart, is a citizen of the State of Florida and is registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than 60 percent of the voting-age population in Congressional District 25.

12. Defendant, Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida (the "Secretary"), is the chief elections officer of the State. It is her duty under Florida law to certify the items, including proposed constitutional amendments, that will be included on the statewide, general election ballot.

Jurisdiction and Venue

13. This Court has jurisdiction pursuant to Sections 26.012(2), Florida Statutes.

14. Venue is proper in this Court because the Secretary is headquartered in Leon County, Florida.

15. This Court has authority to grant declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes.

16. Under *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of the Congressional Amendment, *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009), is no impediment this challenge.

General Allegations

17. All petitions to amend the Florida Constitution must be accompanied by a clear and unambiguous summary of the proposed amendment. § 101.161(1), Fla. Stat. (2009). The summary may not exceed 75 words. *Id.* The text of a proposed amendment will not appear on

the ballot — only the title and summary of the amendment are placed on the ballot. *Id.* It is the responsibility of the sponsor to prepare a clear and unambiguous summary. *Id.* § 101.161(2).

18. An initiative petition can only be submitted to the voters if the proposed amendment concerns a single subject and matter directly connected therewith, *see* Art. XI, § 3, Fla. Const., and the ballot summary is clear and unambiguous, *see* Art. XI, § 5(a), Fla. Const.; § 101.161(1), Fla. Stat. (2009). A proposed amendment involves multiple subjects if, without disclosure to the voters, it substantially affects preexisting constitutional provisions or multiple branches of government. A ballot summary is not clear and unambiguous if it is misleading.

19. A ballot summary that omits material information and thus precludes the voters from casting their ballots intelligently violates the accuracy requirement. *In re Adv. Op. to Att'y Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

COUNT I – MISLEADING BALLOT SUMMARY

20. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

21. The Congressional Amendment contains two, distinct requirements that relate to the voting rights of racial and language minorities:

- Districts shall not be drawn with the intent or result of denying or abridging the **equal opportunity** of minorities **to participate in the political process**; and
- Districts shall not be drawn to **diminish the ability** of minorities **to elect representatives of their choice.**

The guarantee of an "equal opportunity" applies only to minorities' participation in the political process—not to the ability of minorities to elect representatives of their choice. The Florida Supreme Court has made clear that these are two separate and distinct requirements. *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d at 188-89.

22. The ballot summary mischaracterizes the second of these requirements (the "Non-Diminishment Provision"). The actual text of the Congressional Amendment provides:

> Districts shall not be drawn . . . to **diminish [the] ability** [of racial and language minorities] to elect representatives of their choice.

But the ballot summary describes the Non-Diminishment Provision as follows:

> Districts shall not be drawn to **deny racial or language minorities the equal opportunity** to . . . elect representatives of their choice.

23. The summary is misleading. The Congressional Amendment does not guarantee minorities an equal opportunity to elect representatives of their choice. It provides in this respect only that minorities' ability to elect representatives of their choice — equal or unequal — will not be diminished.

24. There is a material difference between a guarantee of equality and a mere protection against diminishment. A guarantee of equality would require the practical attainment of an objective ideal. A protection against diminishment only guards against a worsening in the existing ability of minorities to elect representatives of their choice. In its promise of equality, the summary grandly overstates the actual—and less protective—effect of the Congressional Amendment.

25. In a series of statements made to a committee of the Florida House of Representatives, the Sponsor repeatedly asserted that the Non-Diminishment Provision merely prevents future "harm" to the present ability of minorities to elect representatives of their choice:

> That last phrase prohibits the drawing of any district or plan that will ***reduce*** the ability of minorities to elect minority representatives. Plain and simple.
>
> Minorities' ability, the ability of minority voters to elect representatives of their choice is not going to be ***diminished*** with this amendment.

> What I do know is that these amendments will very clearly by their language forbid any legislator or any Legislature I should say, to adopt any plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.
>
> The . . . language says that districts cannot be drawn or plans cannot be drawn to ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> However, given that and given the language that is in our amendment, you cannot ***diminish*** the ability of . . . minority voters to elect representatives of their choice. So that is a protection that will be in the Florida Constitution. You will be violating the Constitution if you ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> What our language says is that you cannot . . . make districts or create a plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.
>
> What our amendments say is that . . . with regard to ability to elect representatives of choice, the Legislature cannot do anything to ***diminish*** that ability.
>
> And we want to make sure that in doing all that there is ***no harm done*** and ***no diminution*** of . . . the rights of minority voters.
>
> The language of the amendment says that you can't draw districts to ***diminish*** the ability to elect representatives of choice and that is—***that is the prohibition.***
>
> In fact, that is the reason that the language is in there to ensure that . . . the ability of minority voters to elect representatives of their choice will not be ***diminished.***

(Emphasis added.)

26. Conceptually and practically, non-diminishment is different from equality. Contrary to the promise of the ballot summary, the Congressional Amendment does not require that the ability of minorities to elect representatives of their choice be affirmatively enhanced until equality is achieved. They merely prevent backsliding in relation to the status quo—equal or unequal.

27. The Congressional Amendment's sentence construction makes clear that minorities are not ensured an equal opportunity to elect representatives of their choice. The Congressional Amendment does ensure an "equal opportunity . . . to participate in the political process," and the drafter might have completed the sentence: "and to elect representatives of their choice." "Equal opportunity" would then have applied to the ability to elect the representatives of choice. This was not done.

28. As the Florida Supreme Court explained, "the negative verb 'shall not be drawn' in the proposed amendment[] modifies both clauses 'with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process' and 'to diminish their ability to elect representatives of their choice.'" *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d at 189. The phrase "equal opportunity" does not modify both clauses—except in the erroneous ballot summary.

29. The Sponsor has stated that the Non-Diminishment Provision is "somewhat similar to what is in Section 5" of the VRA. Where it applies, Section 5 ensures that no voting change "has the purpose or will have the effect of diminishing the ability of any citizen of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section 5 does not guarantee equality, but merely prevents backsliding, or "retrogression." The benchmark for comparison is the status quo, and not the ideal of equality.

30. Like Section 5 of the VRA, the Congressional Amendment's Non-Diminishment Provision prohibits backward steps. It prohibits the undoing or reversal of gains already achieved by minorities. It does not, however, ensure an "equal opportunity . . . to elect representatives of their choice." Thus, a redistricting plan that neither diminishes the ability

of minorities to elect representatives of their choice, nor accords minorities an equal opportunity to elect representatives of their choice, would not violate the Non-Diminishment Provision.

31. In stating that the Congressional Amendment guarantees minorities the "equal opportunity to . . . elect representatives of their choice," the ballot summary misrepresents the legal impact of the Congressional Amendment and gives voters a wrong and materially misleading impression.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT II – *MISLEADING BALLOT SUMMARY*

32. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

33. The ballot summary is deceptive and misleading because it does not tell voters that the Congressional Amendment, through its compactness and political and geographical boundaries requirements, restrains the Legislature's ability to draw districts in which minority voters will have the ability to elect representatives of their choice.

34. Currently, the Equal Protection Clauses of the United States and Florida Constitutions are the only legal constraints that act as a ceiling on the Legislature's discretion to draw districts in which minority voters will have the ability to elect candidates of their choice.

35. If the Congressional Amendment is enacted, the Legislature will be subject to two new legal constraints on drawing districts: the requirements that districts be compact and that districts, where feasible, utilize existing political and geographical boundaries.

36. To avoid these new requirements, the Legislature would have to show that they conflict with the following, superior standard, which is also contained in the Congressional Amendment: "Districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

37. Except to the extent necessary to comply with this requirement and the federal Voting Rights Act (the "VRA"), the Legislature's discretion to create districts that promote minority representation will be subject to the limitation that districts be compact and follow political and geographical boundaries.

38. The ballot summary does nothing to inform voters of the Congressional Amendment's significant effect on the Legislature's discretion under current law to promote minority representation.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT III – MISLEADING BALLOT SUMMARY

39. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

40. The ballot summary states that, under the Congressional Amendment, districts must be "as equal in population as feasible." Thus, the summary suggests that current law does not already require districts to consist of populations as nearly equal as practicable, or that districts in Florida in fact consist of unequal populations. Both of the inferences that flow from the summary are false.

41. Federal law already requires that congressional districts be as nearly equal in population as practicable. *Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

42. Florida's current congressional plan, adopted in 2002, has a total deviation of one person. Twenty-two of the State's twenty-five congressional districts have zero deviation and the other three districts only deviate by a single resident.

43. The ballot summary, therefore, misleads voters about the existing requirements applicable to the redistricting process and the legal effect of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT IV – MISLEADING BALLOT SUMMARY

44. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

45. The ballot summary confuses and misleads voters because the summary uses the same phrase—"*drawn to*"—inconsistently to mean no fewer than three different things.

46. First, the ballot summary provides that districts may not be "drawn to" favor or disfavor an incumbent or political party. In this case, the phrase "drawn to" means that districts may not be drawn with the *intent* to favor or disfavor an incumbent of political party.

47. Second, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to participate in the political process. In this case, the phrase "drawn to" means that districts may not be drawn with either the *intent* or *result* of denying the equal opportunity of minorities to participate in the political process.

48. Third, the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to elect representatives of their choice. In this case, the phrase "drawn to" means that districts may not be drawn with the *result* of diminishing the ability of racial or language minorities to elect representatives of their choice.

49. Thus, the phrase "drawn to" has three different meanings in the summary: (i) *intent*, as applied to the prohibition against favoring or disfavoring incumbents or political parties; (ii) *intent* or *result*, as applied to the prohibition against denying minorities an equal opportunity to participate in the political process; and (iii) *result*, as applied to the prohibition against diminishing the ability of minorities to elect representatives of their choice.

50. The inconsistent use of terminology within the ballot summary is misleading. The summary fails to inform the voters, clearly and unambiguously, whether the Congressional Amendment prohibits an intent, a result, or both, in the three instances to which the phrase "drawn to" applies. In using the identical phrase to denote three different and clearly distinguishable legal standards, the ballot summary confuses and dissembles the true legal impact of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT V – MISLEADING BALLOT SUMMARY

51. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

52. The ballot summary suggests that the Legislature will be required to ignore incumbency. Under the VRA, it cannot do so. The Legislature must consider incumbency — and may favor an incumbent — to protect minority rights. By suggesting that the Congressional Amendment prohibits an intent to favor incumbents, the summary promises more than can be delivered.

53. Section 5 of the VRA, which applies to changes in electoral practices and procedures in five Florida counties (Collier, Hardy, Hendry, Hillsborough, and Monroe), prohibits changes that "lead to retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Whether a change will result in retrogression "depends on an examination of all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479.

54. One component of the opportunity to participate in the political process is the preservation of minority incumbents in positions of legislative influence and leadership. *Id.* at

483. Thus, the VRA requires the Legislature to weigh incumbency when it assesses compliance with Section 5, and permits it to favor minority incumbents as one means of compliance.

55. The Congressional Amendment, however, purports to deprive the Legislature of this important mechanism to ensure compliance with the VRA. Because it is foreseeable that the Legislature will intend to favor minority incumbents to ensure compliance with the VRA, the summaries' unqualified representation that an intent to favor incumbents is prohibited is inaccurate.

56. For the same reason, the Congressional Amendment itself contains an internal contradiction. The Congressional Amendment requires that districts not be drawn to deny or abridge "the equal opportunity of racial or language minorities to participate in the political process." The preservation of minority *incumbents* in positions of power is relevant to the requirement that districts maintain the equal opportunity of racial minorities to participate in the political process. This requirement thus conflicts with the prohibition against favoring incumbents.

57. The Legislature cannot fully assess and protect racial minorities' opportunity to participate in the political process unless it assesses and protects the achievements of minority incumbents. Because the conflicting requirements in Subsection (I) claim equal dignity in the hierarchy of requirements, the Congressional Amendment creates an irreconcilable contradiction. This internal conflict will prevent full compliance with all requirements contained in the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on

the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VI – MISLEADING BALLOT SUMMARY

58. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

59. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, and predictably. The Congressional Amendment expresses broad and subjective concepts in undefined terms — terms which voters can reasonably construe in an endless number of differing, conflicting ways.

60. The Congressional Amendment does not define "compact" or enable voters to distinguish between compact and non-compact districts. The Congressional Amendment does not define "political and geographical boundaries" or explain when it is "feasible" and when it is not "feasible" to utilize them. The Congressional Amendment prescribes no standard by which courts can determine the "intent" of a legislative body and of the Governor.

61. The Sponsor's own public statements about the Amendment underscore that the ballot summary is misleading and that the Amendment therefore flies under false colors.

62. Notwithstanding differences in wording between the Congressional Amendment and the VRA, the Sponsor initially informed the public that the Congressional Amendment's

voting-rights provisions are "identical" to and would "enshrine" in the Florida Constitution the protections in the VRA. *See How Will the FairDistrictsFlorida.org Amendments Work?*, Sponsor's Advertisement (Mar. 5, 2009); *Stop Protecting Politicians*, TCPalm (Nov. 26, 2008); *Leaning Republican, Again*, Florida Trend (Sep. 1, 2008).

63. But after the Supreme Court's decision in *Bartlett v. Strickland*, ___ U.S. ___, 129 S. Ct. 1231 (2009), the Sponsor stated (in an apparent acknowledgement of the different wording of the Amendment and the VRA) that the Amendment affords minorities "enhanced" rights and "greater protection than exists today in federal law." *See Plan to Redraw State Districts Called Unfair*, Tampa Tribune (Jan. 12, 2010); *Race Enters Debate Over Redrawing Florida Political Districts*, Florida Times-Union (Dec. 14, 2009); *Two Ballot Proposals Stir Fears*, Sarasota Herald-Tribune (Nov. 27, 2009); *Initiative Prompts Questions of Racial Fairness*, Daytona Times (Nov. 19, 2009).

64. At the committee meeting on February 11, 2010, Ellen Freidin, the Chairwoman of Fair Districts Florida also noted that the language of the Amendment and the VRA is not identical. She further stated that, under the Amendment, the Legislature must use all possible means at its disposal to ensure that the ability of minorities to elect representatives of their choice is not diminished. But Ms. Freidin refused to identify any measure of the "ability" of groups to elect their preferred representatives. Nor did she explain how the Legislature should measure the "opportunity of racial or language minorities to participate in the political process."

65. The recent public statements of the Chairwoman of the Congressional Amendment's sponsor have only increased voter confusion and further clouded the meaning of the ballot summary.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VII – MISLEADING BALLOT SUMMARY

66. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

67. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, predictably, and systematically.

68. The Congressional Amendment expresses broad and subjective concepts in undefined terms—terms which the voters can reasonably construe in an endless number of differing and conflicting ways. The Congressional Amendment does not define "language minorities," or state how large a group would have to be in order to qualify as a language minority, and thus does not identify the groups that will benefit from the new voting rights created by the Congressional Amendment.

69. On February 11, 2010, at a joint meeting of the Senate Committee on Reapportionment and the House Select Policy Council on Strategic and Economic Planning,

FDF refused to provide guidance. And, asked to define "language minorities," FDF referenced the VRA, which defines "language minorities" to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 42 U.S.C. § 1973*l*(c)(3), but then stated that "language minorities" only means "Hispanics," contrary both to the VRA and to the definition espoused by three Justices of the Florida Supreme Court. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

70. The ballot summary's use of the phrase "language minorities" in the plural will cause voters to believe that more than a single language minority group is intended to be protected by the Congressional Amendment.

71. If the intent of the Congressional Amendment was to merely protect those persons who are Spanish speakers, then the ballot summary could have been written to state that directly.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VIII – MISLEADING BALLOT SUMMARY

72. The allegations contained in Paragraphs 1 through 19 above are incorporated as though restated herein.

73. The ballot language also leads voters to believe that Legislature will be able to determine with certainty where members of language minorities reside and to take that into consideration when crafting districts.

74. The questionnaire sent out during the 2010 Census to every Florida household only asks 10 questions: (1) the number of people living in the dwelling; (2) additional people staying in the dwelling as of April 1, 2010 who were not counted in answer to question (1); (3) whether the dwelling is owned, rented, or occupied without paying rent; (4) the dwelling's telephone number; (5) the names of persons who occupy the dwelling; (6) the sex of persons occupying the dwelling; (7) the age and date of birth of persons occupying the dwelling; (8) whether any person occupying the dwelling is of "Hispanic, Latino, or Spanish origin" and, if so, whether they are "Mexican, Puerto Rican, Cuban, or other Hispanic origin"; (9) the race of the persons occupying the dwelling; and (10) whether any occupant occasionally stays elsewhere. There are no questions on the form about language, nor is any required by United States Public Law 94-171, the enactment that directs the Census Bureau to make Census data available to the states for purpose of redistricting and reapportionment.

75. Accordingly, there will be no bloc-level count of language use available at the time the Legislature draws the legislative and congressional districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that language minorities will have an "equal opportunity to participate in the political process and elect representatives of their choice."

76. The Census Bureau will no longer send a long-form to 1 out of 6 households asking about languages. See "2010 Census Constituent FAQs", Census Bureau, http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf. Accordingly, there will be no Census block level count containing data on language available at the time the Legislature draws the Congressional Districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that they will have "the equal

opportunity to participate in the political process and elect representatives of their choice" as stated in the proposed Congressional Amendment.

77. In lieu of the long Census form, the Census Bureau will be using its American Community Survey ("ACS"). Like a political poll, the ACS will use a random sample of U.S. residents. The annual results of the ACS will be available for all areas with populations of 65,000 or more. Areas with populations less than 65,000 require the use of multiyear estimates to reach an appropriate sample size for data publication.

78. However, the sample size will not permit disaggregating the Census data down to the level of a Census block, the lowest geographic level used in redistricting. For instance, the 2006 ACS only surveyed 152,155 of Florida's estimated population of 18,328,340. With such a small sample size it will be impossible for the Legislature to precisely determine how many minority language speakers are spread throughout the hundreds of thousands of Census blocks, block groups, and tracts in the State of Florida.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates Section 101.161(1), Florida Statutes; an injunction prohibiting Defendant from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

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Fla. Bar No. 334685

Exhibit A

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____
(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS: _____

CITY: _____ ZIP: _____

COUNTY: _____

Date of birth: ___/___/___ (or) Voter registration number: _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X _____ _____
SIGNATURE OF REGISTERED VOTER DATE SIGNED

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator; Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-15

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

PLAINTIFFS' NOTICE OF PRIORITY STATUS

Pursuant to Florida Rule of Judicial Administration 2.545(c)(1), Plaintiffs, Corrine Brown and Mario Diaz-Balart, request priority status and an expedited disposition schedule.

1. This case challenges the validity of a proposed amendment to the Florida Constitution. The Florida Department of State has certified the amendment for placement on the general election ballot. The general election is scheduled to be held on November 2, 2010.

2. Florida's sixty-seven Supervisors of Elections will begin printing millions of general election ballots shortly after the results of the August 24, 2010, primary election are certified, on or about September 1, 2010. *See* §§ 102.111(1), 102.112(2), Fla. Stat. (2009). Millions of ballots will be printed between the date of certification and September 18, 2010, the date by which the Supervisors must mail absentee ballots to overseas voters. *Id.* § 101.62(4)(a).

3. Here, Plaintiffs ask the Court to withhold the challenged amendment from the general election ballot. To provide the requested relief, the Court must resolve the issues raised in Plaintiffs' Complaint for Declaratory and Injunctive Relief no later than September 1, 2010.

4. Florida Rule of Judicial Administration 2.215(g) directs the Court to "expedite priority cases to the extent reasonably possible." Priority cases are cases that have been assigned priority status or an expedited disposition schedule. Fla. R. Jud. Admin. 2.215(g). "Particular attention shall be given to . . . challenges involving . . . proposed constitutional amendments." *Id.*; *accord Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 559, 558-59 (Fla. 1st DCA 2006) (holding that refusal to expedite challenge to proposed constitutional amendment was error); *Crawford v. Gilchrist*, 89 So. 963, 966 (Fla. 1912) ("[T]he public welfare demands that the questions here raised as to the validity of . . . such amendments should be determined as speedily as the law will permit so as to avoid unnecessary expense, confusion, and litigation in governmental matters that vitally affect all the people of the state.").

5. Impending election deadlines require expedited consideration of this challenge to a proposed constitutional amendment. Time should be afforded, moreover, for appellate review. The vital interests of the people of this state warrant priority status and expedited treatment.

WHEREFORE, Plaintiffs, Corrine Brown and Matio Diaz-Balart, respectfully request that this case be assigned priority status and an expedited disposition schedule.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening Plaintiff,

v. Case No.: 2010 CA 001824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

Pursuant to Florida Rule of Civil Procedure 1.230, the Florida House of Representatives, through its Speaker, Larry Cretul, moves the Court for an order permitting it to intervene as a Plaintiff in this action.

1. The Florida Department of State has certified two proposed constitutional amendments for placement on the November ballot.[1] Both proposals would inject ambiguous, contradictory, and misleading requirements into the redistricting process. If implemented, they would dramatically and detrimentally impact the Legislature's ability to carry out its constitutional duty to create districting plans openly, fairly, and accountably. And they would substantially curtail the Legislature's ability to protect the interests of racial minorities, whose ability to elect members of their choice has significantly improved over the past two decades.

[1] Copies of the proposed amendments and their ballot summaries are attached to this Motion.

Worse still, the amendments' impacts are deliberately hidden from the electorate asked to approve them. The Florida House of Representatives has a duty to protect the interests of voters, who are entitled to "receive[] fair and actual notice of the proposal's purpose and effect." *Harris v. Moore*, 752 So. 2d 1241, 1242 (Fla. 4th DCA 2000). The Florida House of Representatives likewise has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980).

2. The two proposals are substantially identical, except one (Amendment 5) applies exclusively to state legislative districts and the other (Amendment 6) applies exclusively to congressional districts. The amendments say some things but would do others. The proposals mislead, obfuscate, hide the ball, and fly under false colors. They do so by design. Their proponents carefully crafted the amendments and their ballot summaries to secure passage by confusing and misleading the public. Absent judicial intervention, Amendments 5 and 6 will appear on the ballot accompanied by summaries as deliberately false and misleading as the name of their political sponsor: "FairDistrictsFlorida."

3. The proponents of Amendments 5 and 6 suggest that the amendments will improve the redistricting process, making it more "fair" by removing legislative discretion and political considerations. Their website boasts an intent to "restore true democracy to Florida." *See* http://www.fairdistrictsflorida.org/home.php (last visited May 26, 2010). But what they truly seek is to remove democracy from the redistricting process, putting inherently political decisions in the hands of the Florida Supreme Court rather than the hands of politically accountable elected officials.

4. Redistricting is, and always has been, a "highly political task." *Growe v. Emison*, 507 U.S. 25, 33 (1993). As the United States Supreme Court has recognized, "extirpating politics from what are the essentially political processes of the sovereign States" constitutes "an impossible task." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973); *see also Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (finding nothing invidious in politically drawn district lines). The Florida Constitution commits the critical task of redistricting to the Legislature because courts "are inherently ill-equipped" to "make decisions based on highly political judgments" relating to redistricting issues, *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244 (2009) (plurality opinion) (marks omitted).

5. As the amendments' proponents are well aware, Amendments 5 and 6 will ultimately remove this process from the Legislature and deliver it to the Florida Supreme Court. This is their true effect and purpose. Rather than explicitly so stating, "FairDistrictsFlorida" hopes to implement ambiguous, contradictory, and misleading "standards," which the Legislature must follow in redistricting. Satisfying all the "standards"—many of which lie in the eye of the beholder—is impossible. As a result, each legislatively enacted plan would be subject to endless challenge, and the courts will ultimately be called upon to handle the highly political and time-sensitive task of redistricting:

- Districts that neatly follow non-compact municipal boundaries would be challenged as not being "compact."
- Compact districts crossing municipal boundaries would be challenged for not following municipal boundaries.
- A district that traditionally elects Democrats would be challenged as favoring a Democratic incumbent.
- The same district if redrawn as a Republican district would be challenged as disfavoring the Democratic incumbent.

- And any number of districts would be challenged for "denying or abridging the equal opportunity of racial or language minorities to participate in the political process or [] diminish[ing] their ability to elect representatives of their choice," however that language is ultimately interpreted by an empowered, reviewing court.[2]

6. Rather than guide the Legislature, the amendments do little more than provide endless avenues for judicial attacks on redistricting plans. No plan would be immune from challenge. And no plan could possibly satisfy all interested groups. Litigation—and the public expense of defending the Legislature's work product—would be endless. "Inviting attack on minor departures from some supposed norm [in redistricting review] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely *unless the express or tacit goal is to effect its removal from legislative halls.*" *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (emphasis added). The amendments' tacit goal and certain effect *is* to transfer redistricting from the Legislature to the courts.[3]

7. By design, the amendments' tacit goal is not disclosed to the voters. Instead, the amendments hide their true purpose and fly under false colors. They thus violate the accuracy requirement, which "functions as a kind of 'truth in packaging' law for the ballot." *Adv. Opinion*

[2] The amendments' only requirements not vulnerable to countless subjective challenges mandate that districts be contiguous and consist of populations as nearly equal as possible. But these requirements do not change existing law and practice. *See Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

[3] The proponents' earlier attempt to remove political accountability from the redistricting process was overt. In 2006, a proposed amendment would have expressly removed redistricting from the Legislature and delivered it to a "nonpartisan commission." *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1221 (Fla. 2006). The Florida Supreme Court struck that attempt from the ballot because, despite the proponents' marketing the commission as "nonpartisan," "the method of selecting the commission members is decidedly partisan." *Id.* at 1228-29. The Court therefore found the ballot summary misleading. *Id.* (It also found single-subject violations.) That amendment never appeared on the ballot, in part because its proponents settled on this deceptive alternative.

to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature, 926 So. 2d 1218, 1227 (Fla. 2006); *accord Adv. Op. to Att'y Gen. re Add'l Homestead Tax Exemption*, 880 So. 2d 646, 653-54 (Fla. 2004) ("The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based only on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution.") (citation omitted).

8. Because they lack accurate ballot summaries, the amendments are invalid. Amendment 5 suffers an additional infirmity: it violates the single-subject rule. Neither amendment should appear on the ballot this November. The Florida House of Representatives seeks to intervene in this case, to join in Plaintiffs' challenge, and to ensure that Florida voters are not presented with amendments flying under false colors.

THE EXISTING CLAIMS

9. Plaintiffs Corrine Brown and Mario Diaz-Balart, both members of Congress, initiated this action on May 24, 2010. Their Complaint comprises eight counts, each of which alleges that the ballot summary for Amendment 6 is misleading. They sue the interim Secretary of State, whose duty it is to certify proposed constitutional amendments for ballot placement. (Compl. ¶ 12.)

10. The Congresspersons' Complaint challenges only Amendment 6, which relates to congressional districts. Amendment 5, which is substantially identical to Amendment 6 but applies only to state legislative districts, is not implicated in the Complaint.

INTERVENTION OF THE FLORIDA HOUSE OF REPRESENTATIVES IS PROPER

11. Under Florida House of Representatives Rule 2.6, "[t]he Speaker may initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House . . . when the Speaker determines that such suit is of significant interest to the House."

12. Intervention is governed by Florida Rule of Civil Procedure 1.230, which provides: "Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." "Consistent with the policies which the Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County*, 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992); *accord Nat'l Wildlife Fed. Inc. v. Glisson*, 531 So. 2d 996, 998 (Fla. 1st DCA 1988) ("Intervention should be liberally allowed.").

13. Whether to allow intervention is committed to the discretion of the Court, but intervention should be permitted when a proposed intervenor's interest is already at issue in the litigation and is "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992) (quoting *Morgareidge v. Howey*, 78 So. 14, 15 (1918)). The Florida House of Representatives satisfies these criteria. Its interest is in protecting the electorate by keeping misleading Amendments 5 and 6 off the ballot. And to that end, it would plainly gain if this Court were to enter a judgment granting that requested relief.

14. The existing Plaintiffs represent their own unique interests. Both represent congressional districts with a majority (or near-majority) of minority voters. (Compl. ¶¶ 10, 11.) Amendment 6 will have a negative impact on the ability of minorities to elect representatives of

their choice, so the amendment will necessarily impact the Plaintiffs and their congressional constituents. The Florida House of Representatives shares an interest in protecting minority communities. And it also has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980). Thus, the Florida House of Representatives has interests related to—but broader than—the interests of the existing Plaintiffs.

15. The Florida House of Representatives seeks to join in the Plaintiffs' existing challenge to Amendment 6. Although the Plaintiffs do not challenge Amendment 5, their challenges are equally applicable to both amendments, which have substantially identical language. The Florida House of Representatives seeks to present most of those same challenges with respect to Amendment 5, as well as Amendment 6. In addition, the Florida House of Representatives seeks to present one further challenge to Amendment 5.

The Florida House of Representatives' Proposed Claims

16. If permitted to intervene as a Plaintiff, the Florida House of Representatives would assert most of the claims already presented by the Plaintiffs. Specifically, as alleged in Counts I though VI of the Complaint, the ballot summaries are misleading for numerous reasons. The Florida House of Representatives therefore seeks to adopt the claims presented in Counts I through VI in full.

17. In addition, each of those Counts is equally applicable to Amendment 5. The Florida House of Representatives, therefore, seeks to apply each of those claims to both amendments.

18. Furthermore, the Florida House of Representatives asserts that the ballot summaries for both amendments are false, deceptive, and misleading because the true purpose of

the amendments is to remove the redistricting process from the Legislature and deliver it to the Florida Supreme Court, as discussed in paragraphs 1 through 8, above. The amendments therefore fly under false colors and should be removed from the ballot.

19. Finally, the Florida House of Representatives seeks to present one additional claim that is applicable to Amendment 5 only:

20. Amendment 5 would create Article III, Section 21 of the Florida Constitution, imposing complex, intensely fact-specific criteria on state legislative redistricting. But its summary never informs voters of its inevitable and dramatic effect on the Florida Supreme Court's mandatory review of state legislative redistricting plans under Article III, Section 16(c), Florida Constitution.

21. The Florida Constitution establishes a carefully constructed, time-sensitive process for the decennial reapportionment of state legislative districts. Art. III, § 16, Fla. Const. The constitutional framework is designed to ensure that a redistricting plan is adopted by the Legislature and approved by the Florida Supreme Court in sufficient time to allow candidates to qualify and voters to elect their representatives at the next election. Under this process, the Legislature must redraw state legislative districts at its 2012 regular session. Art. III, § 16(a), Fla. Const. Within fifteen days after adoption of a redistricting plan, the Attorney General must petition the Florida Supreme Court to determine the validity of the plan. Art. III, § 16(c), Fla. Const. Historically, the Attorney General has petitioned the Court in early to mid-April, during or after the session in which the Legislature takes up redistricting.

22. The Supreme Court must review any redistricting plan, permit opposing parties to present their views, and determine the validity of the plan—all within thirty days. *Id.* The Court's judgment is "binding upon all the citizens of the state." Art. III, § 16(d), Fla. Const. As

a result of the 30-Day Rule and existing constitutional standards, the scope of review has historically been extremely limited. The framework established by the Florida Constitution does not "allow for a fact-intensive review within [the] thirty-day window." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002).

23. Under the 30-Day Rule, the Court has traditionally rendered a decision by mid-May, only weeks before candidates began to qualify for office in the newly drawn districts. In 2012, candidate qualifying is scheduled to commence on June 18th. §§ 99.061(1), (9), 100.031, 100.061, Fla. Stat. (2009). The primary and general elections are scheduled to follow in short order, on August 28th and November 6th, respectively. *Id.* §§ 100.061, 100.031.

24. The constitutional framework affords little time to remedy any invalidity in a redistricting plan. If the Court invalidates a plan, the Governor must convene the Legislature for an extraordinary session of no more than fifteen days. Art. III, § 16(d), Fla. Const. Again, the Attorney General must petition for review or, if no plan is adopted, must report that fact to the Court. Art. III, § 16(e), Fla. Const. If the Court strikes the new plan, or if none was adopted, the Court, in the last resort, makes an emergency apportionment. Art. III, § 16(f), Fla. Const.

25. The 30-Day Rule has never impeded the Court's review of a plan's compliance with the Florida Constitution, because the criteria presently imposed by the Constitution are few and simple. State House districts must be between 80 and 120 in number, while State Senate districts must be between 30 and 40 in number. Art. III, § 16(a), Fla. Const. Districts must be numbered consecutively and consist of contiguous, overlapping, or identical territory. *Id.* Compliance with these criteria can readily be determined from the face of any redistricting plan. Thus, the Court has never found it difficult to reconcile the 30-Day Rule with its obligation to assess the validity of a plan under criteria contained in the Florida Constitution.

26. Amendment 5 would substantially affect the Florida Supreme Court's automatic, binding review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It would create new, fact-intensive criteria that would inevitably spawn a range of legal challenges to individual districts and the plan as a whole—challenges the Court cannot review within the limited time allotted by the Constitution. The amendment would generate fact-intensive inquiries about every district. The Florida Supreme Court would have to determine whether legislators subjectively intended to favor or disfavor political parties or incumbents. It would have to engage in a circumstantial analysis of the opportunity of racial and language minorities to participate in the political process—and the Legislature's intent in this regard—and the ability of minority voters to elect representatives of their choice. It would have to scrutinize the compactness or non-compactness of every district, and the feasibility of utilizing local political and geographical boundaries.

27. The Florida Supreme Court itself has deemed it impossible to conduct a fact-specific review in thirty days. The Court has refused to adjudicate VRA claims—claims that are less complex than those which the amendment's criteria would engender—explaining that "article III, section 16(c) did not envision the development of the highly complex federal claims. The juxtaposition of these claims on this Court's article III, section 16(c) review is highly problematic." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 829 n.13.

28. If the Florida Supreme Court attempts the impossible, it must perform an inadequate review that deprives parties of any opportunity to conduct discovery and present evidence, and therefore denies their due process rights. The Court's decision, though unsupported by record evidence, would bind all citizens of the state and extinguish their right to raise future challenges. Any such review of fact-intensive criteria will fundamentally reshape the

Court's review process, which, by the Court's own precedents, has hitherto been limited to simple, facial challenges. On the other hand, if the Court declined to review the plan's compliance with the criteria ordained by Amendment 5, it would violate its constitutional responsibility to determine the validity of redistricting plans under the Florida Constitution. The Court has never declined to assess the validity of a state legislative redistricting plan under any criteria set forth in the Florida Constitution. To do so in this instance would thus substantially alter the Court's review process.

29. If the Court ignores the 30-Day Rule and engages in a more lengthy review, it will frustrate the timely completion of the redistricting process and subvert the right to vote of all Florida citizens. A thoughtful and deliberate evaluation of complex criteria cannot be completed prior to candidate qualifying, or even before the first general election after reapportionment.

30. In Alaska, the state constitution contains detailed redistricting criteria. In 2001, redistricting spawned nine lawsuits. The parties engaged in extensive discovery, and about 160 witnesses were deposed. The court conducted a three-week trial and issued a 121-page opinion seven months after the cases were filed. The Alaska Supreme Court commended the trial court for its thorough review under "extreme time pressures." *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 n.1 (Alaska 2002).

31. The imposition of multiple, complex, fact-intensive criteria on the existing timelines in Article III, Section 16(c) would force the Florida Supreme Court either to ignore its constitutional duty to promptly determine the validity of redistricting plans, or, contrary to the restraint observed in its own precedents, to perform a desperate, slapdash review of fact-intensive claims which, under constitutional time pressures, will amount to mere guesswork and deny adversary interests due process and meaningful access to the courts. Amendment 5 not

only imposes a collection of fact-intensive standards, but it also fundamentally alters the Florida Supreme Court's review of state legislative plans. Because it radically alters—but does not explain—its effect upon existing provisions of the Florida Constitution, Amendment 5 embraces multiple subjects.

32. The ballot summary does not inform voters of Amendment 5's inevitable and substantial effect on the Court's review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It hides the ball as to the amendment's true effect, and fails to inform voters of the monumental change it makes to existing constitutional processes. A proposed amendment that works substantial changes to established constitutional processes, and does so without informing the voters, is inaccurate and misleading by omission. Amendment 5 is therefore invalid.

This Court Should Permit the Addition of the New Claims

33. Although intervening parties typically must "take cases as they find them," the court may order otherwise in its discretion. *Litvak v. Scylla Props., LLC*, 946 So. 2d 1165, 1175 (Fla. 1st DCA 2006) (citing Fla. R. Civ. P. 1.230); *accord Smith v. Atl. Boat Builder Co.*, 356 So. 2d 359, 362 (Fla. 1st DCA 1978) ("We note, however, that Fla. R. Civ. P. 1.230 while providing that intervention 'shall be in subordination to, and in recognition of, the propriety of the main proceeding' concludes with the qualifying clause 'unless otherwise ordered by the court in its discretion.'"). Moreover, while "the intervenor may not assert matters extraneous to his own interests . . . he may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties." *Williams v. Nussbaum*, 419 So. 2d 715, 717 n.1 (Fla. 1st DCA 1982).

34. In this case, the Florida House of Representatives could file its own complaint to assert its interests. But it would benefit all parties—and serve judicial efficiency—to have the existing claims and the Florida House of Representatives' claims presented in the same case. Intervention promotes judicial efficiency, and "[c]onsistent with the policies which the [intervention] Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County*, 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992).

35. The Florida House of Representatives seeks to join in Counts I through VI of the Plaintiffs' Complaint, and to extend them to Amendment 5. These challenges are equally applicable to both substantively identical amendments, as will be any defenses. And the additional challenge presented to Amendment 5 is closely related. These challenges are appropriately considered together. The alternative to intervention would be the Florida House of Representatives' filing its own action, asserting overlapping claims, and potentially burdening two judges with similar or identical issues. This inefficient alternative would offer no benefits to offset its many burdens, including duplicative proceedings and the potential for inconsistent judgments.

36. The proposed intervention would not prejudice any party. This Motion is filed immediately after the case was initiated, and the intervention will not delay or prolong the case.

37. Upon intervention, the Florida House of Representatives will assert the claims presented in this Motion.[4]

[4] The entirety of the Florida House of Representatives' claims is presented in this Motion as if presented in an independent complaint. Should the Court order it, the Florida House of Representatives will present its claims in a separately filed complaint. Given the need for expedited relief, the relative positions of the parties, and the nature of the case, the House respectfully suggests such additional pleading is unnecessary, and that this Motion should be accepted as the pleading of the House. *Cf. Wogisch v. Tiger*, 193 So. 2d 187, 188 (Fla. 4th DCA

WHEREFORE, the Florida House of Representatives respectfully seeks entry of an order (i) granting this Motion, (ii) designating the Florida House of Representatives as an intervening Plaintiff, (iii) accepting this Motion as the Florida House of Representatives' pleading, and (iv) granting such further relief as the Court finds appropriate.

Respectfully submitted,

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1966) ("When intervention is permitted upon sufficient showing of interest . . . , the intervenor may, by proper pleading, make his petition for leave to intervene suffice as his complaint.").

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail this twenty-sixth day of May 2010, to the following:

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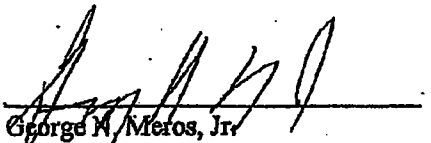

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CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____
(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS: _____

CITY: _____ ZIP: _____

COUNTY: _____

Date of birth: / / (or) Voter registration number: _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X _____ _____
SIGNATURE OF REGISTERED VOTER DATE SIGNED

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233
RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-15

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

CASE NO: 10-CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

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OFFICE OF GENERAL COUNSEL

MOTION FOR LEAVE TO INTERVENE AS AN INTERESTED PARTY

COMES NOW, THE FLORIDA SENATE, by and through its President Jeff Atwater (the "Florida Senate"), and hereby moves this Court for an order permitting it to intervene in the above-captioned litigation as an interested party pursuant to Florida Rule of Civil Procedure 1.230. In support of the instant Motion for Leave to Intervene as an Interested Party, the Florida Senate asserts the following:

I. **Background**

1. The Florida Senate is a legislative body created by Article III of the Constitution of the State of Florida vested, along with the Florida House of Representatives, with the legislative power of the State.

2. This lawsuit, filed by United States Congressman Mario Diaz-Balart and United States Senator Corrine Brown, challenges the validity of proposed constitutional amendments to Florida's constitutional apportionment processes that seek to impose a new set of contradictory and unworkable standards thereon.

App. A/10

II. **Standing of Florida Senate to Intervene as an Interested Party**

3. Pursuant to Article III, section 16 of the Constitution of the State of Florida, the Florida Senate (along with the House of Representatives) is vested with the duty to apportion the State and Congressional voting districts in accordance with the United States Constitution, the Constitution of the State of Florida and all applicable state and federal law in the second year following each decennial census (2010). Specifically, Article III, Section 16(a) of the Florida Constitution mandates that the "legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state..."

4. The redistricting process for the 2012 cycle has already begun. Committees of the Florida Legislature have met on numerous occasions to plan for the reapportionment process and to discuss the proposed constitutional amendments at issue in this litigation and their impact upon the redistricting process. In early 2011, the United States Census Bureau will release state-by-state data, and the Florida Legislature will hold dozens of public hearings across the state to listen to the voters and gather essential information.

5. The criteria mandated by the proposed constitutional amendments at issue in this litigation are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rules by which their effects can be divined and their purposes accomplished. Moreover, they lack judicially discoverable or manageable standards that would enable the courts to construe and enforce their requirements coherently, objectively, predictably, and systematically. The proposed constitutional amendments

also patently violate paramount federal law relative to the voting rights of minorities and will therefore ultimately be futile and inoperable.

6. Pursuant to Rule 1.230. Florida Rules of Civil Procedure, "Anyone claiming an interest in pending litigation may at any time be able to assert a right by intervention." Intervention should be liberally allowed. *National Wildlife Federation, Inc. v. J.T. Glisson*, 531 So.2d 996, 98 (Fla. 1st DCA 1988).

7. The Florida Senate respectfully submits that the proposed constitutional amendments being challenged in the instant case will have a direct impact upon the Senate's reapportionment duties and responsibilities as delineated by Article III, § 16(a) of the Constitution of the State of Florida. Moreover, the Florida Senate, if permitted to intervene in the case at bar, will demonstrate to this Court not only the statutory and procedural invalidity of the proposed constitutional amendments and their ballot summaries, but will also establish how application of the proposed reapportionment criteria contained within patently violates paramount federal law and, should, therefore, render the proposed constitutional amendments ineligible for placement upon the ballot. *See Gray v. Winthrop*, 115 Fla. 721 (Fla. 1934).

8. For example, the language and application of the proposed constitutional amendments at issue will patently conflict with paramount federal law, namely the Voting Rights Act of 1965 (42 U.S.C. § 1971) and the supremacy clause to the United States Constitution.

9. A reapportionment plan is violative of section 5 of the Voting Rights Act if the plan would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Georgia v. Ashcroft*, 539 U.S. 461, 480

(2003). Five Florida counties are currently covered jurisdictions under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973. Loss of minority districts from a statewide plan is sufficient to show a violation of section 5 of the Voting Rights Act. *Georgia v. Ashcroft*, 539 U.S. at 479. In addition, section 2 of the Voting Rights Act protects minorities from electoral laws or procedures that cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

10. To comply with the non-retrogression standard of Section 5 and the non-vote dilution provision of Section 2, federal courts have expressly authorized and affirmed a legislature's use of incumbency and political party affiliation data in the redistricting process. As recently as 2002 in Florida, the federal appellate court expressly held that certain challenged districts from the 2002 Florida Reapportionment plan were in compliance with the Voting Rights Act because they relied upon political party and incumbency data in the same manner as the Florida Legislature did during the redistricting process. *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D. Fla. 2002).

11. The proposed constitutional amendments at issue, however, expressly prohibit the Florida Legislature from having an intent to favor or disfavor a political party or an incumbent. Under this mandate, the Florida Legislature would be legally prohibited from utilizing political party or incumbency data in the redistricting process to protect minority rights (which has been expressly authorized to use by the Voting Rights Act, vis-a-vis the *Martinez* Court to ensure that the crafted apportionment plan is in compliance with the Voting Rights Act).

12. Hence, the proposed constitutional amendments, on their face, patently contravene both the *Martinez* Court's express approval of the Florida Legislature's use of political party and incumbency data and the *Martinez* Court's own utilization of such data in finding that challenged minority districts were in compliance with the Voting Rights Act. If the Florida Legislature is prohibited from utilizing political party or incumbency data in the redistricting process to ensure that retrogression does not occur, minority seats will be lost as the likelihood of a district's performance for a minority candidate has been determined based upon data such as political party affiliation and incumbency. *See Martinez v. Bush, supra.*

13. The proposed constitutional amendments will interfere with and obstruct the opportunity of minority voters to participate in the political process and to elect candidates of their choice. The proposed constitutional amendments will also cause the loss of minority seats as political party and incumbency data will be precluded from consideration in the redistricting process. When a plan crafted under the proposed constitutional amendments causes the loss of minority seats, the criteria mandated by the proposed constitutional amendments and the resulting apportionment plan itself will be inexorably in violation of the non-retrogression and non-vote dilution mandates of the Voting Rights Act and, therefore, fully illegal.

14. The Florida Senate's intervention into the instant case would not cause prejudice to any existing party, and would not delay the proceedings. This Motion is filed a mere days after the underlying suit was filed and the Florida House of Representatives has already filed its own request to intervene in this case as well as its own additional claims (which the Florida Senate supports). Given the importance of this case and of

legislative reapportionment to the citizens of Florida and to their Florida Legislature, it is imperative that both houses of the Florida Legislature be fully represented in this proceeding.

WHEREFORE, the Florida Senate respectfully requests that this Court enter an Order: 1) granting it leave to intervene in the instant case and affording it full party status herein as an intervening Plaintiff, 2) providing it leave to assert additional claims relative to the invalidity of the proposed constitutional amendments, as necessary, and 3) granting any further relief that this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished via electronic means and U.S. mail: to Stephen M. Cody, Esq., Attorney for Plaintiffs, 16610 S.W. 82 Court, Palmetto Bay, FL 33157, and Dawn K. Roberts, Interim Secretary of State, Florida Dept. of State, 500 South Bronough Street, Tallahassee, FL 32399 this 28 day of May, 2010.

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Counsel for Intervenor, the Florida Senate:
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CIVIL DIVISION
Case No.: 2010 CA 1824
Judge: Jackie Fulford

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of the State of Florida,

Defendant.

MOTION OF BOB GRAHAM TO INTERVENE AS A DEFENDANT

Intervenor, BOB GRAHAM, moves to intervene as a defendant in this action, with the right to litigate all matters arising therein. In support of this motion, Intervenor states:

Facts Supporting Intervention

1. Plaintiffs, CORRINE BROWN and MARIO DIAZ-BALART, have initiated this action seeking a declaration by this Court that the ballot summary of Amendment 6 – designated in their complaint as the "Congressional Amendment" – is misleading and violates Section 101.161(1), Florida Statutes, and an injunction prohibiting the Defendant from directing that Amendment 6 be placed on the 2010 general election ballot.

2. The "Congressional Amendment" is the product of a citizen initiative, which was placed on the ballot following review of the ballot summary and ballot title by the Florida Supreme Court and the submission of in excess of 681,000 signatures of Florida electors.

3. On January 29, 2009, the Florida Supreme Court held that the "Congressional Amendment" met the legal requirements of Article XI, Section 3, Florida Constitution, and that its ballot title and summary complied with Section 101.161, Florida Statutes. *Advisory Opinion to the Attorney General Re: Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175 (Fla. 2009).

4. Defendant DAWN K. ROBERTS is the Interim Secretary of State of the State of Florida. She is the chief election officer of the state and the head of the DEPARTMENT OF STATE. Pursuant to Section 100.371(4), Florida Statutes, it was determined that the "Congressional Amendment" had received the requisite number of signatures for placement on the ballot and Secretary of State Kurt Browning, the predecessor in office of Defendant DAWN K. ROBERTS issued a certificate of ballot position and designated the "Congressional Amendment" as Amendment 6.

5. Intervenor, BOB GRAHAM, is a resident of Miami-Dade County, Florida, and a registered voter and taxpayer. He has regularly voted in Florida general elections and on ballot proposals and intends to vote in the November 2010 general election. He supports Amendment 6 which establishes standards

for the Florida Legislature in establishing congressional districts following the decennial census.

6. Plaintiffs, CORRINE BROWN and MARIO DIAZ-BALART, seek to nullify BOB GRAHAM's constitutional right to seek to amend the State Constitution through the initiative process set forth in Article XI, Section 3, Florida Constitution.

7. Accordingly, Intervenor, BOB GRAHAM, has an interest in this pending action and should be permitted to intervene as a matter of right.

Standards for Granting the Motion to Intervene

8. Rule 1.230, Florida Rules of Civil Procedure, provides as follows:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be subordinate to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

See Williams v. Nussbaum, 419 So. 2d 715, 717 n. 1 (Fla. 1st DCA 1982)(stating that an intervenor "may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by the original parties.").

9. Furthermore, Florida courts hold that the right to intervene should be liberally construed. As the Florida Supreme Court has stated:

> It is generally been held that the interest which will entitle a person to intervene under this provision must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a

> claim to the demand in the suit or some part thereof, or a claim to, or lien upon the property or some part thereof, which is the subject matter of the litigation.

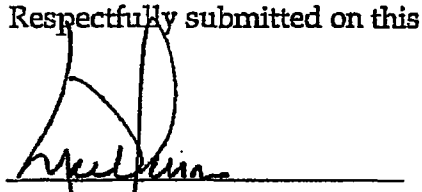
Miracle House Corporation v. Haige, 96 So. 2d 417, 418 (Fla. 1957)(citations and internal quotes omitted).

10. Intervenor, BOB GRAHAM, has such an interest. To the extent that Plaintiffs, CORRINE BROWN and MARIO DIAZ-BALART, seek to remove Amendment 6 from the 2010 general election and nullify his constitutional right to seek the State Constitution through the initiative process set forth in Article XI, Section 3, Florida Constitution, he has a direct and immediate interest in this litigation and he will gain or lose by the direct legal operation and effect of any judgment entered by this Court.

Prayer

WHEREFORE, Intervenor, BOB GRAHAM, respectfully asks this Court to enter an order granting this motion to intervene as a defendant in this action with the right to litigate all matters arising therein.

Respectfully submitted on this 9th day of June 2010 by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided to the following by United States Postal Service and by electronic mail on this 9th day of June, 2010:

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and
200 West College Avenue, Suite 216
Tallahassee, FL 32301

Mark Herron

RECEIVED
JUN 14 2010
By

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

CASE NO: 2010 CA 001824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING FLORIDA SENATE'S MOTION FOR LEAVE TO INTERVENE

THIS CAUSE having come before the Court and the Court, being otherwise fully apprised in the premises, it is, hereby,

ORDERED AND ADJUDGED that the Motion For Leave To Intervene As An Interested Party filed by the Florida Senate is GRANTED.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida on this 9th day of June, 2010.

CIRCUIT JUDGE

Copies Furnished:

James A. Scott, Esq.
Stephen M. Cody, Esq.
Attorney for Sec. of State
George Meros, Esq.

RECEIVED
JUN 14 2010
By

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE

This cause came before the Court on June 9, 2010, upon the respective Motions to Intervene filed by the Florida House of Representatives on May 26, 2010. The Court, having reviewed the Motion and being otherwise fully advised, finds that the intervention of the Florida House of Representatives is appropriate. Accordingly, the Florida House of Representatives' Motion to Intervene is **GRANTED**. The Court accepts the allegations in the Motion to Intervene as the operative pleading of the Florida House of Representatives.

DONE and **ORDERED** this 11th day of June 2010, Leon County, Florida.

JACKIE L. FULFORD
CIRCUIT JUDGE

Copies to Counsel of Record

RECEIVED
JUN 14 2010
By

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

SCHEDULING ORDER

This cause came before the Court for hearing on June 9, 2010. Counsel for all parties, including the intervenors (collectively, the "Parties"), were present personally or telephonically.

Consistent with Florida Rule of Judicial Administration 2.215(g) and the agreement of counsel, and being otherwise fully advised, the Court finds and orders as follows:

1. Intervening Plaintiff, Florida Senate, shall serve its complaint on or before June 14, 2010. Defendant shall file responses to the pleadings of Plaintiffs and Intervening Plaintiffs on or before June 28, 2010.

2. Plaintiffs and Intervening Plaintiffs shall serve witness and exhibit lists and expert witness disclosures on or before July 6, 2010. Defendant shall serve witness and exhibit lists and expert witness disclosures on or before July 12, 2010. The expert witness disclosures shall

identify all expert witness intended to be called at trial and briefly summarize the expert witness' expected testimony.

3. The Parties shall serve any dispositive motions on or before July 16, 2010, and any responses to such dispositive motions on or before July 21, 2010.

4. The discovery period shall close on July 21, 2010.

5. All papers which, under the Florida Rules of Civil Procedure or this Scheduling Order, are required to be served on the Parties, shall additionally be furnished to the Parties by electronic mail no later than the date of service. All responses by the Parties to requests for written discovery shall be due within 20 days after the date of service by electronic mail, without regard to Florida Rule of Civil Procedure 1.090(e).

6. The Court shall conduct a non-jury trial at the Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida, beginning on July 26, 2010. Counsel shall be present and prepared to begin proceedings at 7:30 a.m. The Court may hear argument on any dispositive motions before trial at a time to be determined.

DONE and **ORDERED** this 11th day of June 2010, Leon County, Florida.

JACKIE L. FULFORD
CIRCUIT JUDGE

Copies to Counsel of Record

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

CASE NO: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

INTERVENOR'S COMPLAINT OF THE FLORIDA SENATE

COMES NOW, Intervenor, the FLORIDA SENATE, through its President Jeff Atwater (the "Florida Senate"), and by and through its undersigned counsel and hereby files this, its Intervenor's Complaint against the Defendant DAWN K. ROBERTS (hereinafter referred to as the "Defendant"), in her capacity as Interim Secretary of State of the State of Florida, and in support thereof states the following:

1. This Complaint is filed in addition to the claims alleged by Plaintiffs' in their initial Complaint. On June 9, 2010, this Court granted the Florida Senate and the Florida House of Representative's Motions to Intervene into the case at bar as Party Plaintiff's. The Florida Senate expressly adopts and incorporates the claims raised by Plaintiffs and the Florida House of Representatives in their respective Complaints.

2. This lawsuit, filed by United States Congressman Mario Diaz-Balart and United States Senator Corrine Brown, challenges the validity of proposed constitutional amendments to Florida's constitutional apportionment processes that seek to impose a new set of contradictory and unworkable standards thereon. Pursuant to this Court's Order granting leave to the Florida

Senate to intervene as a Party Plaintiff, the claims raised herein will apply to Amendments 5 and 6.

PARTIES, JURISDICTION AND VENUE

3. The Florida Senate is a legislative body created by Article III of the Constitution of the State of Florida vested, along with the Florida House of Representatives, with the legislative power of the State

4. Pursuant to Article III, Section 16 of the Constitution of the State of Florida, the Florida Senate (along with the House of Representatives) is vested with the duty to apportion the State and Congressional voting districts in accordance with the United States Constitution, the Constitution of the State of Florida and all applicable state and federal law in the second year following each decennial census (2010). Specifically, Article III, Section 16(a) of the Florida Constitution mandates that the "legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state..." The Florida Legislature is also vested with the duty to reapportion the congressional districts apportioned to the State of Florida.

5. Defendant, in her capacity as Interim Secretary of the State of Florida, is the chief elections officer of the State of Florida. In that capacity, Defendant is charged with the duty under Florida law to certify the items, including proposed constitutional amendments 5 and 6, which are scheduled to be included on the next statewide general election ballot. A copy of the proposed constitutional amendments at issue in this litigation is attached hereto as Exhibit A.

6. Venue is proper in this Court because the Defendant is headquartered in Leon County, Florida.

7. This Court has authority to grant declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes.

8. The Court also has jurisdiction over this cause, because the proposed constitutional amendments at issue will be in express conflict with paramount federal law, the Federal Voting Rights Act of 1965 (42 U.S.C. § 1971, *et seq.*). Thus, this Court has jurisdiction to enjoin the proposed constitutional amendments from being placed on the ballot as their contradictions with federal law will render them futile and incapable of being made operative under any circumstances. *See Gray v. Winthrop*, 115 Fla. 721 (1934).

GENERAL ALLEGATIONS

I. The Redistricting Process

9. The Constitution of the State of Florida establishes a carefully constructed, time-sensitive process for the decennial reapportionment of state legislative districts by the Legislature. Art. III, § 16, Fla. Const.

10. The redistricting process for the 2012 cycle has already begun. Committees of the Florida Legislature have met on numerous occasions to plan for the reapportionment process and to discuss the proposed constitutional amendments at issue and their impact upon the apportionment process. In early 2011, the United States Census Bureau will release state-by-state data, and the Florida Legislature will hold dozens of public hearings across the state to listen to the voters and gather essential information.

11. In contrast to state legislative redistricting, the Constitution of the State of Florida does not regulate congressional redistricting, and congressional plans are not subject to automatic review by the Florida Supreme Court. Pursuant to its authority to regulate elections

for Congress, *see* U.S. Const, Art. I, § 4, cl. 1, the Florida Legislature has, in recent decades, redrawn Florida's congressional districts simultaneously with its decennial reapportionment of state legislative districts.

II. The Challenged Amendments

12. The Florida Department of State, Division of Elections, approved Amendments 5 and 6 for circulation on September 28, 2007. These proposed constitutional amendments have since been certified for placement on the 2010 general election ballot in November, 2010.

13. The proposed constitutional amendments purport to create new, fact-intensive criteria applicable to redistricting. One applies to state legislative redistricting (the "State Legislative Petition"), while the other imposes virtually identical requirements upon congressional redistricting.

14. The criteria mandated by the proposed constitutional amendments at issue in this litigation are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rules by which their effects can be divined and their purposes accomplished. Moreover, they lack judicially discoverable or manageable standards that would enable the courts to construe and enforce their requirements coherently, objectively, predictably, and systematically. Furthermore, the proposed Amendments contain an unconstitutional and unworkable "intent" standard that will impermissibly delve into the intent of the Legislature as a whole while also chilling the public hearings that are vital to the redistricting process. Lastly, the proposed constitutional amendments also patently violate paramount federal law relative to the voting rights of minorities and will therefore ultimately be futile and inoperable.

COUNT I – REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF DUE TO THE AMENDMENTS PATENT CONFLICT WITH PARAMOUNT FEDERAL LAW

15. The allegations contained in Paragraphs 1 through 14 above are incorporated as though restated herein.

16. This is an action for declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes. Additionally, pursuant to the Supreme Court of Florida holding in the case of *Gray v. Winthrop*, an administrative officer may be enjoined from placing a proposed constitutional amendment on the ballot when the amendment, if adopted, would patently violate paramount federal law, and would inevitably be futile and incapable of being made operative under any circumstances. 115 Fla. 721 (Fla. 1934).

17. State statutes and constitutions are subject to applicable prohibitions and limitations of the United States Constitution, the supreme law of the land, which all officers and all electors are required to take an oath to support. State statutes or state constitutions are also controlled by, and subject to federal organic law and federal statutes by virtue of the supremacy clause of the United States Constitution. *U.S. v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1311 n.14 (11th Cir. 1999) (explaining that federal forfeiture statutes trump the homestead protections of the Florida constitution); *see also, Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F. Supp. 282, 289 (S.D. Tex. 1986) ("assuming that the [federal statute] is truly in conflict with the Texas Constitution, the Supremacy Clause of the United States Constitution requires that the provisions of the federal statute prevail.").

18. The language and application of the proposed constitutional amendments at issue will patently conflict with paramount federal law, namely the Voting Rights Act of 1965 (42 U.S.C. § 1971).

19. Section 2 of the Voting Rights Act protects minorities from electoral laws or procedures that cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Moreover, a reapportionment plan is violative of section 5 of the Voting Rights Act if the plan would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003). Five Florida counties are currently covered jurisdictions under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973. Loss of minority districts from a statewide plan is sufficient to show a violation of section 5 of the Voting Rights Act. *Georgia v. Ashcroft*, 539 U.S. at 479.

20. To comply with the non-vote dilution provision of Section 2 and the non-retrogression standard of Section 5, federal courts have expressly authorized and affirmed a legislature's use of incumbency and political party affiliation data in the redistricting process. As recently as 2002 in Florida, a three judge federal panel expressly held that certain challenged districts from the 2002 Florida Reapportionment plan were in compliance with the Voting Rights Act by relying upon political party and incumbency data in the same manner as the Florida Legislature did during the redistricting process. *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D. Fla. 2002).

21. In upholding two questioned Florida Congressional Minority Districts, Districts 3 and 23 (Corrine Brown and Alcee Hastings), the *Martinez* Court expressly upheld these districts as affording minorities sufficient opportunities to participate in political process based upon political party affiliation data and the incumbent status of the elected official, just as the Legislature did in crafting the 2002 plan. *Id.* at 1302-03. Since Amendment 5 applies to state legislative districts, the vote dilution and retrogressive effects that will be caused by the

Amendments prohibition on considering political party and incumbency data (alleged supra) will also be applicable to State House and State Senate minority seats as well, such as those held by Senator Chris Smith (Senate District 29) and Senator Gary Siplin (Senate District 19), among others.

22. The proposed constitutional amendments at issue, however, expressly prohibit the Florida Legislature from having an intent to favor or disfavor a political party or an incumbent. Under this mandate, the Florida Legislature would be legally prohibited from utilizing political party or incumbency data in the redistricting process which it has been expressly authorized to use by the Voting Rights Act, vis-a-vis the *Martinez* Court, to ensure that the crafted apportionment plan is in compliance with the Voting Rights Act.

23. This prohibition, on its face, patently contravenes both the *Martinez* Court's express approval of the Florida Legislature's use of such data and the *Martinez* Court's own utilization of such data in finding that challenged minority districts were in compliance with the Voting Rights Act. If the Florida Legislature is prohibited from utilizing political party or incumbency data in the redistricting process to ensure that retrogression does not occur, minority seats will be lost as the likelihood of a district's performance for a minority candidate has been determined based upon data such as political party affiliation and incumbency. *See Martinez v. Bush, supra.*

24. The proposed constitutional amendments will interfere with and obstruct the opportunity of minority voters to participate in the political process and to elect candidates of their choice. The proposed constitutional amendments will also cause the loss of minority seats as political party and incumbency data will be precluded from consideration in the redistricting process. In particular, by prohibiting the use of incumbency as a factor in reapportionment,

minority voters will be denied the benefits of the achievements and participation of their elected officials in plain violation of federal law. When a plan crafted under the proposed constitutional amendments causes the loss of minority seats, the criteria mandated by the proposed constitutional amendments and the resulting apportionment plan itself will be inexorably in violation of the non-vote dilution and non-retrogression mandates of the Voting Rights Act.

25. On January 29, 2009, the Florida Supreme Court performed its narrowly-tailored review of the proposed constitutional amendments at issue and rendered an advisory opinion that their summaries are clear and unambiguous and that the proposed amendments are limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

26. Subsequently, on March 9, 2009 the United States Supreme Court rendered its opinion in the case of *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). Therein, the Court revisited the protections afforded to the maintenance and creation of minority districts pursuant to section 2 of the Voting Rights Act. This case was decided after the proposed constitutional amendments at issue were certified to the general election ballot.

27. Due to the proposed constitutional amendments' express violation and contradiction of paramount federal law, as described above, the proposed constitutional amendments will be futile and incapable of being made operative under any circumstance; as a result, the Defendant must be enjoined from placing proposed Amendments 5 and 6 on the ballot in order to avoid inevitable litigation and undue expenses to the State.

28. The Florida Senate has a clear legal right to injunctive relief and lacks an adequate remedy at law.

29. It is in the public interest for this Court to grant injunctive relief to prevent irreparable harm to the Florida Senate and the voters of Florida.

COUNT II-DECLARATORY RELIEF

30. This is a claim declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes. The allegations contained in Paragraphs 1 through 14 above are incorporated as though restated herein.

31. The criteria mandated by the proposed constitutional amendments are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished.

32. For example, pursuant to subsection (1) of the proposed constitutional amendments, "No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or incumbent." (See Exhibit A). Hence, the proposed constitutional amendments are unworkable because they provide no parameters or guidance as to how the "intent to favor or disfavor" a political party or incumbent will be ascertained.

33. The public hearing process currently used in Florida that allows the electorate to espouse their views relative to their respective districts will be chilled as any statements made to legislators in favor of a party or incumbent will be utilized to support a claim that a district was drawn with mal-intent. Furthermore, Legislators will be unable to amend proposed districts based upon comments received from the voters of Florida at public hearings as said statements will be used to support a claim that a district was drawn with an impermissible "intent to favor or disfavor."

34. Most importantly, any searching judicial scrutiny into the intent of specific Legislators and their decisions would violate the separation of powers scheme specifically set out in the Constitution of the State of Florida.

35. Moreover, the Amendments are also unworkable due to their mandate that districts "shall be compact." (See Exhibit A).

36. The proposed constitutional amendments do not provide the Florida Senate with: a definition of what a "compact" district is; what a "compact" district looks like, or with any parameters whatsoever that would provide guidance to the Florida Senate as to what would constitute a "compact" district.

37. These facial and operational defects will substantially impede the Florida Senate's ability to effectively carry out its constitutionally mandated reapportionment duties since it will perpetually be operating in a state of legal and operational uncertainty with respect to its perceived intent as well as attempting to comply with an inherently subjective compactness requirement.

38. Moreover, as noted above, any searching judicial scrutiny into the intent of specific Legislators and their decisions would violate the separation of powers scheme specifically set out in the Constitution of the State of Florida.

39. The parties hereto have a bona fide, actual, present practical need for declaration by this Court.

40. The declaration sought herein concerns a present, ascertained or ascertainable state of facts, or a present controversy as to a state of facts.

41. Constitutional rights and obligations of the Florida Senate are dependent upon the law applicable to the facts of this case.

42. The adverse interests are all before this Court.

43. The Florida Senate has an actual, present and adverse interest in the subject matter of this Complaint.

44. The relief sought herein in not merely the giving of legal advice or the answer to questions posed for curiosity but is an actual controversy necessitating a decision.

45. The Florida Senate has a clear legal right to injunctive relief and lacks an adequate remedy at law.

46. It is in the public interest for this Court to grant injunctive relief to prevent irreparable harm to the Florida Senate and to the voters of Florida.

WHEREFORE, the Plaintiff-Intervenor, Florida Senate, respectfully requests this Court to:

a. Hold that the proposed Amendments 5 and 6 violate paramount federal law, and will thus be futile and incapable of being made operative under any circumstances in violation of Florida law;

b. Hold that proposed Amendments 5 and 6 to the Florida Constitution are also vague, conflicting, violative of separation of powers, and are wholly incapable of being made operative

c. Enjoin the Defendant from placing proposed Amendments 5 and 6 on the 2010 general election ballot; and

d. Grant Plaintiff-Intervenor such other relief as the Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by U.S. mail to Stephen M. Cody, Esq., Attorney for Plaintiffs, 16610 S.W. 82 Court, Palmetto Bay, FL 33157, George Meros, Esq., Attorney for Intervenor, Gray Robinson, P.A., 301 South

Bronough Street, Suite 600, P.O. Box 11189 (32302-3189), Tallahassee, Florida 32301 and Michael J. Tanner, Esq., Attorney for Defendant, Tanner Bishop, The Modis Building, One Independent Drive, Suite 1700, Jacksonville, Florida 32202, this 14th day of June, 2010.

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CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____
(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS: _____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: / / **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X _____ _____
SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org
P.O. Box 330868, Miami, FL 33233
RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	D	SERIAL NUMBER: 07-15

EXHIBIT
A

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS: _____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: ___/___/___ **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new Section 21 to Article III

BALLOT TITLE:

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

BALLOT SUMMARY: Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new Section 21 to Article III

Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:
(1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X_____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-16

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AND INTERVENING PLAINTIFFS' COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves to dismiss Plaintiffs' and Intervening Plaintiffs' respective complaints for lack of subject matter jurisdiction pursuant to Rule 1.140(b)(1), Florida Rules of Civil Procedure.

I. PRELIMINARY STATEMENT

As the State of Florida's chief elections officer, the Defendant is vitally interested in an orderly elections process, particularly an orderly process for pre-election judicial review of amendments to the Florida Constitution proposed by voter initiatives. *See* § 97.012, Fla. Stat.

To that end, the Florida Constitution and Florida Supreme Court precedent direct that the Supreme Court has exclusive jurisdiction over pre-election ballot summary challenges to voter initiative proposed amendments to the Florida Constitution such as those asserted against

Amendments 5 and 6 in this case.

Confining such review to the Supreme Court prevents the type of piecemeal and last-minute litigation over voter initiatives that this case represents.

Because the Plaintiffs and the Intervening Plaintiffs can only pursue the claims asserted here in the Florida Supreme Court, this case must be dismissed.

II. BACKGROUND

Proposed Amendments 5 and 6

On September 28, 2007, the Florida Department of State, Division of Elections, (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts"). [Plaintiffs' Complaint, ¶ 1; Senate Complaint, ¶ 12]

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Attorney General to request an advisory opinion from the Supreme Court as to whether the Amendments comply with the requirements of article XI, section 3 of the constitution and section 101.161, Florida Statutes (2008) (relating to ballot title and summary). *See Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 178-79 (Fla. 2009) (hereafter, "*Redistricting Standards*").

The Supreme Court consolidated its review of the Amendments and allowed all interested parties the opportunity to file briefs in support or opposition. FairDistricts filed its brief in

support of the Amendments, and the Legislature filed a brief in opposition and appeared at oral argument. *Redistricting Standards*, 2 So.3d at 178, 185-91. The Plaintiffs in this case, Corrine Brown and Mario Diaz-Balart, chose not to appear in the Supreme Court.

On January 29, 2009, the Supreme Court declared, "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Redistricting Standards*, 2 So. 3d at 191.

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010, general election. *Id.*

The Plaintiffs' Claims

The Supreme Court's decision notwithstanding, on May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major ramifications" posed by Amendment 6. [Complaint, ¶ 5]

The Plaintiffs' Complaint alleges eight separate claims, each entitled "Misleading Ballot Summary," and each claim asserts that the ballot summary of proposed Amendment 6 is misleading in some respect and therefore violates Florida law.

The House and Senate Claims

The Plaintiffs are joined in their challenge to Amendment 6 by Intervenors the Florida House of Representatives and the Florida Senate (together, "Intervening Plaintiffs").

In its operative pleading ("House Complaint"), the House: (1) adopts Counts I-VI of the Plaintiffs' Complaint, each of which alleges that the ballot summary of proposed Amendment 6

is misleading; (2) asserts the allegations in Counts I-VI of the Plaintiffs' Complaint against the ballot summary for proposed Amendment 5; and (3) asserts an additional claim against the Amendment 5 ballot summary (also on the basis that the summary is purportedly misleading).[1]

On June 14, 2010, the Senate filed its complaint ("Senate Complaint"), which adopts each of the claims raised by the Plaintiffs and by the House. In addition, the Senate asserts two claims seeking injunctive and declaratory relief on the basis that proposed Amendment 5 and Amendment 6 purportedly violate federal and Florida law.

Now, less than three months before the Supervisors of Elections must finalize the ballots for the general election – and after delaying more than sixteen months following the advisory opinion in *Redistricting Standards* – the Plaintiffs and Intervening Plaintiffs ask this Court to exceed its jurisdiction and set aside the reasoned opinion of the Florida Supreme Court, blocking the Amendments from appearing on the ballot.

III. ARGUMENT

A. The Florida Supreme Court has exclusive jurisdiction to consider pre-election challenges to voter initiative amendments to the Florida Constitution.

In 1984, the Florida Supreme Court decided *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), in which it affirmed the trial court's grant of an injunction striking a voter initiative amendment from the ballot on grounds that the amendment violated the single subject requirement of article XI, section 3, and that the ballot summary did not comply with section 101.161. *Evans*, 457 So. 2d at 1353-55.

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[1] On June 11, 2010, the Court entered its Order Granting Florida House of Representatives Motion to Intervene. In addition to permitting the House to intervene in this case, the Court accepted the allegations contained in the House's motion to intervene as the House's operative pleading.

Evans was the second opinion issued by the Supreme Court in 1984 in which the Court struck a voter initiative proposed amendment from the ballot due to violations of article XI, section 3[2] or section 101.161.[3] In his concurrence in *Evans*, Justice Overton observed: "the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." 457 So. 2d at 1356 (quotation omitted).

In 1986, the Legislature put forward just such a process when it proposed for adoption article IV, section 10 and article V, subsection 3(b)(10) of the constitution. These provisions established the Supreme Court's present mandatory and exclusive jurisdiction over pre-election challenges to voter initiative petitions to amend the Florida Constitution. The accompanying legislative staff summaries explained the purpose of these provisions: "This proposed amendment, together with the enacting language of PCS/HB 72, are designed to provide a method by which an initiative's proposal's compliance with constitutional and statutory requirements could be ascertained expedititously." Staff of Fla.H.R.Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla.H.R.Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986).[4]

In *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the Supreme Court discussed the history and purpose behind article IV, section 10 and article V, subsection 3(b)(10) as follows:

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[2] *Evans*, 457 So. 2d at 1353-54; *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

[3] *Evans*, 457 So. 2d at 1353-54.

[4] *See Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (citing the staff analysis summaries to CS/HJR 71 and PCS/HJR 71 and noting that "[a]lthough the committee substitutes discussed in these summaries were not themselves adopted, they differ in no relevant way from House Joint Resolution 71, which ultimately was adopted, placed before the voters, and approved. *See* Fla. HJR 71, 1986 Fla. Laws 2281, 2281-83.").

> The constitution expressly authorizes judicial review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const.; *see generally* Art. V, § 3(10), Fla. Const.; Art XI, § 3, Fla. Const. (explaining that the sponsor of an initiative petition must obtain signatures of eight percent of electors statewide in order to place the amendment on the ballot); §§ 15.21 (explaining that judicial review may be sought when the sponsor has obtained one-tenth of the signatures necessary for placement on the ballot), 16.061, Fla. Stat. (1997). This provision was adopted in 1986 in response to the Court's striking of two initiative amendments from the ballot after the sponsors had obtained the requisite number of signatures for placement on the ballot. *See Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). **The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . .**

Armstrong, 773 So. 2d at 14 n.18 (emphasis added).

On at least two occasions, the Supreme Court has stated expressly that its jurisdiction to review voter initiative proposed amendments to the Florida Constitution, pre-election, is both mandatory **and exclusive**. *See Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994) ("The Attorney General of Florida has petitioned this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)); *Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) ("The Attorney General of Florida has requested this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. § 16.061, Fla.Stat. (1993). In response, we issued an order permitting interested parties to file briefs, and we heard oral arguments on the validity of the proposed amendment. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)).

Notably, in the more than two decades following the voters' adoption of article V, subsection 3(b)(10), there has not been a published opinion in which a Florida court, other than

the Supreme Court, has attempted to exercise jurisdiction over a pre-election suit seeking to invalidate a voter initiative to amend the constitution on the basis that the proposed amendment or ballot summary did not comply with article XI, section 3 or section 101.161.[5]

B. Constitutional amendments from resolutions of the Legislature are subject to different procedures than voter initiatives

A joint resolution of the Florida Legislature is the other principal means by which proposed constitutional amendments are placed on the ballot.[6]

Prior to the voters' approval of article IV, section 10 and article V, subsection 3(b)(10) in 1986, the method by which legislative joint resolutions and voter initiatives were reviewed by the Florida courts was identical; either could be reviewed through a declaratory action filed in

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[5] Plaintiffs' "Notice of Priority Status" cites the First District Court of Appeal's opinion in *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 558-59 (Fla. 1st DCA 2006) ("*Playing Field*"), for the proposition that the trial court's "refusal to expedite [a] challenge to a proposed constitutional amendment was in error." [Notice of Priority Status, ¶ 4] Defendant does not dispute that this case should be resolved on an expedited basis. However, to the extent that Plaintiffs rely on *Playing Field* in support of this Court exercising jurisdiction in this case, that opinion is entirely distinguishable. *Playing Field* involved a procedural challenge based on allegations that the initiative sponsor fraudulently obtained signatures on the initiative petition in violation of section 100.371, Florida Statutes. It did not address whether the amendment complied substantively with article XI, section 3 and section 101.161.

[6] There are five methods by which the Florida Constitution may be amended:
(i) Constitutional Convention – Florida voters may call a constitutional convention by collecting a designated amount of signatures and then gaining a majority of the vote to the question "Shall a constitutional convention be held?";
(ii) Constitutional Revision Commission – this commission meets every 20 years to examine the constitution of the state and propose the amendments deemed necessary;
(iii) Taxation and Budget Reform Commission – this commission also meets only every 20th year;
(iv) Legislative Joint Resolution – The Florida Legislature can pass a joint resolution supported by three-fifths of the membership of each house of the legislature; and
(v) Citizen Initiative – the method by which Amendments 5 and 6 were proposed here.
See art. XI, §§ 1-4, 6, Fla. Const.

the circuit courts or a mandamus petition filed in the Supreme Court.[7]

After article IV, section 10 and article V, subsection 3(b)(10) took effect, the Supreme Court has had original and exclusive jurisdiction over the pre-election review of voter initiative proposed amendments to the Constitution, for the reasons discussed above. By contrast, no basis for original and exclusive Supreme Court jurisdiction exists for review of proposed amendments by legislative joint resolution. *Armstrong*, 773 So. 2d at 14 n.18 ("The constitution expressly authorizes [Supreme Court] review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const. . . .").

Therefore, unlike voter initiative proposed amendments, the validity of joint resolution proposed amendments may still be reviewed by circuit courts pursuant to declaratory judgment actions.[8] *See e.g., Armstrong*, 773 So. 2d at 9 (pre-election declaratory judgment action filed in circuit court as to validity of constitutional amendment proposed by legislative resolution).

Thus, any authorities arising from proposed amendments by legislative resolution which may be relied upon here by the Plaintiffs and the Intervening Plaintiffs are entirely inapplicable.

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[7] *See Evans*, 457 So. 2d at 1352 (in which the Supreme Court reviewed a "a declaratory judgment rendered [in the circuit court] in which [that court] found the [citizen initiative] proposed amendment to the Florida Constitution . . . and its ballot summary were constitutionally valid."); *Askew v. Firestone*, 421 So. 2d 151, 152-53 (Fla. 1982) (Florida Supreme Court opinion reviewing declaratory judgment issued by a circuit court regarding validity of joint resolution proposed amendment to the Florida Constitution); *Fine*, 448 So. 2d 985-86 (Florida Supreme Court accepting discretionary mandamus jurisdiction to consider validity of citizen initiative proposed amendment to Florida Constitution).

[8] One reason for the Legislature's decision not to include pre-election review of joint resolution proposed amendments by the Supreme Court in the amendment resulting in article IV, section 10 in 1986 was posited by the *Armstrong* Court: "The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . . Obviously, no such provision is necessary for amendments originating from other sources." *Armstrong*, 773 So. 2d at 14 n.18.

C. Plaintiffs' reliance upon *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) is misplaced.

Plaintiffs' Complaint alleges that "[u]nder *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of [Amendment 6] in [*Redistricting Standards*] is no impediment to this challenge." [Plaintiffs' Complaint, ¶ 16]

Smith was decided pursuant to a petition for writ of mandamus originally filed in the Supreme Court. 607 So. 2d at 398 (citing art. 5, § 3(b)(8) ("The supreme court . . . [m]ay issue writs of mandamus and quo warranto to state officers and state agencies."). The Court had previously issued an advisory opinion pursuant to article IV, section 10 and article V, subsection 3(b)(10) as to the validity of the voter initiative amendment at issue in that case and, consequently, the *Smith* Court was faced with the question of:

> whether our earlier advisory proceeding precludes us from considering the present cause. It is true that article IV, section 10 and article V, subsection 3(b)(10) are silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction.

607 So. 2d at 398.

In its holding that a second challenge to the proposed amendment was permissible, the *Smith* Court noted that its advisory opinions "would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised." *Id.*[9] The Court stated that its holding that advisory opinions issued pursuant to article IV, section 10 and article V, subsection 3(b)(10) are non-binding was:

> entirely consistent with settled law holding that advisory opinions "are not binding judicial precedents, [although] they are frequently very persuasive and

[9] The Court relied in part on the legislative staff summaries considered by the Legislature prior to its submission of the proposed amendment resulting in voter approval of article IV, section 10, and article V, subsection 3(b)(10). 607 So. 2d at 399.

> usually adhered to" . . . as to issues they actually address, [but] not as to issues . . . that were not addressed at all in a prior advisory opinion.

Id. at 399 n.3 (quoting *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944)).

There is no ambiguity in *Smith* that in "extraordinary cases" an amendment opponent can advance a second challenge in the Supreme Court prior to an election. 607 So. 2d at 399. Yet the issue here is not whether the *Supreme Court* has jurisdiction to revisit issues previously decided. The issue here is whether *this* Court has such jurisdiction. As to that question, *Smith* provides no support for the Plaintiffs' contention that this Court may exercise original jurisdiction in this case. Indeed, in two respects, the *Smith* opinion indicates that jurisdiction lies only with the Supreme Court.

First, *Smith* was decided pursuant to a petition for writ of mandamus filed directly in the Supreme Court – not the circuit court. Thus, the procedure followed in that case is wholly consistent with subsequent statements of the Supreme Court that it has original and exclusive jurisdiction over the pre-election review of proposed initiative amendments pursuant to article V, section 3(b)(10). *Advisory Opinion*, 642 So. 2d at 725; *Advisory Opinion*, 661 So. 2d at 1205. Second, the manner in which the Supreme Court framed the issue before it demonstrates that Court's exclusive jurisdiction. As the Court stated, the issue there was "whether the advisory proceeding raises a procedural bar or otherwise deprives **this Court** of jurisdiction over the present case." 607 So. 2d at 398 (emphasis added).

In short, nothing in *Smith* even hints that the petitioner/opponent of the proposed amendment could have gone to any other court with its pre-election challenge.

Likewise, the Supreme Court's decision in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), supports Defendant's position here. In *Ray*, a post-election amendment challenge, the Supreme Court revisited *Smith* to make clear that absent *extraordinary circumstances*, its decisions in an

advisory opinion are binding. As stated in *Ray*:

> relitigation of issues expressly addressed in an advisory opinion on a proposed amendment **is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction.** Renewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion. [A]lthough our advisory opinions are not strictly binding precedent in the most technical sense, only under **extraordinary circumstances** will we revisit an issue decided in our earlier advisory opinions.
>
> This case does not present such a circumstance. . . . Therefore, we conclude that our earlier [advisory opinion] decision . . . **is binding** on the single-subject issue and we find no reason to reconsider the issue and recede from that decision.

Ray, 742 So. 2d at 1285 (emphasis added; internal quotation omitted).

Thus, to the extent Plaintiffs or Intervening Plaintiffs wish to challenge Amendments 5 and 6 before the election, they, like the petitioner in *Smith*, must do so in the Florida Supreme Court and must show that *extraordinary circumstances* warrant that Court's exercise of mandamus jurisdiction.

D. This Court has no jurisdiction to consider a pre-election challenge to the validity of the Amendments with an expanded scope of review.

The Senate Complaint alleges as a basis for this Court's jurisdiction that:

> this Court has jurisdiction to enjoin the proposed constitutional amendments from being placed on the ballot as their contradictions with federal law will render them futile and incapable of being made operative under any circumstances. *See Gray v. Winthrop*, 115 Fla. 721 (1934).

[Senate Complaint, ¶ 8] Remarkably, this is the very argument Justice Overton made in his dissent – rejected by the majority – in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229-30 (Fla. 1991) (Overton, J., concurring in part and dissenting in part) (hereafter "*Limited Terms*"). In *Limited Terms*, Justice Overton argued that pursuant to *Gray v. Winthrop*, 156 So. 270 (Fla. 1934), *Gray v. Moss*, 156

So. 262 (Fla. 1934), and *Weber v. Smathers*, 338 So. 2d 819, 821 (Fla. 1976), the Supreme Court must strike an initiative proposed amendment to the constitution from the ballot if:

> "by its terms [it] specifically and necessarily violates a command or limitation of the Federal Constitution . . . in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances."

Limited Terms, 592 So. 2d at 229 (J. Overton, dissenting) (quoting *Winthrop*, 156 So. at 272). That argument was rejected by the majority, which held that "we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989)." 592 So. 2d at 227 & n.2 (citing *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla.1982) (question of whether proposed amendment violated due process not justiciable in challenge to ballot summary)).

Likewise, in *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (hereafter, "*Class Size*"), the Supreme Court reaffirmed its holding in *Limited Terms*, and once again rejected the argument made by Justice Overton in his dissent in *Limited Terms* – and by the Senate here. As stated in *Class Size*:

> In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment. Moreover, **other constitutional challenges are not justiciable in this type of proceeding.** [*Limited Political*], 592 So. 2d 225, 227 (Fla. 1991).

816 So. 2d 580, 582 (emphasis added, internal citation omitted in part). By "this type of proceeding," the Court meant a **pre-election proceeding**, over which, for the reasons previously discussed, the Supreme Court has original and exclusive jurisdiction.

In *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 804-05 (Fla. 1998) (hereafter, "*Term Limits*"), Justice Overton once again argued, this time in a

concurrence joined by no other Justice, that:

> it is a fraud on the public to indicate that this initiative provision could be properly placed on the ballot if the ballot summary was not misleading. I find this entire provision to be unconstitutional on its face under *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). I still adhere to the view that I expressed in [*Limited Terms*] that . . . in considering whether or not the proposed amendment to [the Florida] constitution meets constitutional requirements of validity under the Constitution of the United States. . . .

718 So. 2d at 804 (Overton, J., concurring in the result only) (citing in part Art. III, § 10, Fla. Const.; *Winthrop*, 156 So. 270; *Moss*, 156 So. 262). Once again, the majority of the Court rejected the argument. 718 So. 2d at 801 & n.1.

The Defendant does not dispute that if the voters approve the Amendments, the Senate may assert – post-election – the arguments it attempts to make in this Court.[10] But the pre-election scope of review of initiative proposed amendments is "limited to two legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary of the proposed amendment are misleading, in violation of section 101.161(1), Florida Statutes." *Term Limits*, 718 So. 2d at 801.[11]

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[10] *Ray* is an example of this procedure. There, the amendment opponents filed a post-election circuit court case to prevent enforcement of a voter-approved amendment to the Florida Constitution on the ground that the amendment was invalid under federal law. *Ray*, 742 So. 2d at 1277, 1278, 1280. This is precisely the claim the Florida Senate makes in this case.

[11] The Plaintiffs and Intervening Plaintiffs stated at the hearing on June 9 that their claims require a trial of factual issues. As discussed above, the appropriate scope of pre-election review is limited to the issues under Article XI, section 3, of the constitution and section 101.161, Florida Statutes, *i.e.*, whether the language of an amendment conforms to the single subject rule and whether the ballot title and summary conform to the requirements of the statute. If there are factual issues the Attorney General believes are necessary to enable the Supreme Court to render an advisory opinion, he must specifically enumerate those. *See* § 16.061, Fla. Stat. There were no factual issues so enumerated by the Attorney General as to Amendments 5 and 6. *See Redistricting Standards*.
(Continued ...)

The rationale for this limitation is simple and compelling; as stated in *Advisory Opinion to the Attorney General Re: Tax Limitation*, 644 So. 2d 486 (Fla. 1994) (hereafter, "*Tax Limitation*"):

> This Court's role in these matters is strictly limited to the legal issues presented by the constitution and relevant statutes. **This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments, and we have not done so. Infringing on the people's right to vote** on an amendment is a power this Court should use only where the record shows the constitutional single-subject requirement has been violated or the record establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment and its effect on the present constitution.

Id. at 489 (emphasis added).

Even as to the two narrow issues which the Supreme Court does consider in a pre-election advisory opinion, "'[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.'" *Advisory Opinion to Attorney General Re: 1.35% Property Tax Cap*, 2 So. 3d 968, 971 (Fla. 2009) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). "[W]here voter initiatives are concerned, the Court has no authority to inject itself in the process, unless the laws governing the process [i.e., article XI, section 3 and section 101.161] have been clearly and conclusively violated." *Id.* (internal quotation and citation omitted).

As aptly put by the Third District Court of Appeal:

> The law is well-settled that a court of equity as a general rule will not restrain the holding of an election because a free election in a democracy is a political matter to be determined by the electorate and not the courts. Limited exceptions to this rule have been recognized but only on the narrowest of grounds. One such exception is where the election is being held in violation of an applicable

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Any other issues for which evidence may be necessary for Plaintiffs to support their claims are assertable only in a post-election proceeding as discussed above. Consequently, a trial is neither necessary nor proper in this case.

> legislative enactment. Another is where the ballot question on a referendum is misleading and deprives the voter of an opportunity to know and to be on notice as to the proposition on which he is to cast his vote.

Metropolitan Dade County v. Shiver, 365 So. 2d 210, 212 (Fla. 3d DCA 1978), *affirmed*, 394 So. 2d 981 (Fla. 1981) (internal citation omitted).

In sum, the Supreme Court has applied its limited authority to review initiative proposed amendments to infringe as little as possible on the people's right to vote. Allowing an amendment opponent to simply sidestep the Supreme Court and seek broader review in a pre-election challenge in a Florida circuit court would render that limited scope of review meaningless.

In this case, the Plaintiffs and Intervening Plaintiffs plainly seek to do just that.

IV. CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction to decide this case. If the Plaintiffs and the Intervening Plaintiffs wish to challenge Amendments 5 and 6 prior to the November 2010 general election, they must seek review through the Supreme Court's exclusive jurisdiction.

Accordingly, the Defendant respectfully asks this Court to dismiss the Plaintiffs' and Intervening Plaintiffs' claims in this case for lack of subject matter jurisdiction.

Dated this 22nd day of June, 2010.

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00017775 v. 2.doc

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION FOR STAY OF DISCOVERY

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves the Court to enter an order staying all discovery in this case pending resolution of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

I. BACKGROUND

On September 28, 2007 the Florida Department of State, Division of Elections (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States Congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, the "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts").

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (relating to ballot title and summary).

The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued its opinion holding "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010 general election. *Id.*

On May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major ramifications" posed by Amendment 6. [Complaint, ¶ 5.] Plaintiffs were joined in their challenge to Amendment 6 by Intervenors The Florida House of Representatives on May 26, 2010, and by The Florida Senate on May 27, 2010 (together, the "Intervening Plaintiffs"). The Intervening Plaintiffs also challenge Amendment 5 on various grounds.

At the time they filed their Complaint, the Plaintiffs filed a Notice of Priority Status requesting an expedited disposition schedule for this case pursuant to Rules 2.215(g) and 2.545(c)(1), Florida Rules of Judicial Administration (the "Priority Notice"). The Plaintiffs asserted that various deadlines attendant to ballot preparation for the 2010 general election

necessitate expedited consideration of their claims. [Priority Notice, ¶¶ 2-5]

Following a hearing on June 9, 2010, the Court entered a Scheduling Order for this case which directs the parties to exchange witness lists, exhibit lists, and expert disclosures on an expedited basis (all to be completed by July 12) and directs that discovery must be completed by July 21, 2010. [Scheduling Order, ¶¶ 1-5] The Scheduling Order sets the case for non-jury trial beginning on July 26. [*Id.* ¶ 6]

In conjunction with this Motion, Defendant has filed its Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss"). The Motion to Dismiss demonstrates that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs in this case.

The Defendant has also filed a motion asking the Court to expedite its consideration and disposition of the issues raised in the Motion to Dismiss.

This Motion asks the Court to stay discovery pursuant to the Court's inherent authority to manage proceedings in a manner that avoids unnecessary costs or delay.

II. ARGUMENT

The Court has the inherent authority to stay discovery

The Florida Rules of Civil Procedure invest trial courts with "broad discretion . . . to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (quoting Fla. R. Civ. P. 1.280(c)). "In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it." *Rasmussen*, 500 So. 2d at 535. The court should

"assess all of the interests that would be served by the granting or denying of discovery—the importance of each and the extent to which the action serves each interest." *Id.*

The trial court's broad discretion includes the "'inherent power to stay discovery until preliminary issues can be settled which may be dispositive of some important aspect of the case.'" *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997) (citing *Petrus v. Bowen*, 833 F.2d 581 (5th Cir. 1987)); see also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (discovery may be stayed to determine the dispositive issue of immunity of government officials).[1]

Preliminary motions presenting purely legal questions should be resolved before discovery begins, as neither the parties nor the court have any need for discovery at this juncture. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). "Courts have held good cause to stay discovery exists when resolution of a preliminary motion may dispose of the entire action." *Nankvil v.. Lockheed Martin Corp.*, 216 F.R.D. 689, 692 (M.D. Fla. 2003). Accordingly, courts may stay the discovery process in order to avoid abuse of the process and prejudice to the parties. *See Chudasama*, 123 F.3d at 1367-68; *see also Staup v. Wachovia Bank, N.A.*, 2008 WL 1771818, *1 (S.D. Fla. 2008) (finding that requiring discovery before resolution of motion to dismiss would impose an undue burden on defendant). Furthermore, public policy can "support[] the denial of the discovery, after a proper balancing of the competing interests to be served by granting discovery or by denying it." *Sugarmill Woods Civic Ass'n, Inc. v. S. States Util.*, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997) (citations omitted).

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[1] The Florida Rules of Civil Procedure are "patterned very closely after the Federal rules[.] . .[,]" and Florida courts will "closely examine and analyze Federal decisions and commentaries" to aid in interpreting the Florida Rules. *Deltona Corp. v. Bailey*, 336 So. 2d 1163, 1170 (Fla. 1976) (citing *Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 610 (Fla. 4th DCA 1975).

In the context of motions to dismiss for lack of personal jurisdiction, the Florida Supreme Court has adopted the federal standard, which permits discovery as to the question of whether the court has jurisdiction over the defendant, but prohibits discovery on the merits of the case until the pending motion to dismiss for lack of personal jurisdiction is finally resolved. *Cf. Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282, 1284 (Fla. 1992) ("Limited discovery on jurisdictional issues will assist the trial court in answering the question of whether to grant or deny jurisdiction. . . . We emphasize that the discovery which is envisioned by our holding here should not be broad, onerous or expansive, **nor should it address the merits of the case.**" (emphasis added)).

The balance of competing interests favors a stay of discovery

The Defendant asks the Court to stay discovery until its challenge to the Court's subject matter jurisdiction asserted in its Motion to Dismiss is addressed and ruled upon. If the Court grants the Motion to Dismiss, that relief will obviate the need for any discovery at all, and the Defendant has asked the Court to expedite its hearing and resolution of the Motion to Dismiss such that any delay occasioned by a stay would be minimal.

Consequently, any harm from a stay of discovery is greatly outweighed by the benefit of avoiding the substantial expense (for all parties) that discovery in this case will undoubtedly entail.

Furthermore, the public policy concerns here should be accorded particular weight. Three of the litigants are public bodies, litigating with scarce public resources. The Florida Supreme Court has already addressed the Amendments, finding them appropriate to appear on

the ballot in November 2010,[2] and until the dispositive question of whether the Plaintiffs and Intervening Plaintiffs may re-litigate that holding here is resolved, the Defendant should not be made to bear the burden of discovery.

III. CONCLUSION

For these reasons, the Defendant asks the Court to stay discovery in this matter pending the resolution of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Dated this 22nd day of June, 2010.

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[2] *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S MOTION FOR EXPEDITED DISPOSITION

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves the Court to expedite disposition of the issues raised by (i) Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss") and (ii) Defendant's Motion for Stay of Discovery (the "Motion for Stay"), filed on even date.

I. PRELIMINARY STATEMENT

When subject matter jurisdiction is in doubt, the Court must promptly address and resolve the question – *sua sponte* if necessary – before allowing the case to proceed.

And while jurisdiction remains in doubt, discovery should be stayed in order to conserve the time and resources of the Court and the litigants. This is especially so here where three of the litigants are public bodies expending public resources in this case.

II. BACKGROUND

On September 28, 2007 the Florida Department of State, Division of Elections (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States Congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, the "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts").

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (relating to ballot title and summary).

The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued its opinion holding "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010 general election. *Id.*

On May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major

ramifications" posed by Amendment 6. [Complaint, ¶ 5] Plaintiffs were joined in their challenge to Amendment 6 by Intervenors The Florida House of Representatives on May 26, 2010, and by The Florida Senate on May 27, 2010 (together, the "Intervening Plaintiffs"). The Intervening Plaintiffs also challenge Amendment 5 on various grounds.

At the time they filed their Complaint, the Plaintiffs filed a Notice of Priority Status requesting an expedited disposition schedule for this case pursuant to Rules 2.215(g) and 2.545(c)(1), Florida Rules of Judicial Administration (the "Priority Notice"). The Plaintiffs asserted that various deadlines attendant to ballot preparation for the 2010 general election necessitate expedited consideration of their claims. [Priority Notice, ¶¶ 2-5]

Following a hearing on June 9, 2010, the Court entered a Scheduling Order for this case which directs the parties to exchange witness lists, exhibit lists, and expert disclosures on an expedited basis (all to be completed by July 12) and directs that discovery must be completed by July 21, 2010. [Scheduling Order, ¶¶ 1-5] The Scheduling Order sets the case for non-jury trial beginning on July 26. [*Id.* ¶ 6]

In conjunction with this Motion, Defendant has filed the Motion to Dismiss and the Motion for Stay. The Motion to Dismiss demonstrates that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs in this case. The Motion for Stay seeks a stay of all discovery pending the Court's resolution of the Motion to Dismiss.

This Motion asks the Court, pursuant to its inherent authority to manage cases before it, to expedite its consideration and disposition of the issues raised in Defendant's Motion to Dismiss and Motion for Stay to ensure a speedy resolution of the vital, threshold questions addressed therein.

III. ARGUMENT

The Court is authorized to expedite its resolution of the Motions

The Florida Rules of Civil Procedure and the Florida Rules of Judicial Administration equip trial courts with the authority to insure the just and expeditious disposition of cases. *See* Fla. R. Civ. P. 1.010 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."); Fla. R. Jud. Admin. 2.215(g) ("Particular attention shall be given to . . . challenges involving elections and proposed constitutional amendments.").

As Plaintiffs acknowledged in their Priority Notice, cases such as this are particularly appropriate for expedited disposition. [Priority Notice, ¶ 5]

The Court should expedite resolution of the Motion to Dismiss

The Motion to Dismiss asserts that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs because the Florida Supreme Court has the exclusive jurisdiction to determine whether a proposed amendment to the Florida Constitution may appear on the ballot.

Challenges to the Court's subject matter jurisdiction must be resolved as promptly as possible.

It is well-settled in Florida law that "[i]f [a] court is without jurisdiction, it is powerless to act in the case." *Roberts v. Seaboard Sur. Co.*, 29 So. 2d 743, 748 (Fla. 1947) (internal citation omitted). Thus, "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997). "The limits of a court's jurisdiction are of 'primary concern,' requiring the court to

address the issue 'sua sponte when any doubt exists.'" *Id.* (quoting *Mapoles v. Wilson*, 122 So. 2d 249, 251 (Fla. 1st DCA 1960)).

The Scheduling Order requires dispositive motion briefing to be completed by July 21, 2010 [Scheduling Order, ¶ 3] but it does not restrict the Court's earlier consideration of the jurisdictional challenge raised in the Motion to Dismiss. In keeping with the expedited relief requested here, the Scheduling Order allows dispositive motions to be heard "before trial at a time to be determined." [Scheduling Order, ¶ 6]

Notably, expediting disposition of the Motion to Dismiss will eliminate the expense associated with discovery and trial – concerns which are especially acute in this case where three of the litigants are public bodies, litigating with scarce public funds.

The Court should expedite resolution of the Motion for Stay

Defendant's Motion for Stay argues that a stay of discovery is proper because the Court lacks subject matter jurisdiction in this case.

The Court is authorized to order a stay because the discovery rules invest trial courts with "broad discretion . . . to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (quoting Fla. R. Civ. P. 1.280(c)). Public policy can "support[] the denial of discovery, after a proper balancing of the competing interests to be served by granting discovery or by denying it." *Sugarmill Woods Civic Ass'n, Inc. v. S. States Util.*, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997) (citations omitted).

As discussed in the Motion for Stay, the Defendant should not be subjected to the burden of discovery in this case when *bona fide* questions as to the court's subject matter jurisdiction are present.

IV. CONCLUSION

For these reasons, the Defendant respectfully asks the Court to hear the Motion to Dismiss and the Motion for Stay at the earliest available date on the Court's calendar and thereafter to rule on the motions as promptly as possible.

Dated this 22nd day of June, 2010.

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

10 JUN 22 PM 5:50

CLERK CIRCUIT COURT
LEON COUNTY FLORIDA

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as the Interim Secretary of State of the State of Florida

Defendant.
_____/

GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Governor Charlie Crist, by and through undersigned counsel, respectfully asks for leave to appear as amicus curiae and file the attached Memorandum of Law in Support of Defendant's Motion to Dismiss and Answer to Complaint for Declaratory and Injunctive Relief.

1. The subject of this litigation involves two redistricting measures, proposed constitutional amendments 5 and 6.

2. The particular issue to be addressed is whether the placement of Amendments 5 and 6 on the November election ballot violates article XI, section 3 of the Florida Constitution and section 101.161(1), Florida Statutes, which require that a proposed constitutional amendment embrace one subject and be accompanied by a statement of its "substance," printed in "clear and unambiguous language."

3. The Governor seeks to appear in this case in furtherance of his obligation to "take care that the laws be faithfully executed." Article IV, § 1(a), Fla. Const. Specifically, the Governor seeks to ensure faithful execution of section 100.371, Florida Statutes, which provides for placement of citizen initiatives on the ballot; article XI, section 3, Florida Constitution, and section 101.161(1), Florida Statutes, which require ballot clarity; and article IV, section 10, and article V, section 3, of the Florida Constitution, which provide the Florida Supreme Court with exclusive jurisdiction to determine the validity of a citizen initiative petition.

4. The constitutional process balances essential judicial review of ballot clarity with the need for finality, providing the public with sufficient time to analyze and debate proposed amendments before votes are cast. To that end, the constitution limits the scope of review to whether the amendment embraces a single subject and whether the ballot title and summary are clear, *Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1226 (Fla. 2006), and confines the judicial forum to the Florida Supreme Court, *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995).

5. Section 101.161(1) arises from the constitutional mandate that all amendments be submitted to the people for a vote. *See* art. XI, §§ 1, 3, 5, Fla. Const. The Court must be circumspect in reviewing a citizen initiative, acting only "with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Advisory Op. to Att'y Gen. re Fla. Minimum Wage Amendment*, 880 So. 2d 636, 639 (Fla. 2004) (quotation marks omitted) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Governor Crist seeks to appear as amicus curiae to help ensure that the public policy embodied in the statutes and constitutional provisions cited herein be preserved by ensuring that the citizen initiative process be as free of unnecessary and untimely hurdles as possible.

6. It is profoundly important to our system of constitutional democracy that the limited pre-election review process take place in the proper forum and involve only issues that are relevant to ballot clarity. The Governor appears as amicus curiae to help ensure that this State remains true to those sacrosanct provisions of law.

7. The Governor has requested and obtained the consent of the Defendant Dawn K. Roberts, Proposed Defendant Intervenor Bob Graham, and Plaintiff Intervenors Florida House of Representatives and Florida Senate. Plaintiffs Corrine Brown and Mario Diaz-Balart are opposed to this Motion.

WHEREFORE, the Governor respectfully requests the Court grant this Motion for Leave to Appear as Amicus Curiae.

RESPECTFULLY SUBMITTED this 22nd day of June, 2010.

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

2010 JUN 22 PM 5:51
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as the Interim Secretary of State of the State of Florida

Defendant.

_____/

GOVERNOR CHARLIE CRIST'S MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Governor Charlie Crist, by and through undersigned counsel, hereby submits the following memorandum of law in support of Defendant's Motion to Dismiss the complaints filed by Plaintiffs Corrine Brown and Mario Diaz-Balart and Plaintiff Intervenors the Florida Senate and Florida House of Representatives (hereinafter "Plaintiffs"). For the reasons stated in the Defendant's motion to dismiss, and for the reasons stated herein, Governor Crist respectfully urges that this Court dismiss the Plaintiffs' complaints.

Interest of Amicus Curiae

Governor Crist appears as amicus curiae in this matter in furtherance of his constitutional obligation to "take care that all laws be faithfully executed." Art. IV, § 1(a), Fla. Const. The Governor seeks to ensure faithful execution of section 100.371, Florida Statutes, which provides

for placement of citizen initiatives on the ballot; section 101.161(1), Florida Statutes, which requires that a proposed constitutional amendment be accompanied by a statement of its "substance," printed in "clear and unambiguous language;" and article IV, section 10, and article V, section 3, of the Florida Constitution, which provide the Florida Supreme Court with exclusive jurisdiction to determine the validity of citizen initiative petitions.

Section 101.161(1) arises from the constitutional mandate that all amendments be submitted to the people for a vote. *See* art. XI, §§ 1, 3, 5, Fla. Const. Accordingly, the Court must be circumspect in reviewing a citizen initiative, having "no authority to inject itself in the process, unless the laws governing the process have been clearly and conclusively violated." *Advisory Op. to Att'y Gen. re Fla. Minimum Wage Amendment*, 880 So. 2d 636, 639 (Fla. 2004) (quotation marks omitted). The "Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Id.* (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Governor Crist appears as amicus curiae to oppose the Plaintiffs' initiation of this proceeding, which can best be described as an end-run around the Supreme Court's limited, exclusive review of the people's ability to amend their constitution through the citizen initiative process.

In 1986 the Legislature proposed the amendments that are now article IV, section 10, and article V, section 3(b)(10), of the Florida Constitution, which provide for an orderly process to expeditiously vet citizen-proposed amendments for placement on the ballot. The system balances essential judicial review of ballot clarity with the need for finality, providing the public with sufficient time to analyze and debate proposed amendments before they cast their votes. To that end, the constitution limits the scope of review to whether the amendment embraces a single subject and whether the ballot title and summary are clear, *Advisory Op. to Att'y Gen. re Fla.*

Marriage Prot. Amendment, 926 So. 2d 1226 (Fla. 2006), and confines the judicial forum to the Florida Supreme Court, *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995).

Successive legal challenges such as those brought by the Plaintiffs contravene the purpose of the limited pre-election review process. By raising issues that are not relevant to ballot clarity, and by raising those issues in the wrong court (thereby creating the likelihood of district court and Supreme Court review), Plaintiffs turn the process on its head—prolonging a legal imbroglio at the expense of healthy political debate. The bringing of "multiple challenges to initiatives" has rightly been characterized as a "tactic[]" that "prevent[s] the electorate from voting," where "each subsequent challenge unnecessarily wastes scarce judicial resources and acts as a de facto burden to the initiative process." Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 Fla. Coastal L.J. 15, 32–34 (2004). It is profoundly important to our system of constitutional democracy that the public policy embodied by the statutes and constitutional provisions cited herein be preserved by ensuring that the citizen initiative process be as free of unnecessary and untimely hurdles as possible. The Governor appears as amicus curiae to help ensure that this State remains true to those sacrosanct provisions of law, which can only be accomplished by this Court expeditiously dismissing Plaintiffs' complaints.

Background

Article XI, section 3 of the Florida Constitution gives the people the power to revise or amend the Constitution through the initiative process. Two citizen initiatives proposing changes to how legislative and congressional districts are drawn have been placed on the November 2 election ballot. The Department of State has designated the citizen initiative relating to

legislative districts as Amendment 5, and the other, relating to congressional districts, as Amendment 6 (hereinafter "Amendments").

There are currently no provisions in the Florida Constitution regarding the boundaries of congressional districts but the Constitution does provide for legislative districts.[1] Article III, section 16(a) requires the Legislature to "apportion the state in accordance with the constitution of the state and of the United States into" senatorial and representative districts "of either contiguous, overlapping or identical territory." The current process allows the Legislature to fashion those districts with the intent to favor an incumbent or a certain political party. No directive in the Florida Constitution constrains the Legislature from shaping districts to ensure political success, or from favoring one candidate, party, or demographic group over another in the drawing of legislative and congressional boundaries. In fact, these practices have become the norm in Florida and elsewhere.

Amendments 5 and 6 are intended to reduce and eliminate partisanship and political favoritism in drawing legislative and congressional districts. The Amendments would add additional standards by requiring districts to be drawn in such a way as to not favor or disfavor any incumbent or political party or deny any racial or language minority the ability to participate in the political process or in the election of their representatives.

Article V, section 3 of the Florida Constitution, requires the Supreme Court to render an advisory opinion as to the validity of a citizen initiative when requested by the Attorney General. In *Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 191 (Fla. 2009) (hereinafter "*Legislative District Boundaries*"), the

[1] The United States Supreme Court has held that the responsibility of "apportionment of ... federal congressional and state legislative districts" falls upon the States. *Growe v. Emison*, 507 U.S. 25, 34 (1993).

Supreme Court held that Amendments 5 and 6 and their ballot titles and summaries comply with article XI, section 3 of the Florida Constitution and section 101.161(1), Florida Statutes, by embracing only one subject and using clear and unambiguous language.

Argument

The Florida Supreme Court unanimously concluded that Amendments 5 and 6 do not violate the single-subject requirement and that their titles and summaries are not misleading. *Legislative District Boundaries*, 2 So. 3d at 184, 191. The Legislature exercised its opportunity to appear in that litigation and argue against the amendments' validity. Now, sixteen months after the Florida Supreme Court issued its opinion, on the eve of the election season in which voters are to decide whether to amend their constitution, the Legislature and other Plaintiffs have filed an eleventh-hour lawsuit to stymie placement of the amendment on the ballot. Supporters of the citizen initiatives at great expense have already obtained the requisite signatures and defended against the prior legal challenge. Now the Legislature has launched a successive attempt to block the people's opportunity to weigh in on the way their congressional and legislative districts are drawn.

This gratuitous, second challenge, brought by parties who have or could have made their arguments when the Florida Supreme Court first analyzed these questions, unnecessarily inflates the cost of citizen-participation in our constitutional democracy. The Florida Constitution provides for judicial review of amendments proposed by citizen initiative in order to allow a determination of their "validity . . . *before* the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot." *Armstrong v. Harris*, 773 So.2d 7, 14 n.18 (Fla. 2000) (emphasis in original). Here, that determination has been made and proponents of the amendments have spent their time, sweat, and treasure in

obtaining the requisite signatures. Plaintiffs' redundant legal challenge poses an unnecessary, additional hurdle to the people's opportunity to express their voice.

Plaintiffs' challenge should fail for a number of reasons. Firstly, the Florida Supreme Court has exclusive jurisdiction to review a constitutional amendment proposed by initiative petition. *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) (citing Art. V, § 3(b)(10), Fla. Const.); *Advisory Op. to Att'y. Gen. re Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994). Consequently, jurisdiction does not lie in the circuit court, and this Court should dismiss Plaintiffs' complaint for lack of subject matter jurisdiction for that reason alone.

Further, Plaintiffs' complaints seek to relitigate issues already addressed by the Justices of the Florida Supreme Court in the *Legislative District Boundaries* case. The Florida Supreme Court in past decisions has expressed its strong disfavor for "relitigation of issues expressly addressed in an advisory opinion on a proposed amendment," an effort that "almost always will result" in the Court refusing to exercise jurisdiction. *Florida League of Cities v. Smith*, 607 So. 2d 397, 398–99 (Fla. 1992). Rather, the Supreme Court has made clear that "[r]enewed litigation" should be "entertained only in truly extraordinary cases, such as . . . where a vital issue was not addressed in the earlier opinion." *Id.* at 399. Where a party attempts to raise the same issue in a subsequent proceeding, the Florida Supreme Court has considered its prior advisory opinion "binding" on that issue and refused to "reconsider the issue and recede from [its] decision." *Ray v. Mortham*, 742 So.2d 1276, 1285 (Fla. 1999) (rejecting reassertion of a single-subject argument because it was "not new argument on an important issue not addressed in our earlier opinion").

Here, Plaintiffs assert ballot clarity and single-subject arguments, both of which were already adjudicated by the Florida Supreme Court. *Legislative District Boundaries*, 2 So. 3d at 184, 191. Accordingly, these issues should not be subject to further judicial review in a pre-election challenge. Viewed against the backdrop of this Supreme Court precedent, the weakness of Plaintiffs' case becomes crystal clear. Plaintiffs now seek relief in this Court—to address issues that either have already been addressed by the Florida Supreme Court (and thus dismissed by that Court) or related issues that the Supreme Court would choose not to address prior to ballot placement. Simply put, Plaintiffs have approached the wrong forum, with issues that would surely be dismissed by the right forum—the Florida Supreme Court.

The issues Plaintiffs seek this Court to adjudicate have either already been decided by the Florida Supreme Court or must not be decided prior to the election. Plaintiffs advance substantive arguments regarding the merits of Amendments 5 and 6 that are outside of the constitutionally limited scope of pre-election judicial review. Review of amendments proposed by petition initiative is "strictly limited" to "whether the proposed amendment comports with the single-subject requirement" and "whether the ballot title and summary are clear and unambiguous;" that review "does not include an evaluation of the merits or the wisdom of the proposed amendment." *Advisory Op. to Att'y Gen. ex rel. Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 367, 368–69 (Fla. 2000). Arguments regarding the "substance of the amendment" are not justiciable in the pre-election proceeding. *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla. 1982).

Plaintiffs assail the wisdom and merit of the proposed amendments and impugn its validity under federal and constitutional law. *See, e.g.*, Compl. of Florida Senate ¶¶ 14, 32, 38 (asserting the Amendments are "unworkable," "violate paramount federal law," and "violate the

separation of powers"). These are topics not cognizable at this stage of review. *See, e.g.*, *Advisory Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 801 n.1 (Fla. 1998) (declining to reach a federal constitutional issue because it was outside the Court's "limited" "jurisdiction" to review "proposed amendments based on citizen initiative petitions"); *Advisory Op. to Att'y Gen.—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226–27 (Fla. 1991) (declining to reach "various constitutional challenges" that were "not justiciable").

Some of these substantive and policy-oriented arguments are disguised as single-subject or ballot clarity issues. *See, e.g.*, Plaintiffs' Compl. ¶¶ 52–57 (arguing that, because the Amendments could violate the federal Voting Rights Act, the ballot summary is inaccurate); *see also id.* at ¶¶ 67, 73–78; (framing the argument that the Amendments would make legislative redistricting and judicial review unworkable as "misleading ballot summary" issues); Florida House of Representatives' Mot. to Intervene ¶¶ 26–32 (advancing the argument that Amendment 5 would make judicial review of redistricting more difficult as a single-subject and ballot summary issue). However, courts must decline to pass on the merits of amendments proposed for placement on the ballot—even when such arguments are nominally mischaracterized as single-subject and ballot clarity issues.

Judicial removal of "a constitutional amendment from the vote of the people" should be undertaken only with "extreme care, caution, and restraint." *In re Advisory Op. to Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient*, 880 So. 2d 659, 666 (Fla. 2004) ("*In re Physician Fee*") (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla.1982)). As it has the potential to infringe "on the people's right to vote on an amendment," pre-election review should be constrained to determining whether "the ballot language would clearly mislead the public concerning material elements of the proposed

amendment and its effect." *In re Physician Fee*, 880 So. 2d at 666; *Advisory Op. to Att'y Gen. re Extending Existing Sales Tax To Non-Taxed Services Where Exclusion Fails To Serve Public Purpose*, 953 So. 2d 471, 477 (Fla. 2007) (A court must "not address the merits or wisdom of the proposed amendment.").

Indeed, an amendment "may be the subject of future litigation, and it will not be until that occurs that the full and complete application may be absolutely known." *In re Physician Fee*, 880 So. 2d at 665. However, that fact should not preclude approval for placement on the ballot. *Id.* "The potential *practical* impact of the amendment is a matter for public debate by proponents and opponents of the measure as part of the political process." *Id.* at 667 (Pariente, J., concurring) ("Our role is not to pass on the merits of the measure or the wisdom of its inclusion in our state constitution . . . [and] the possibility that a proposed amendment could have 'broad ramifications' for the state does not render it infirm under chapter 101.161(1)") (emphasis in original); *see Grose v. Firestone*, 422 So.2d 303, 306 (Fla. 1982) (explaining such arguments "may be raised in an appropriate proceeding in due course when the issue is properly presented").

Plaintiffs' speculation about the future effects of Amendments 5 and 6 are wholly inappropriate in a proceeding to determine whether they should be placed on the ballot. *See Advisory Op. to Att'y Gen. English—The Official Language of Florida*, 520 So. 2d 11, 12–13 (Fla. 1988) (finding it "premature to speculate how the amendment might interact with other portions of the constitution as applied to a given factual situation," even though, "if passed, the amendment could have broad ramifications"); *Advisory Op. to Att'y Gen. re Ltd. Casinos*, 644 So. 2d 71, 74 (Fla. 1994) (rejecting challenges as "premature speculation"). By raising those issues here, Plaintiffs avoid debating these policy considerations in the forum of public opinion.

They seek to prematurely litigate what should be decided by the people when they are presented with the ballot. *Advisory Op. to Att'y Gen. ex rel. Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, 815 So.2d 597, 600 (Fla. 2002) (Pariente, J., concurring) ("[T]he merits or wisdom of the proposal is irrelevant to whether the proposed amendment may be placed on the ballot.").

The Florida Supreme Court has strongly expressed its reluctance to revisit the validity of a citizen initiative after issuing an advisory opinion, advising that it will hear a renewed challenge only in the very limited circumstances in which "a vital issue was not addressed in the earlier opinion." *Florida League of Cities*, 607 So. 2d at 399. This is certainly not one of those "truly extraordinary cases" in which "[r]enewed litigation" is warranted. *Id.* Rather, Plaintiffs seek to *relitigate* issues that *were relevant* when decided and to *pre-litigate* issues that are *irrelevant* to the ballot review process, serving only to thwart the people's constitutional right to propose and vote on amendments to their constitution. As such, this Court should dismiss Plaintiffs' claims.

Allowing Plaintiffs' suit to proceed in defiance of the constitutionally limited system of pre-election review would work an inequitable and undue hardship on the Defendant, proponents of the Amendments, and the people of Florida. After the Amendments' sponsor obtained ten percent of the required voter signatures for placement on the ballot, the Secretary of State submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court in the manner prescribed by article IV, section 10, and article V, section 3, of the Florida Constitution. This proceeding provided all parties ample opportunity to raise any concerns regarding the Amendments' validity. Nonetheless, sixteen months after the

Florida Supreme Court issued its opinion finding the Amendments valid, Plaintiffs mount an attack on the eve of the election season.

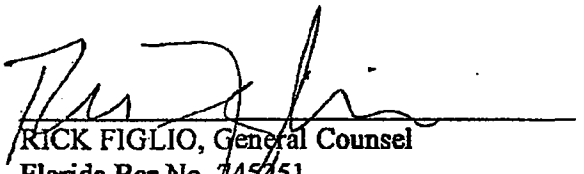
During those intervening months, the sponsor and interested citizens expended time, effort, and financial resources to obtain the remaining signatures—with no reason to anticipate that the Legislature and other parties would attempt a second challenge long after the Amendments were approved for placement on the ballot. Plaintiffs' unreasonable delay now costs the Defendant, the Amendments' sponsor, and the people of Florida additional expense to resolve a legal dispute on issues that were or could have been resolved during the advisory opinion stage. With this cost comes a corresponding reduction in time and resources to engage in the public debate that is central to our participatory democracy.

In sum, the Florida Supreme Court has already decided the only issues now relevant to Amendments 5 and 6: that they do not violate the single-subject rule and that the ballot title and summary adequately inform the voters of what they are being asked to decide. As such, "there is no prohibition upon placing th[e] proposed amendment[s] on the ballot." *In re Physician Fee*, 880 So. 2d at 666. This court lacks jurisdiction to entertain Plaintiffs' last-minute attempt to reassert those issues and throw up additional legal roadblocks to the citizen initiative process. Plaintiffs' unreasonable delay in bringing this challenge, and their disregard for the method of review prescribed by our constitution, pose unacceptable obstacles to the people's right to shape their government's defining document.

Conclusion

For the foregoing reasons, the Governor respectfully urges this court to dismiss the Plaintiffs' complaints.

Respectfully submitted,



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By

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING MOTION OF BOB GRAHAM
TO INTERVENE AS A DEFENDANT

This cause came before the Court on the Motion of Bob Graham to Intervene as a Defendant. Upon consideration of the motion, the responses and reply, having heard argument of counsel and being otherwise fully advised, the Court orders as follows:

The Motion of Bob Graham to Intervene as a Defendant is GRANTED.

DONE and ORDERED this 23rd day of June, 2010, in Leon County, Florida.

Jackie L. Fulford
Circuit Judge

Copies to Counsel of Record

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

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendant,

and

BOB GRAHAM,

Intervening Defendant.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Corrine Brown and Mario Diaz-Balart, sue Defendant, Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida, and FairDistrictsFlorida.org and allege:

1. On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by Defendant FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The Congressional

Petition has since obtained the necessary number of signatures and has been certified for placement on the November 2010 general election ballot.

2. The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Exhibit A attached hereto.

3. The ballot title and summary for the proposed Congressional Amendment is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Id.

4. Pursuant to Article IV, section 10, Florida Constitution, the Florida Supreme Court reviewed the Petitions and rendered an advisory opinion that their summaries are clear and unambiguous and that the proposed amendments are limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

5. The Congressional Amendment's ballot summary violates the strict standard for ballot clarity. Because the ballot summary misrepresents the legal effect and major ramifications of the Congressional Amendment, the Congressional Amendment must be withheld from the 2010 General Election Ballot.

6. The ballot summary overstates the protections afforded to minorities. The summary states that districts shall not be drawn to deny minorities the equal opportunity to elect representatives of their choice. In fact, the Congressional Amendment guarantees only that minorities' ability to elect representatives of their choice — whether equal or unequal — will not be diminished.

7. The ballot summary also misleads by omission. It gives no hint that the Congressional Amendment's compactness and political and geographical boundary requirements will constrain the Legislature's ability to promote minority rights.

8. The ballot summary also purports to require that districts be as nearly equal in population as practicable. But the United States Constitution already imposes this requirement, and all of Florida's congressional districts comply with it. The negative implication that this requirement does not exist, or that Florida's Congressional districts are not as nearly equal in population as practicable, is false and misrepresents the legal impact of the Congressional Amendment.

9. The ballot summary is loaded with vague and ambiguous terms which even their sponsor of the Congressional Amendment is unable or unwilling to define. As a result, the courts will draw the districts, and voters will have no say. To the extent the sponsor has attempted to clarify the Congressional Amendment's unworkable criteria, its statements have been evasive and contradictory.

The Parties

10. Plaintiff Corrine Brown is a citizen of the State of Florida and is registered to vote in Duval County. Since 1993, Brown has represented the citizens of Congressional District 3 in the United States House of Representatives. African-Americans comprise nearly half of the voting-age population in Congressional District 3.

11. Plaintiff Mario Diaz-Balart is a citizen of the State of Florida and is registered to vote in Miami-Dade County. Since 2003, Diaz-Balart has represented the citizens of Congressional District 25 in the United States House of Representatives. Hispanics comprise more than 60 percent of the voting-age population in Congressional District 25.

12. Defendant Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida (the "Secretary"), is the chief elections officer of the State. It is her duty under Florida law to certify the items, including proposed constitutional amendments, that will be included on the statewide, general election ballot.

13. Defendant FairDistrictsFlorida.Org, Inc. (the "Sponsor") is a Florida corporation and the political committee that sponsored the Congressional Amendment.

Jurisdiction and Venue

14. This Court has jurisdiction pursuant to section 26.012(2), Florida Statutes.

15. Venue is proper in this Court because the Secretary is headquartered in Leon County, Florida.

16. This Court has authority to grant declaratory and injunctive relief pursuant to sections 26.012(3) and 86.011, Florida Statutes.

17. Under *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of the Congressional Amendment, *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009), is no impediment this challenge.

General Allegations

18. All petitions to amend the Florida Constitution must be accompanied by a clear and unambiguous summary of the proposed amendment. § 101.161(1), Fla. Stat. (2009). The summary may not exceed 75 words. *Id.* The text of a proposed amendment will not appear on the ballot — only the title and summary of the amendment are placed on the ballot. *Id.* It is the responsibility of the sponsor to prepare a clear and unambiguous summary. *Id.* § 101.161(2).

19. An initiative petition can only be submitted to the voters if the proposed amendment concerns a single subject and matter directly connected therewith, *see* Art. XI, § 3, Fla. Const., and the ballot summary is clear and unambiguous, *see* Art. XI, § 5(a), Fla. Const.; § 101.161(1), Fla. Stat. (2009). A proposed amendment involves multiple subjects if, without disclosure to the voters, it substantially affects preexisting constitutional provisions or multiple branches of government. A ballot summary is not clear and unambiguous if it is misleading.

20. A ballot summary that omits material information and thus precludes the voters from casting their ballots intelligently violates the accuracy requirement. *In re Adv. Op. to Att'y Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

COUNT I – MISLEADING BALLOT SUMMARY

21. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

22. The Congressional Amendment contains two, distinct requirements that relate to the voting rights of racial and language minorities:

- Districts shall not be drawn with the intent or result of denying or abridging the **equal opportunity** of minorities **to participate in the political process**; and
- Districts shall not be drawn to **diminish the ability** of minorities **to elect representatives of their choice.**

The guarantee of an "equal opportunity" applies only to minorities' participation in the political process—not to the ability of minorities to elect representatives of their choice. The Florida Supreme Court has made clear that these are two separate and distinct requirements. *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d at 188-89.

23. The ballot summary mischaracterizes the second of these requirements (the "Non-Diminishment Provision"). The actual text of the Congressional Amendment provides:

> Districts shall not be drawn . . . to **diminish [the] ability** [of racial and language minorities] to elect representatives of their choice.

But the ballot summary describes the Non-Diminishment Provision as follows:

> Districts shall not be drawn to **deny racial or language minorities the equal opportunity** to . . . elect representatives of their choice.

24. The summary is misleading. The Congressional Amendment does not guarantee minorities an equal opportunity to elect representatives of their choice. It provides only that minorities' ability to elect representatives of their choice — equal or unequal — will not be diminished.

25. There is a material difference between a guarantee of equality and a mere protection against diminishment. A guarantee of equality would require the practical attainment of an objective ideal. A protection against diminishment only guards against a worsening in the existing ability of minorities to elect representatives of their choice. In its promise of equality, the summary grandly overstates the actual — and less protective — effect of the Congressional Amendment.

26. In a series of statements made to a committee of the Florida House of Representatives, the Sponsor repeatedly asserted that the Non-Diminishment Provision merely prevents future "harm" to the present ability of minorities to elect representatives of their choice:

> That last phrase prohibits the drawing of any district or plan that will ***reduce*** the ability of minorities to elect minority representatives. Plain and simple.
>
> Minorities' ability, the ability of minority voters to elect representatives of their choice is not going to be ***diminished*** with this amendment.
>
> What I do know is that these amendments will very clearly by their language forbid any legislator or any Legislature I should say, to adopt any plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.
>
> The . . . language says that districts cannot be drawn or plans cannot be drawn to ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> However, given that and given the language that is in our amendment, you cannot ***diminish*** the ability of . . . minority voters to elect representatives of their choice. So that is a protection that will be in the Florida Constitution. You will be violating the Constitution if you ***diminish*** the ability of minority voters to elect representatives of their choice.
>
> What our language says is that you cannot . . . make districts or create a plan that ***diminishes*** the ability of minority voters to elect representatives of their choice.

> What our amendments say is that . . . with regard to ability to elect representatives of choice, the Legislature cannot do anything to ***diminish*** that ability.
>
> And we want to make sure that in doing all that there is ***no harm done*** and ***no diminution*** of . . . the rights of minority voters.
>
> The language of the amendment says that you can't draw districts to ***diminish*** the ability to elect representatives of choice and that is—***that is the prohibition.***
>
> In fact, that is the reason that the language is in there to ensure that . . . the ability of minority voters to elect representatives of their choice will not be ***diminished.***

Emphasis added.

27. Conceptually and practically, non-diminishment is different from equality. Contrary to the promise of the ballot summary, the Congressional Amendment does not require that the ability of minorities to elect representatives of their choice be affirmatively enhanced until equality is achieved. They merely prevent backsliding in relation to the status quo—equal or unequal.

28. The Congressional Amendment's sentence construction makes clear that minorities are not ensured an equal opportunity to elect representatives of their choice. The Congressional Amendment does ensure an "equal opportunity . . . to participate in the political process," and the drafter might have completed the sentence: "and to elect representatives of their choice." "Equal opportunity" would then have applied to the ability to elect the representatives of choice. This was not done.

29. As the Florida Supreme Court explained, "the negative verb 'shall not be drawn' in the proposed amendment[] modifies both clauses 'with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political

process' and 'to diminish their ability to elect representatives of their choice.'" *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d at 189. The phrase "equal opportunity" does not modify both clauses—except in the erroneous ballot summary.

30. The Sponsor has stated that the Non-Diminishment Provision is "somewhat similar to what is in Section 5" of the federal Voting Rights Act. Where it applies, Section 5 ensures that no voting change "has the purpose or will have the effect of diminishing the ability of any citizen of the United States on account of race or color . . . to elect their preferred candidates of choice." 42 U.S.C. § 1973c(b). Section 5 does not guarantee equality, but merely prevents backsliding, or "retrogression." The benchmark for comparison is the status quo, and not the ideal of equality.

31. Like Section 5 of the VRA, the Congressional Amendment's Non-Diminishment Provision prohibits backward steps. It prohibits the undoing or reversal of gains already achieved by minorities. It does not, however, ensure an "equal opportunity . . . to elect representatives of their choice." Thus, a redistricting plan that neither diminishes the ability of minorities to elect representatives of their choice, nor accords minorities an equal opportunity to elect representatives of their choice, would not violate the Non-Diminishment Provision.

32. In stating that the Congressional Amendment guarantees minorities the "equal opportunity to . . . elect representatives of their choice," the ballot summary misrepresents the legal impact of the Congressional Amendment and gives voters a wrong and materially misleading impression.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be

placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT II – MISLEADING BALLOT SUMMARY

33. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

34. The ballot summary is deceptive and misleading because it does not tell voters that the Congressional Amendment, through its compactness and political and geographical boundaries requirements, restrains the Legislature's ability to draw districts in which minority voters will have the ability to elect representatives of their choice.

35. Currently, the Equal Protection Clauses of the United States and Florida Constitutions are the only legal constraints that act as a ceiling on the Legislature's discretion to draw districts in which minority voters will have the ability to elect candidates of their choice.

36. If the Congressional Amendment is enacted, the Legislature will be subject to two new legal constraints: the requirements that districts be compact and that districts, where feasible, utilize existing political and geographical boundaries.

37. To avoid these new requirements, the Legislature would have to show that they conflict with the following, superior standard, which is also contained in the Congressional Amendment: "Districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice."

38. Except to the extent necessary to comply with this requirement and the federal Voting Rights Act, the Legislature's discretion to create districts that promote minority

representation will be subject to the limitation that districts be compact and follow political and geographical boundaries.

39. The ballot summary does nothing to inform voters of the Congressional Amendment's significant effect on the Legislature's discretion under current law to promote minority representation.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT III – MISLEADING BALLOT SUMMARY

40. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

41. The ballot summary states that, under the Congressional Amendment, districts must be "as equal in population as feasible." Thus, the summary suggests that current law does not already require districts to consist of populations as nearly equal as practicable, or that districts in Florida in fact consist of unequal populations. Both of the inferences that flow from the summary are false.

42. Federal law already requires that congressional districts be as nearly equal in population as practicable. *Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

43. Florida's current congressional plan, adopted in 2002, has a total deviation of one person. Twenty-two of the State's twenty-five congressional districts have zero deviation and the other three districts only deviate by a single resident.

44. The ballot summary, therefore, misleads voters about the existing requirements applicable to the redistricting process and the legal effect of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT IV – MISLEADING BALLOT SUMMARY

45. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

46. The ballot summary confuses and misleads voters because the summary uses the same phrase—"*drawn to*" —inconsistently to mean no fewer than three different things.

47. **First,** the ballot summary provides that districts may not be "drawn to" favor or disfavor an incumbent or political party. In this case, the phrase "drawn to" means that districts may not be drawn with the *intent* to favor or disfavor an incumbent of political party.

48. **Second,** the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to participate in the political process. In this case, the phrase "drawn to" means that districts may not be drawn with either the *intent* or *result* of denying the equal opportunity of minorities to participate in the political process.

49. **Third,** the ballot summary provides that districts may not be "drawn to" deny minorities the equal opportunity to elect representatives of their choice. In this case, the phrase

"drawn to" means that districts may not be drawn with the *result* of diminishing the ability of racial or language minorities to elect representatives of their choice.

50. Thus, the phrase "drawn to" has three different meanings in the summary: (i) *intent*, as applied to the prohibition against favoring or disfavoring incumbents or political parties; (ii) *intent* or *result*, as applied to the prohibition against denying minorities an equal opportunity to participate in the political process; and (iii) *result*, as applied to the prohibition against diminishing the ability of minorities to elect representatives of their choice.

51. The inconsistent use of terminology within the ballot summary is misleading. The summary fails to inform the voters, clearly and unambiguously, whether the Congressional Amendment prohibits an intent, a result, or both, in the three instances to which the phrase "drawn to" applies. In using the identical phrase to denote three different and clearly distinguishable legal standards, the ballot summary confuses and dissembles the true legal impact of the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT V – MISLEADING BALLOT SUMMARY

52. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

53. The ballot summary suggests that the Legislature will be required to ignore incumbency. Under the VRA, it cannot do so. The Legislature must consider incumbency —

and may favor an incumbent — to protect minority rights. By suggesting that the Congressional Amendment prohibits an intent to favor incumbents, the summary promises more than can be delivered.

54. Section 5 of the VRA, which applies to changes in electoral practices and procedures in five Florida counties (Collier, Hardy, Hendry, Hillsborough, and Monroe), prohibits changes that "lead to retrogression in the position of racial minorities with respect to the effective exercise of the electoral franchise." *Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Whether a change will result in retrogression "depends on an examination of all the relevant circumstances," including "the extent of the minority group's opportunity to participate in the political process." *Id.* at 479.

55. One component of the opportunity to participate in the political process is the preservation of minority incumbents in positions of legislative influence and leadership. *Id.* at 483. Thus, the VRA requires the Legislature to weigh incumbency when it assesses compliance with Section 5, and permits it to favor minority incumbents as one means of compliance.

56. The Congressional Amendment, however, purports to deprive the Legislature of this important mechanism to ensure compliance with the VRA. Because it is foreseeable that the Legislature will intend to favor minority incumbents to ensure compliance with the VRA, the summaries' unqualified representation that an intent to favor incumbents is prohibited is inaccurate.

57. For the same reason, the Congressional Amendment itself contains an internal contradiction. The Congressional Amendment requires that districts not be drawn to deny or abridge "the equal opportunity of racial or language minorities to participate in the political process." The preservation of minority incumbents in positions of power is relevant to the

requirement that districts maintain the equal opportunity of racial minorities to participate in the political process. This requirement thus conflicts with the prohibition against favoring incumbents.

58. The Legislature cannot fully assess and protect racial minorities' opportunity to participate in the political process unless it assesses and protects the achievements of minority incumbents. Because the conflicting requirements in subsection (1) claim equal dignity in the hierarchy of requirements, the Congressional Amendment creates an irreconcilable contradiction. This internal conflict will prevent full compliance with all requirements contained in the Congressional Amendment.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VI – MISLEADING BALLOT SUMMARY

59. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

60. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would

enable courts to construe and enforce their requirements coherently, objectively, and predictably. The Congressional Amendment expresses broad and subjective concepts in undefined terms — terms which voters can reasonably construe in an endless number of differing, conflicting ways.

61. The Congressional Amendment does not define "compact" or enable voters to distinguish between compact and non-compact districts. The Congressional Amendment does not define "political and geographical boundaries" or explain when it is "feasible" and when it is not "feasible" to utilize them. The Congressional Amendment prescribes no standard by which courts can determine the "intent" of a legislative body and of the Governor.

62. Events subsequent to the Florida Supreme Court's initial, advisory review prove that the Amendment flies under false colors. Despite confusion about the Congressional Amendment, the Sponsor has refused to answer specific questions or provide voters needed clarification.

63. In fact, the Sponsor's public statements have, if possible, only created more uncertainty. Notwithstanding differences in wording between the Congressional Amendment and the VRA, the Sponsor initially informed the public that the Congressional Amendment's voting-rights provisions are "identical" to and would "enshrine" in the Florida Constitution the protections in the VRA. *See How Will the FairDistrictsFlorida.org Amendments Work?*, Sponsor's Advertisement (Mar. 5, 2009); *Stop Protecting Politicians*, TCPalm (Nov. 26, 2008); *Leaning Republican, Again*, Florida Trend (Sep. 1, 2008).

64. But after *Bartlett*, the Sponsor reversed course, suggesting that the Amendment affords minorities "enhanced" rights and "greater protection than exists today in federal law." *See Plan to Redraw State Districts Called Unfair*, Tampa Tribune (Jan. 12, 2010); *Race Enters Debate Over Redrawing Florida Political Districts*, Florida Times-Union (Dec. 14,

2009); *Two Ballot Proposals Stir Fears*, Sarasota Herald-Tribune (Nov. 27, 2009); *Initiative Prompts Questions of Racial Fairness*, Daytona Times (Nov. 19, 2009).

65. At the committee meeting on February 11, 2010, Ellen Freidin, the Chairwoman of Fair Districts Florida noted that the language of the Amendment and the VRA is not identical, while she refused to state that the language of the Congressional Amendment and the VRA are not identical in legal effect. She stated simply that the Legislature must use all possible means at its disposal to ensure that the ability of minorities to elect representatives of their choice is not diminished, but it refused to identify any measure of the "ability" of groups to elect their preferred representatives. Nor did Ms. Freidin explain how the Legislature should measure the "opportunity of racial or language minorities to participate in the political process."

66. The meaning of the Congressional Amendment is pure conjecture. The ballot summary for the Congressional Amendment itself offers the voters no clarity and does not enable voters to cast an informed and well-advised ballot. And the recent public statements of the Chairwoman of the Congressional Amendment's sponsor have only increased voter confusion.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VII – MISLEADING BALLOT SUMMARY

67. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

68. The criteria mandated by the Congressional Amendment are vague, conflicting, and unworkable. The Congressional Amendment sets forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished. The Congressional Amendment does not prescribe clear and practical guidelines that might enable the Legislature to determine whether it has complied with those criteria. Nor does the Congressional Amendment provide judicially discoverable or manageable standards that would enable courts to construe and enforce their requirements coherently, objectively, predictably, and systematically.

69. The Congressional Amendment expresses broad and subjective concepts in undefined terms—terms which the voters can reasonably construe in an endless number of differing and conflicting ways. The Congressional Amendment does not define "language minorities," or state how large a group would have to be in order to qualify as a language minority, and thus does not identify the groups that will benefit from the new voting rights created by the Congressional Amendment.

70. On February 11, 2010, at a joint meeting of the Senate Committee on Reapportionment and the House Select Policy Council on Strategic and Economic Planning, FDF refused to provide guidance. And, asked to define "language minorities," officers of the Sponsor referenced the VRA, which defines "language minorities" to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 42 U.S.C. § 1973*l*(c)(3), but then stated that "language minorities" only means "Hispanics," contrary both to the VRA and to the definition espoused by three Justices of the Florida Supreme Court. *See Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

71. The ballot summary's use of the phrase "language minorities" in the plural will cause voters to believe that more than a single language minority group is intended to be protected by the Congressional Amendment.

72. If the intent of the Congressional Amendment was to merely protect those persons who are Spanish speakers, then the ballot summary could have been written to state that directly.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

COUNT VIII – MISLEADING BALLOT SUMMARY

73. The allegations contained in Paragraphs 1 through 20 above are incorporated as though restated herein.

74. The ballot language also leads voters to believe that Legislature will be able to determine with certainty where members of language minorities reside and to take that into consideration when crafting districts.

75. The questionnaire sent out during the 2010 Census to every Florida household only asks 10 questions: (1) the number of people living in the dwelling; (2) additional people staying in the dwelling as of April 1, 2010 who were not counted in answer to question (1); (3) whether the dwelling is owned, rented, or occupied without paying rent; (4) the dwelling's telephone number; (5) the names of persons who occupy the dwelling; (6) the sex of persons occupying the dwelling; (7) the age and date of birth of persons occupying the dwelling; (8)

whether any person occupying the dwelling is of "Hispanic, Latino, or Spanish origin" and, if so, whether they are "Mexican, Puerto Rican, Cuban, or other Hispanic origin"; (9) the race of the persons occupying the dwelling; and (10) whether any occupant occasionally stays elsewhere. There are no questions on the form about language, nor is any required by United States Public Law 94-171, the enactment that directs the Census Bureau to make Census data available to the states for purpose of redistricting and reapportionment.

76. Accordingly, there will be no bloc-level count of language use available at the time the Legislature draws the legislative and congressional districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that language minorities will have an "equal opportunity to participate in the political process and elect representatives of their choice."

77. The Census Bureau will no longer send a long-form to 1 out of 6 households asking about languages. See "2010 Census Constituent FAQs", Census Bureau, http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf. Accordingly, there will be no Census block level count containing data on language available at the time the Legislature draws the Congressional Districts. It will be impossible for the Legislature to accurately determine where language minorities reside, making it impossible to ensure that they will have "the equal opportunity to participate in the political process and elect representatives of their choice" as stated in the proposed Congressional Amendment.

78. In lieu of the long Census form, the Census Bureau will be using its American Community Survey ("ACS"). Like a political poll, the ACS will use a random sample of U.S. residents. The annual results of the ACS will be available for all areas with populations of

65,000 or more. Areas with populations less than 65,000 require the use of multiyear estimates to reach an appropriate sample size for data publication.

79. However, the sample size will not permit disaggregating the Census data down to the level of a Census block, the lowest geographic level used in redistricting. For instance, the 2006 ACS only surveyed 152,155 of Florida's estimated population of 18,328,340. With such a small sample size it will be impossible for the Legislature to precisely determine how many minority language speakers are spread throughout the hundreds of thousands of Census blocks, block groups, and tracts in the State of Florida.

WHEREFORE, Plaintiffs demand a declaration that the ballot summary of the Congressional Amendment is misleading and violates section 101.161(1), Florida Statutes; an injunction prohibiting Defendant Roberts from directing that the Congressional Amendment be placed on the 2010 General Election Ballot; an award of costs; and such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed to Michael G. Tanner, Esq., Tanner Bishop, 1 Independent Drive, Suite 1700 Jacksonville, FL 32202, mtanner@tanne rbishoplaw .com; George N. Meros, Jr., Esq., GrayRobinson, P .A., Post Office Box 11189, Tallahassee, Florida 32302-3189, gmeros@gray-robinson.com Allen C. Winsor, Esq., awinsor@gray-robinson .com, Andy Bardos, Esq., abardos@gray-robinson .com; James A. Scott, Esq., Tripp Scott, P.A,, 110 Southeast Sixth Street, 15th Floor Fort Lauderdale, Florida 33301, jas@trippscott.com. Edward J. Pozzuouli, Esq., ejp@rrippscott .com, Stephanie Alexander, sda@rrippscott.com, Brady J.Cobb, Esq., bjc@trippscott .com; Mark Herron, Esq. Messer, Caparello & Self, P.A., Post Office Box 15579,

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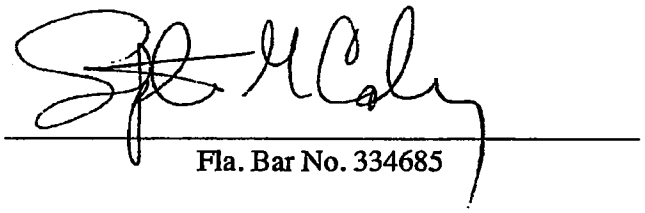

Fla. Bar No. 334685

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

**GRAHAM'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION AND
MOTION TO EXPEDITE DISPOSITION**

Intervening Defendant BOB GRAHAM, pursuant to Rule 1.140(b)(1) of the Florida Rules of Civil Procedure, moves to dismiss this action due to lack of subject matter jurisdiction, and moves to expedite disposition of this motion. In support, Graham adopts in full "Defendant's Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction," and "Defendant's Motion

for Expedited Disposition," both filed by Defendant Secretary of State. These motions are attached and incorporated herein by reference.

In addition to the authorities cited by the Secretary of State, Graham respectfully notes the authorities holding that a trial court must resolve a threshold jurisdictional question timely, *see Berens v. Cobb*, 539 So. 2d 24 (Fla. 2d DCA 1989), and that it may not conduct any further proceedings in a case over which it lacks subject matter jurisdiction, *see City of Sanibel v. Maxwell*, 925 So. 2d 486 (Fla. 2d DCA 2006) (granting writ of prohibition directing trial court to dismiss case due to lack of subject matter jurisdiction) and *Walker v. Garrison*, 610 So. 2d 716 (Fla. 4th DCA 1992) (same).

WHEREFORE, Bob Graham respectfully requests that this Court expedite consideration of, and, upon consideration, grant, his Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

Lynn C. Hearn

Lynn C. Hearn
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

GRAHAM'S MOTION FOR STAY OF DISCOVERY

Intervening Defendant BOB GRAHAM, pursuant to Rule 1.280(c) of the Florida Rules of Civil Procedure, moves for an order staying discovery in this case pending resolution of the Defendant and Intervening Defendants' Motion to Dismiss For Lack of Subject Matter Jurisdiction. In support, Graham adopts in full "Defendant's Motion for Stay of Discovery" filed by Defendant Secretary of State. This motion is attached and incorporated herein by reference.

WHEREFORE, Bob Graham respectfully requests that this Court enter an order staying discovery in this matter pending resolution of the Defendant and Intervening Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

Lynn C. Hearn

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' AMENDED MOTION TO INTERVENE

Pursuant to Florida Rule of Civil Procedure 1.230, the Florida House of Representatives, through its Speaker, Larry Cretul, moves the Court for an order permitting it to intervene as a Plaintiff in this action.

1. The Florida Department of State has certified two proposed constitutional amendments for placement on the November ballot.[1] Both proposals would inject ambiguous, contradictory, and misleading requirements into the redistricting process. If implemented, they would dramatically and detrimentally impact the Legislature's ability to carry out its

[1] Copies of the proposed amendments and their ballot summaries are attached to this Motion.

constitutional duty to create districting plans openly, fairly, and accountably. And they would substantially curtail the Legislature's ability to protect the interests of racial minorities, whose ability to elect members of their choice has significantly improved over the past two decades. Worse still, the amendments' impacts are deliberately hidden from the electorate asked to approve them. The Florida House of Representatives has a duty to protect the interests of voters, who are entitled to "receive[] fair and actual notice of the proposal's purpose and effect." *Harris v. Moore*, 752 So. 2d 1241, 1242 (Fla. 4th DCA 2000). The Florida House of Representatives likewise has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980).

2. The two proposals are substantially identical, except one (Amendment 5) applies exclusively to state legislative districts and the other (Amendment 6) applies exclusively to congressional districts. The amendments say some things but would do others. The proposals mislead, obfuscate, hide the ball, and fly under false colors. They do so by design. Their proponents carefully crafted the amendments and their ballot summaries to secure passage by confusing and misleading the public. Absent judicial intervention, Amendments 5 and 6 will appear on the ballot accompanied by summaries as deliberately false and misleading as the name of their political sponsor: "FairDistrictsFlorida."

3. The proponents of Amendments 5 and 6 suggest that the amendments will improve the redistricting process, making it more "fair" by removing legislative discretion and political considerations. Their website boasts an intent to "restore true democracy to Florida." *See* http://www.fairdistrictsflorida.org/home.php (last visited May 26, 2010). But what they truly seek is to remove democracy from the redistricting process, putting inherently political

decisions in the hands of the Florida Supreme Court rather than the hands of politically accountable elected officials.

4. Redistricting is, and always has been, a "highly political task." *Growe v. Emison*, 507 U.S. 25, 33 (1993). As the United States Supreme Court has recognized, "extirpating politics from what are the essentially political processes of the sovereign States" constitutes "an impossible task." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973); *see also Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) (finding nothing invidious in politically drawn district lines). The Florida Constitution commits the critical task of redistricting to the Legislature because courts "are inherently ill-equipped" to "make decisions based on highly political judgments" relating to redistricting issues, *Bartlett v. Strickland*, 129 S. Ct. 1231, 1244 (2009) (plurality opinion) (marks omitted).

5. As the amendments' proponents are well aware, Amendments 5 and 6 will ultimately remove this process from the Legislature and deliver it to the Florida Supreme Court. This is their true effect and purpose. Rather than explicitly so stating, "FairDistrictsFlorida" hopes to implement ambiguous, contradictory, and misleading "standards," which the Legislature must follow in redistricting. Satisfying all the "standards"—many of which lie in the eye of the beholder—is impossible. As a result, each legislatively enacted plan would be subject to endless challenge, and the courts will ultimately be called upon to handle the highly political and time-sensitive task of redistricting:

- Districts that neatly follow non-compact municipal boundaries would be challenged as not being "compact."
- Compact districts crossing municipal boundaries would be challenged for not following municipal boundaries.
- A district that traditionally elects Democrats would be challenged as favoring a Democratic incumbent.

- The same district if redrawn as a Republican district would be challenged as disfavoring the Democratic incumbent.

- And any number of districts would be challenged for "denying or abridging the equal opportunity of racial or language minorities to participate in the political process or [] diminish[ing] their ability to elect representatives of their choice," however that language is ultimately interpreted by an empowered, reviewing court.[2]

6. Rather than guide the Legislature, the amendments do little more than provide endless avenues for judicial attacks on redistricting plans. No plan would be immune from challenge. And no plan could possibly satisfy all interested groups. Litigation—and the public expense of defending the Legislature's work product—would be endless. "Inviting attack on minor departures from some supposed norm [in redistricting review] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely *unless the express or tacit goal is to effect its removal from legislative halls*." *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (emphasis added). The amendments' tacit goal and certain effect *is* to transfer redistricting from the Legislature to the courts.[3]

7. By design, the amendments' tacit goal is not disclosed to the voters. Instead, the amendments hide their true purpose and fly under false colors. They thus violate the accuracy

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[2] The amendments' only requirements not vulnerable to countless subjective challenges mandate that districts be contiguous and consist of populations as nearly equal as possible. But these requirements do not change existing law and practice. *See Reynolds v. Sims*, 377 U.S. 533, 577-78 (1964).

[3] The proponents' earlier attempt to remove political accountability from the redistricting process was overt. In 2006, a proposed amendment would have expressly removed redistricting from the Legislature and delivered it to a "nonpartisan commission." *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1221 (Fla. 2006). The Florida Supreme Court struck that attempt from the ballot because, despite the proponents' marketing the commission as "nonpartisan," "the method of selecting the commission members is decidedly partisan." *Id.* at 1228-29. The Court therefore found the ballot summary misleading. *Id.* (It also found single-subject violations.) That amendment never appeared on the ballot, in part because its proponents settled on this deceptive alternative.

requirement, which "functions as a kind of 'truth in packaging' law for the ballot." *Adv. Opinion to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Congressional Dists. Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1227 (Fla. 2006); *accord Adv. Op. to Att'y Gen. re Add'l Homestead Tax Exemption*, 880 So. 2d 646, 653-54 (Fla. 2004) ("The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based only on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution.") (citation omitted).

8. Because they lack accurate ballot summaries, the amendments are invalid. Amendment 5 suffers an additional infirmity: it violates the single-subject rule. Neither amendment should appear on the ballot this November. The Florida House of Representatives seeks to intervene in this case, to join in Plaintiffs' challenge, and to ensure that Florida voters are not presented with amendments flying under false colors.

THE EXISTING CLAIMS

9. Plaintiffs Corrine Brown and Mario Diaz-Balart, both members of Congress, initiated this action on May 24, 2010. Their Amended Complaint comprises eight counts, each of which alleges that the ballot summary for Amendment 6 is misleading. They sue the interim Secretary of State, whose duty it is to certify proposed constitutional amendments for ballot placement (Am. Compl. ¶ 12), and FairDistrictsFlorida.org, the political committee that sponsored and continues to finance and publicly promote Amendments 5 and 6 (Am. Compl. ¶ 13).

10. The Congresspersons' Amended Complaint challenges only Amendment 6, which relates to congressional districts. Amendment 5, which is substantially identical to Amendment 6 but applies only to state legislative districts, is not implicated in the Amended Complaint.

INTERVENTION OF THE FLORIDA HOUSE OF REPRESENTATIVES IS PROPER

11. Under Florida House of Representatives Rule 2.6, "[t]he Speaker may initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House . . . when the Speaker determines that such suit is of significant interest to the House."

12. Intervention is governed by Florida Rule of Civil Procedure 1.230, which provides: "Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." "Consistent with the policies which the Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County,* 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992); *accord Nat'l Wildlife Fed. Inc. v. Glisson*, 531 So. 2d 996, 998 (Fla. 1st DCA 1988) ("Intervention should be liberally allowed.").

13. Whether to allow intervention is committed to the discretion of the Court, but intervention should be permitted when a proposed intervenor's interest is already at issue in the litigation and is "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Union Cent. Life Ins. Co. v. Carlisle,* 593 So. 2d 505, 507 (Fla. 1992) (quoting *Morgareidge v. Howey,* 78 So. 14, 15 (1918)). The Florida House of Representatives satisfies these criteria. Its interest is in protecting the electorate by keeping misleading Amendments 5 and 6 off the ballot. And to that end, it would plainly gain if this Court were to enter a judgment granting that requested relief.

14. The existing Plaintiffs represent their own unique interests. Both represent congressional districts with a majority (or near-majority) of minority voters. (Am. Compl. ¶¶ 10, 11.) Amendment 6 will have a negative impact on the ability of minorities to elect representatives of their choice, so the amendment will necessarily impact the Plaintiffs and their congressional constituents. The Florida House of Representatives shares an interest in protecting minority communities. And it also has an unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566-67 (Fla. 1980). Thus, the Florida House of Representatives has interests related to—but broader than—the interests of the existing Plaintiffs.

15. The Florida House of Representatives seeks to join in the Plaintiffs' existing challenge to Amendment 6. Although the Plaintiffs do not challenge Amendment 5, their challenges are equally applicable to both amendments, which have substantially identical language. The Florida House of Representatives seeks to present most of those same challenges with respect to Amendment 5, as well as Amendment 6. In addition, the Florida House of Representatives seeks to present one further challenge to Amendment 5.

The Florida House of Representatives' Proposed Claims

16. If permitted to intervene as a Plaintiff, the Florida House of Representatives would assert most of the claims already presented by the Plaintiffs. Specifically, as alleged in Counts I though VI of the Amended Complaint, the ballot summaries are misleading for numerous reasons. The Florida House of Representatives therefore seeks to adopt the claims presented in Counts I through VI in full.

17. In addition, each of those Counts is equally applicable to Amendment 5. The Florida House of Representatives, therefore, seeks to apply each of those claims to both amendments.

18. Furthermore, the Florida House of Representatives asserts that the ballot summaries for both amendments are false, deceptive, and misleading because the true purpose of the amendments is to remove the redistricting process from the Legislature and deliver it to the Florida Supreme Court, as discussed in paragraphs 1 through 8, above. The amendments therefore fly under false colors and should be removed from the ballot.

19. Finally, the Florida House of Representatives seeks to present one additional claim that is applicable to Amendment 5 only:

20. Amendment 5 would create Article III, Section 21 of the Florida Constitution, imposing complex, intensely fact-specific criteria on state legislative redistricting. But its summary never informs voters of its inevitable and dramatic effect on the Florida Supreme Court's mandatory review of state legislative redistricting plans under Article III, Section 16(c), Florida Constitution.

21. The Florida Constitution establishes a carefully constructed, time-sensitive process for the decennial reapportionment of state legislative districts. Art. III, § 16, Fla. Const. The constitutional framework is designed to ensure that a redistricting plan is adopted by the Legislature and approved by the Florida Supreme Court in sufficient time to allow candidates to qualify and voters to elect their representatives at the next election. Under this process, the Legislature must redraw state legislative districts at its 2012 regular session. Art. III, § 16(a), Fla. Const. Within fifteen days after adoption of a redistricting plan, the Attorney General must petition the Florida Supreme Court to determine the validity of the plan. Art. III, § 16(c), Fla.

Const. Historically, the Attorney General has petitioned the Court in early to mid-April, during or after the session in which the Legislature takes up redistricting.

22. The Supreme Court must review any redistricting plan, permit opposing parties to present their views, and determine the validity of the plan—all within thirty days. *Id.* The Court's judgment is "binding upon all the citizens of the state." Art. III, § 16(d), Fla. Const. As a result of the 30-Day Rule and existing constitutional standards, the scope of review has historically been extremely limited. The framework established by the Florida Constitution does not "allow for a fact-intensive review within [the] thirty-day window." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002).

23. Under the 30-Day Rule, the Court has traditionally rendered a decision by mid-May, only weeks before candidates began to qualify for office in the newly drawn districts. In 2012, candidate qualifying is scheduled to commence on June 18th. §§ 99.061(1), (9), 100.031, 100.061, Fla. Stat. (2009). The primary and general elections are scheduled to follow in short order, on August 28th and November 6th, respectively. *Id.* §§ 100.061, 100.031.

24. The constitutional framework affords little time to remedy any invalidity in a redistricting plan. If the Court invalidates a plan, the Governor must convene the Legislature for an extraordinary session of no more than fifteen days. Art. III, § 16(d), Fla. Const. Again, the Attorney General must petition for review or, if no plan is adopted, must report that fact to the Court. Art. III, § 16(e), Fla. Const. If the Court strikes the new plan, or if none was adopted, the Court, in the last resort, makes an emergency apportionment. Art. III, § 16(f), Fla. Const.

25. The 30-Day Rule has never impeded the Court's review of a plan's compliance with the Florida Constitution, because the criteria presently imposed by the Constitution are few and simple. State House districts must be between 80 and 120 in number, while State Senate

districts must be between 30 and 40 in number. Art. III, § 16(a), Fla. Const. Districts must be numbered consecutively and consist of contiguous, overlapping, or identical territory. *Id.* Compliance with these criteria can readily be determined from the face of any redistricting plan. Thus, the Court has never found it difficult to reconcile the 30-Day Rule with its obligation to assess the validity of a plan under criteria contained in the Florida Constitution.

26. Amendment 5 would substantially affect the Florida Supreme Court's automatic, binding review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It would create new, fact-intensive criteria that would inevitably spawn a range of legal challenges to individual districts and the plan as a whole—challenges the Court cannot review within the limited time allotted by the Constitution. The amendment would generate fact-intensive inquiries about every district. The Florida Supreme Court would have to determine whether legislators subjectively intended to favor or disfavor political parties or incumbents. It would have to engage in a circumstantial analysis of the opportunity of racial and language minorities to participate in the political process—and the Legislature's intent in this regard—and the ability of minority voters to elect representatives of their choice. It would have to scrutinize the compactness or non-compactness of every district, and the feasibility of utilizing local political and geographical boundaries.

27. The Florida Supreme Court itself has deemed it impossible to conduct a fact-specific review in thirty days. The Court has refused to adjudicate VRA claims—claims that are less complex than those which the amendment's criteria would engender—explaining that "article III, section 16(c) did not envision the development of the highly complex federal claims. The juxtaposition of these claims on this Court's article III, section 16(c) review is highly problematic." *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d at 829 n.13.

28. If the Florida Supreme Court attempts the impossible, it must perform an inadequate review that deprives parties of any opportunity to conduct discovery and present evidence, and therefore denies their due process rights. The Court's decision, though unsupported by record evidence, would bind all citizens of the state and extinguish their right to raise future challenges. Any such review of fact-intensive criteria will fundamentally reshape the Court's review process, which, by the Court's own precedents, has hitherto been limited to simple, facial challenges. On the other hand, if the Court declined to review the plan's compliance with the criteria ordained by Amendment 5, it would violate its constitutional responsibility to determine the validity of redistricting plans under the Florida Constitution. The Court has never declined to assess the validity of a state legislative redistricting plan under any criteria set forth in the Florida Constitution. To do so in this instance would thus substantially alter the Court's review process.

29. If the Court ignores the 30-Day Rule and engages in a more lengthy review, it will frustrate the timely completion of the redistricting process and subvert the right to vote of all Florida citizens. A thoughtful and deliberate evaluation of complex criteria cannot be completed prior to candidate qualifying, or even before the first general election after reapportionment.

30. In Alaska, the state constitution contains detailed redistricting criteria. In 2001, redistricting spawned nine lawsuits. The parties engaged in extensive discovery, and about 160 witnesses were deposed. The court conducted a three-week trial and issued a 121-page opinion seven months after the cases were filed. The Alaska Supreme Court commended the trial court for its thorough review under "extreme time pressures." *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 n.1 (Alaska 2002).

31. The imposition of multiple, complex, fact-intensive criteria on the existing timelines in Article III, Section 16(c) would force the Florida Supreme Court either to ignore its constitutional duty to promptly determine the validity of redistricting plans, or, contrary to the restraint observed in its own precedents, to perform a desperate, slapdash review of fact-intensive claims which, under constitutional time pressures, will amount to mere guesswork and deny adversary interests due process and meaningful access to the courts. Amendment 5 not only imposes a collection of fact-intensive standards, but it also fundamentally alters the Florida Supreme Court's review of state legislative plans. Because it radically alters—but does not explain—its effect upon existing provisions of the Florida Constitution, Amendment 5 embraces multiple subjects.

32. The ballot summary does not inform voters of Amendment 5's inevitable and substantial effect on the Court's review of redistricting plans under Article III, Section 16(c) of the Florida Constitution. It hides the ball as to the amendment's true effect, and fails to inform voters of the monumental change it makes to existing constitutional processes. A proposed amendment that works substantial changes to established constitutional processes, and does so without informing the voters, is inaccurate and misleading by omission. Amendment 5 is therefore invalid.

This Court Should Permit the Addition of the New Claims

33. Although intervening parties typically must "take cases as they find them," the court may order otherwise in its discretion. *Litvak v. Scylla Props., LLC*, 946 So. 2d 1165, 1175 (Fla. 1st DCA 2006) (citing Fla. R. Civ. P. 1.230); *accord Smith v. Atl. Boat Builder Co.*, 356 So. 2d 359, 362 (Fla. 1st DCA 1978) ("We note, however, that Fla. R. Civ. P. 1.230 while providing that intervention 'shall be in subordination to, and in recognition of, the propriety of the main

proceeding' concludes with the qualifying clause 'unless otherwise ordered by the court in its discretion.'"). Moreover, while "the intervenor may not assert matters extraneous to his own interests . . . he may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties." *Williams v. Nussbaum*, 419 So. 2d 715, 717 n.1 (Fla. 1st DCA 1982).

34. In this case, the Florida House of Representatives could file its own complaint to assert its interests. But it would benefit all parties—and serve judicial efficiency—to have the existing claims and the Florida House of Representatives' claims presented in the same case. Intervention promotes judicial efficiency, and "[c]onsistent with the policies which the [intervention] Rule is intended to advance, the Rule should, in general, be liberally construed." *Grimes v. Walton County,* 591 So. 2d 1091, 1093-94 (Fla. 1st DCA 1992).

35. The Florida House of Representatives seeks to join in Counts I through VI of the Plaintiffs' Amended Complaint, and to extend them to Amendment 5. These challenges are equally applicable to both substantively identical amendments, as will be any defenses. And the additional challenge presented to Amendment 5 is closely related. These challenges are appropriately considered together. The alternative to intervention would be the Florida House of Representatives' filing its own action, asserting overlapping claims, and potentially burdening two judges with similar or identical issues. This inefficient alternative would offer no benefits to offset its many burdens, including duplicative proceedings and the potential for inconsistent judgments.

36. The proposed intervention would not prejudice any party. This Motion is filed immediately after the case was initiated, and the intervention will not delay or prolong the case.

37. Upon intervention, the Florida House of Representatives will assert the claims presented in this Motion.[4]

WHEREFORE, the Florida House of Representatives respectfully seeks entry of an order (i) granting this Motion, (ii) designating the Florida House of Representatives as an intervening Plaintiff, (iii) accepting this Motion as the Florida House of Representatives' pleading, and (iv) granting such further relief as the Court finds appropriate.

Respectfully submitted,

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[4] The entirety of the Florida House of Representatives' claims is presented in this Motion as if presented in an independent complaint. Should the Court order it, the Florida House of Representatives will present its claims in a separately filed complaint. Given the need for expedited relief, the relative positions of the parties, and the nature of the case, the House respectfully suggests such additional pleading is unnecessary, and that this Motion should be accepted as the pleading of the House. *Cf. Wogisch v. Tiger*, 193 So. 2d 187, 188 (Fla. 4th DCA 1966) ("When intervention is permitted upon sufficient showing of interest . . . , the intervenor may, by proper pleading, make his petition for leave to intervene suffice as his complaint.").

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail this twenty-fourth day of June 2010, to the following:

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Attorneys for Intervening Defendant, Florida House of Representatives

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____

(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS:

_____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: / / **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new Section 21 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

BALLOT SUMMARY: Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new Section 21 to Article III

Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:
(1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X _____ _____

SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org

P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-16

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____
(Please print name as it appears on Voter I.D. Card)

RESIDENTIAL STREET ADDRESS: _____

CITY: _____ **ZIP:** _____

COUNTY: _____

Date of birth: ___/___/___ **(or) Voter registration number:** _____

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE:
STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:
(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X _____ _____
SIGNATURE OF REGISTERED VOTER **DATE SIGNED**

Paid Political advertisement paid for by

FairDistrictsFlorida.org
P.O. Box 330868, Miami, FL 33233
RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name: Address:

RESERVED FOR BAR CODE	DATE APPROVED: 9/28/07	SERIAL NUMBER: 07-15

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO DEFENDANTS' MOTIONS FOR STAY OF DISCOVERY AND FOR EXPEDITED DISPOSITION

On June 22, 2010, Defendant Dawn K. Roberts, in her capacity as Interim Secretary of State of the State of Florida (the "Secretary"), filed a Motion for Stay of Discovery and Motion for Expedited Disposition. On June 24, 2010, Intervening Defendant Bob Graham ("Graham"), filed (i) a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition, and (ii) a Motion for Stay of Discovery. This Court should deny all of these. Intervening Plaintiff, the Florida House of Representatives, files this response to these motions.[1]

[1] This Response addresses the requests for expedited treatment and a stay of discovery only. No later than the July 21, 2010 stipulated deadline for response to dispositive motions, the

1. Two weeks ago, on June 9, 2010, all parties agreed to a litigation schedule in the presence of the Court. On the following day, the parties continued to negotiate a proposed Scheduling Order. All parties agreed, and the proposed order was submitted to the Court on a stipulated basis. Now, the Secretary asks the Court to revise its Scheduling Order. The Court should not adjust the litigation schedule entered on the parties' unanimous agreement.

2. Nor should the Court grant Graham's request to alter the schedule. This Court exercised its discretion by permitting Graham's appearance as an intervening party. An intervening party should not be permitted, immediately after intervention is granted, to disrupt the schedule in place when it joined the case. "[T]he intervention shall be *in subordination to, and in recognition of, the propriety of the main proceeding*, unless otherwise ordered by the court in its discretion." Fla. R. Civ. P. 1.230 (emphasis added).

3. Neither the Secretary nor Graham offers any compelling reason to rearrange the litigation schedule agreed to by the parties and approved by the Court. While a court obviously must determine its jurisdiction, there is no need for this Court to hold essentially an emergency hearing, rather than hear argument on the jurisdictional issue, as intended, on July 23 or July 26, 2010. There is no emergency, and the matter can be addressed consistent with the availability of the Court.

4. Discovery cannot be postponed. If postponed, there will be no opportunity to conduct discovery later because of the time constraints imposed by the impending election. The Supervisors of Elections will begin to print general election ballots around September 1, 2010. The discovery schedule was negotiated by the parties and entered by the Court in appreciation of these constraints. To postpone discovery would be a denial of the right to discovery altogether.

Florida House of Representatives will respond separately to Graham's request for dismissal based on subject matter jurisdiction.

5. The Secretary expresses concern about burdens of discovery, but the Secretary and Bob Graham have indicated that the Secretary's interest is in the jurisdictional issue—not the merits. (*See* Graham's Reply to Plaintiffs' Responses to Graham's Motion to Intervene at 5-6; Secretary's Response to Motion of Bob Graham to Intervene at 1-2.) Discovery on the merits—which is unlikely to be directed to the Secretary anyway—will not burden the Secretary. In fact, it is most probable that the Secretary will have no direct involvement in discovery at all. And Graham is in no position to argue about the burdens discovery might impose on him, having voluntarily made himself a party to this action over the objection of others.

6. The Secretary cites Florida Rule of Judicial Administration 2.215(g) in support of the request for expedited treatment of dispositive motions. The purpose of this Rule, however, is to ensure the final resolution of election cases prior to the election. It does not require expedited treatment of every motion within the case, but it certainly counsels against a stay of discovery. And the Secretary's reliance on *Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282 (Fla. 1992), in support of her stay request is misplaced. *Gleneagle* relates to discovery against non-resident defendants who have challenged a Florida court's assertion of *personal* jurisdiction.

7. Graham's additional authorities likewise do not support the requested relief. The Court in *Berens v. Cobb*, 539 So. 2d 24 (Fla. 2d DCA 1989), directed a trial court to consider a motion to dismiss based on *personal* jurisdiction before the court proceeded to trial. *Id.* at 25 ("Where, as here, the judge refuses to rule on a motion challenging personal jurisdiction, it is appropriate to issue the writ."). Neither of Graham's other cases are better. *City of Sanibel v. Maxwell*, 925 So. 2d 486 (Fla. 2d DCA 2006) held simply that once a trial court ends its judicial labor in a case—by dismissal or otherwise—it lacks subject matter jurisdiction to proceed further. *Id.* And in *Walker v. Garrison*, 610 So. 2d 716 (Fla. 4th DCA 1992), the trial court had

wrongly refused to dismiss a claim over which it lacked subject matter jurisdiction. *Id.* None of these cases supports a proposition that any party's mere *mention* of a jurisdictional challenge must stay the case. That is not the law.

8. The Secretary agreed to the litigation schedule now in place, and this Court should not disturb it just days later. And Graham should not be heard to object to the schedule, having voluntarily injected himself into this case with full knowledge of the schedule. The stipulated schedule will not unfairly burden the Secretary or Graham.

WHEREFORE, the Florida House of Representatives respectfully requests that the Court deny Defendant's Motion for Stay of Discovery and Motion for Expedited Disposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States Mail this 7th day of June 2010, to the following:

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Attorneys for Intervening Plaintiff, Florida House of Representatives

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

CORRINE BROWN AND MARIO DIAZ-BALART,

PLAINTIFFS, AND

FLORIDA HOUSE OF REPRESENTATIVES,
AND FLORIDA SENATE, INTERVENING PLAINTIFFS,

V. CASE NO.: 2010 CA 001824

DAWN K. ROBERTS, IN HER CAPACITY AS
INTERIM SECRETARY OF STATE OF THE STATE OF
FLORIDA, AND FAIRDISTRICTSFLORIDA.ORG, INC.,
A FLORIDA NOT-FOR-PROFIT CORPORATION,

DEFENDANTS, AND

BOB GRAHAM, INTERVENING DEFENDANT.
_____/

NOTICE OF TAKING VIDEOTAPED DEPOSITIONS *DUCES TECUM*

TO: All Counsel of Record

PLEASE TAKE NOTICE that beginning at 9:00 a.m. on July 13, 2010, the undersigned will take the videotaped depositions of the following people:

NAME: BOB GRAHAM *(not duces tecum)*
TIME: 9:00 a.m.
LOCATION: GrayRobinson, P.A. Great Room
1221 Brickell Avenue, Suite 1600
Miami, Florida 33131

NAME: ELLEN FREIDIN
TIME: 11:00 a.m. or immediately following Graham deposition
LOCATION: GrayRobinson, P.A. Great Room
1221 Brickell Avenue, Suite 1600
Miami, Florida 33131

Such videotaped examinations will take place before Veritext Reporting or any other Notary Public or Officer authorized by law to take depositions in the State of Florida. These depositions will be taken by a court reporter who is not of counsel to the parties or interested in the event or cause, upon oral examination for discovery, for use at hearing or trial, or for any other purpose under the Florida Rules of Civil Procedure.

The taking of these depositions shall be recorded by stenographic means and shall continue from day to day until completed.

The Deponent, Ellen Freidin, is required to bring with her at said time and place the following documents:

All communications including, but not limited to, emails, letters, memoranda, text messages, or other documents to or from Bob Graham relating to his participation in this case.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished as indicated below this 10th day of June, 2010, to the following:

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Attorneys for Florida House of Representatives

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

CORRINE BROWN AND MARIO DIAZ-BALART,

PLAINTIFFS, AND

FLORIDA HOUSE OF REPRESENTATIVES,
AND FLORIDA SENATE, INTERVENING PLAINTIFFS,

V. CASE NO.: 2010 CA 001824

DAWN K. ROBERTS, IN HER CAPACITY AS
INTERIM SECRETARY OF STATE OF THE STATE OF
FLORIDA, AND **FAIRDISTRICTSFLORIDA.ORG, INC.,**
A FLORIDA NOT-FOR-PROFIT CORPORATION,

DEFENDANTS, AND

BOB GRAHAM, INTERVENING DEFENDANT.
_____/

NOTICE OF TAKING RULE 1.310(b)(6) CORPORATE REPRESENTATIVE VIDEOTAPED DEPOSITION *DUCES TECUM*

TO: All Counsel of Record

Pursuant to Florida Rule of Civil Procedure 1.310(b)(6), The Florida House of Representatives will take the video deposition of the Corporate Representative(s) of FairDistrictsFlorida.org, Inc. ("FairDistricts"), at the offices of GrayRobinson, P.A., 1221 Brickell Avenue, Suite 1600, Miami, Florida, on **July 13, 2010, beginning at 2:30 p.m.**, or immediately following the deposition of Ellen Freidin. Such videotaped examination will take place before Veritext Reporting or any other Notary Public or Officer authorized by law to take depositions in the State of Florida.

FairDistricts is required to produce the corporate representative(s) most knowledgeable about and able to speak for it concerning the following matters:

1. The drafting and creation of the language in proposed Constitutional Amendments 5 (Standards for Legislature to Follow in Legislative Redistricting) and 6 (Standards for Legislature to Follow in Congressional Redistricting).
2. The intent of the language in Amendments 5 and 6.
3. The intended legal effect of the language in Amendments 5 and 6.
4. Communications by FairDistricts to the public at large about the language in, and the intended effects of, Amendments 5 and 6.

The Deponent is requested to have in his or her possession and to produce at his or her deposition, the following documents:

1. All documents which may be necessary to fully respond to the subject matters and areas of inquiry described above.
2. All communications including, but not limited to, emails, letters, memoranda, text messages, or other documents to or from Bob Graham relating to his participation in this case.
3. All documents in FairDistricts' custody or possession, regardless of the author of the document, which attempt or purport to construe, interpret, or analyze the legal effect of any part of Amendment 5 or 6.

This deposition is being taken for the purpose of discovery, for use as evidence and for such other uses and purposes as are permitted under the Florida Rules of Civil Procedure and other applicable law.

The taking of this deposition shall be recorded by stenographic means and shall continue from day to day until completed.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished as indicated below this 8th day of June, 2010, to the following:

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Attorneys for Florida House of Representatives

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

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

REQUEST FOR ADMISSIONS TO FAIRDISTRICTSFLORIDA.ORG, INC.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendants,

and

BOB GRAHAM,

Intervening Defendant.

Plaintiffs CORRINE BROWN and MARIO DIAZ-BALART, request that Defendant FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation, and admit the attached facts pursuant to the Florida Rules of Civil Procedure and the Scheduling Order entered in this action.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed to Michael G. Tanner, Esq., Tanner Bishop, 1 Independent Drive, Suite 1700 Jacksonville, FL 32202, mtanner@tannerbishoplaw.com; George N. Meros, Jr., Esq., GrayRobinson, P .A., Post Office Box 11189, Tallahassee, Florida 32302-3189, gmeros@gray-

robinson.com, Allen C. Winsor, Esq., awinsor@gray-robinson.com, Andy Bardos, Esq., abardos@gray-robinson.com; James A. Scott, Esq., Tripp Scott, P.A,, 110 Southeast Sixth Street, 15th Floor Fort Lauderdale, Florida 33301, jas@trippscott.com, Edward J. Pozzuouli, Esq., ejp@trippscott.com, Stephanie Alexander, sda@trippscott.com, Brady J.Cobb, Esq., bjc@trippscott.com; Mark Herron, Esq. Messer, Caparello & Self, P.A., Post Office Box 15579, Tallahassee , FL 32317-5579, mherron@lawfla.com and Robert J. Telfer III, Esq., rtelfer@lawfla.com; and Ronald G. Meyer, Esq., Meyer, Brooks, Demma and Blohm, PA, Post Office Box 1547, Tallahassee, FL 32302, rmeyer@meyerbrookslaw.com, Jennifer S. Blohm, Esq., jblohm@meyerbrookslaw.com, Lynn C. Hearn, Esq., lhearn@meyerbrookslaw.com this June 27, 2010.

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s/Stephen M. Cody

Fla. Bar No. 334685

ADMISSIONS

1. The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("proposed Amendment 6") is as follows:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

2. FairDistrictsFlorida.org, Inc. drafted the language of proposed Amendment 6

3. The ballot title and summary for proposed Amendment 6 is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

4. FairDistrictsFlorida.org, Inc. drafted the ballot title and summary of proposed Amendment 6

5. After the 1990 Census, the State of Florida was apportioned a total of 23 Congressional seats.

6. After the 2000 Census, the State of Florida was apportioned a total of 25 Congressional seats.

7. After the 2000 Census, the Census Bureau provided data from the 2000 Census to the State of Florida pursuant to Public Law 94-171.

8. The Public Law 94-171 data provided to the State of Florida after the 2000 Census included a count of all persons by race, a count of the population 18 years and over by race, a count of Hispanic or Latino and a count of not Hispanic or Latino by race for all persons, a count of Hispanic or Latino and a count of not Hispanic or Latino by race for the population 18 years and over.

9. The Public Law 94-171 2000 Census data was available at the census block level.

10. Prior to and during the 2002 Legislative session, the Florida Legislature utilized FREDS 2000 as redistricting computer software for drawing Congressional and Legislative Districts.

11. FREDS 2000 was based on the ArcView® geographic information system software product produced by ESRI.

12. FREDS 2000 was able to run on a PC with a 300 MHz processor, 3 gigabytes available hard-disk space, 64 megabytes random access memory minimum, Microsoft Windows® 98 or higher, and Microsoft Internet Explorer® version 5.01 or higher.

13. FREDS 2000 was made available to the public for a cost of $10 per copy.

14. Copies of FREDS 2000 were also provided free of charge to every public and university library in the State of Florida.

15. FREDS 2000 contained Census shapefiles for county, tract, block group, and block from 2000 Census TIGER/Line Files.

16. The census shapefiles in FREDS 2000 for streets were built from 2000 Census TIGER/Line Files.

17. The other "visual reference" layers (arterial roads, expressways, hydro, shoreline, water, coastal water) in FREDS 2000 were built using 1999 Census TIGER/Line Files for base geometry.

18. Precinct shapefiles in FREDS 2000 were derived from electronic or paper maps of varying scale, projection, and quality from Florida County supervisors of elections and digitized with the aid of 1990 and 1998 Census TIGER/Line File block geometry.

19. Precinct shapefiles in FREDS 2000 include attributes for the voter registration and statewide elections data used in FREDS 2000.

20. FREDS 2000 included 2 gigabytes of census and election data for the State of Florida.

21. The Congressional reapportionment plan enacted by the Florida Legislature in 2002 was designated Congressional Plan S19C0017.

22. The Florida House and Senate passed HB 1993 on March 22, 2002.

23. The Governor signed HB 1993 on March 27, 2002.

24. HB 1993 was codified as Chapter 2002-12, Laws of Florida.

25. Section 8.0002 of the Florida Statutes was amended by Chapter 2002-12, Laws of Florida to set forth the boundaries of 25 congressional districts.

26. The ideal population of a Florida Congressional District drawn in 2000 was 639,295.

27. The total deviation (the difference between the district with the population above ideal district size and the district with the population below the ideal size) for Congressional Plan S19C0017 was 1 person.

28. District 1 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

29. District 2 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

30. District 3 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

31. District 4 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

32. District 5 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

33. District 6 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

34. District 7 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

35. District 8 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

36. District 9 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of +1.

37. District 10 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

38. District 11 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

39. District 12 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of +1.

40. District 13 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

41. District 14 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

42. District 15 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

43. District 16 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

44. District 17 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of +1.

45. District 18 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

46. District 19 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

47. District 20 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

48. District 21 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

49. District 22 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

50. District 23 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

51. District 24 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

52. District 22 in Congressional Plan S19C0017 had a population of 639,295 and a total deviation of 0.

53. Congressional Plan S19C0017 already meets the requirement that districts be as "nearly equal in population as is practicable" as contained in proposed Amendment 6.

54. Congressional Plan S19C0017 already meets the requirement that "districts shall consist of contiguous territory" as contained in proposed Amendment 6.

55. Florida is subject to the preclearance requirements of Section 5 of the Voting Rights Act.

56. Collier, Hardee, Hendry, Hillsborough, and Monroe Counties are jurisdictions covered under Section 5 of the Voting Rights Act.

57. Any changes to Congressional Districts in Collier, Hardee, Hendry, Hillsborough, and Monroe Counties must be precleared by the United States Department of Justice or by a declaration of the United States District Court for the District of Columbia.

58. Congressional Districts 9, 11, and 12 take in parts of Hillsborough County, Florida.

59. Congressional District 13 takes in all of Hardee County, Florida.

60. Congressional District 14 takes in part of Collier County, Florida.

61. Congressional District 18 takes in part of Monroe County, Florida.

62. Congressional District 25 takes in part of Collier County, Florida.

63. Congressional District 23 takes in part of Hendry County, Florida.

64. Congressional District 25 takes in part of Monroe County, Florida.

65. The Justice Department precleared the Congressional redistricting plan contained in Congressional Plan S19C0017.

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

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendants,

and

BOB GRAHAM,

Intervening Defendant.

INTERROGATORIES TO FAIRDISTRICTSFLORIDA.ORG, INC.

Plaintiffs CORRINE BROWN and MARIO DIAZ-BALART, propound the following interrogatories upon the Defendant FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation, and request that they be answered separately, fully, and under oath pursuant to the Florida Rules of Civil Procedure and the Scheduling Order entered in this action.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed to Michael G. Tanner, Esq., Tanner Bishop, 1 Independent Drive, Suite 1700 Jacksonville, FL 32202, mtanner@tannerbishoplaw.com; George N. Meros, Jr., Esq.,

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s/Stephen M. Cody

Fla. Bar No. 334685

DEFINITIONS

(a) The words "you", "yours" and/or "yourself" means Defendant FairDistrictsFlorida.org, Inc.

(b) The singular shall include the plural and vice versa; the terms "and" or "or" shall be both conjunctive and disjunctive and the term "including" means "including without limitation".

(c) "Date" shall mean the exact date, month and year, if ascertainable or, if not, the best approximation of the date (based upon relationship with other events).

(d) The word "document" shall mean any writing, recording or photograph in your actual or constructive possession, custody, care or control, which pertain directly or indirectly, in whole or in part, either to any of the subjects listed below or to any, other matter relevant to the issues in this action, or which are themselves listed below as specific documents; including, but not limited to: correspondence, emails, memoranda, notes, messages, diaries, minutes, books, reports, charts, ledgers, invoices, computer printouts, microfilms, videotapes, or tape recordings.

(e) The term "third party" or "third parties" refers to individuals or entities that are not a party to this lawsuit.

(f) The word "identify" when used in reference to a document, means and includes the name and address of the custodian of the document, and a general description of the document, including (1) the type of document (i.e., correspondence, memorandum, facsimile etc.); (2) the general subject matter of the document; (3) the date of the document; (4) the author of the document; (5) the addressee of the document; and (6) the relationship of the author and addressee to each other.

(g) The word "identify" when used in reference to a person, corporation, hospital, medical practice or any third party, means and includes the name, address, and telephone number of the person, corporation, hospital, medical practice or any third party. If you object to fully

identifying a document or oral communication because of a privilege, you must nevertheless provide the following information unless divulging the information would disclose the privileged information: 1) the nature of the privilege claimed (including work product); 2) if the privilege is being asserted in connection with a claim or defense governed by state law, the state privilege rule being invoked; 3) the date of the document or oral communication; if a document: its type (correspondence, memorandum, facsimile etc.), custodian, location, and such other information sufficient to identify the document for a subpoena duces tecum or a document request, including where appropriate, the author, the addressee, and if not apparent, the relationship between the author and addressee; 4) if an oral communication, the place where it was made, the names of persons present while it was made, and if not apparent, the relationship of the persons present to the declarant; and 5) the general subject matter of the document or oral communication.

You are under a continuous obligation to supplement your answers to these interrogatories under the circumstances specified in the Florida Rules of Civil Procedure.

INTERROGATORIES

1. Please provide the name, address and telephone number, place of employment, and job title of the person who is signing these interrogatories on your behalf.

   Answer:

2. Please provide the name, address and telephone number, place of employment, and job title of any person who has assisted you in preparing your answers to these interrogatories.

   Answer:

3. Please identify any political scientist you consulted about the redistricting criteria you included in proposed Amendment 6 to the Florida Constitution.

   Answer:

4. Identify all Congressional redistricting plans you or any third party have drawn using the redistricting criteria you included in proposed Amendment 6 to the Florida Constitution, and for each plan, state the population of each district, the voting age population of each district, the population of each district by race, the population of each district by ethnicity (i.e., Hispanic or other ethnic identifiers), and party registration.

   Answer:

5. For each plan identified in answer to Interrogatory 4, please provide the Census geographic areas included in each district (ie., counties, or statistically equivalent entities, county subdivisions, incorporated places, unincorporated places, census designated places, census tracts, census block groups, and census blocks).

   Answer:

6. Identify all documents produced by you wherein you have claimed that the use of the redistricting criteria contained in proposed Amendment 6 to the Florida Constitution would have produced more competitive districts if proposed Amendment 6 had been in effect when the Legislature last undertook Congressional redistricting after the 2000 Census.

   Answer:

7. Applying the criteria set forth in proposed Amendment 6 to the Florida Constitution to the 2000 Census data, please state how a plan drawn with that criteria would have resulted in more competitive districts.

   Answer:

8. Identify each press release you have issued since your incorporation that discusses, in whole or in part, proposed Amendment 6 to the Florida Constitution.

   Answer:

9. Identify all correspondence you, your officers, your employees, and your directors have had with any newspaper, television station, television network, cable news channel, radio station, radio network since your incorporation that discusses, in whole or in part, proposed Amendment 6 to the Florida Constitution.

Answer:

10. Identify each political advertisement or political communication you have issued since your incorporation that discusses, in whole or in part, proposed Amendment 6 to the Florida Constitution, and for each communication.

Answer:

11. Identify all prepared public statements made by you, your officers, your employees, and your directors since your incorporation that discusses, in whole or in part, proposed Amendment 6 to the Florida Constitution.

Answer:

FAIRDISTRICTSFLORIDA.ORG, INC.

By: _____

Name: _____

Title: _____

STATE OF FLORIDA
COUNTY OF _____

BEFORE ME, the undersigned authority, personally appeared _____ _____, whose title is _____ with FairDistrictsFlorida.org, Inc., who swears and deposes that he or she has read the Answers to these interrogatories and say that they are true and correct.

SWORN TO AND SUBSCRIBED before me this _____ day of _____. 2010.

_____
NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

PRINT NAME:

My Commission Expires:

Personally known by me _____

or Produced Identification _____

Type of identification: _____

IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

Case No. _____
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, and BOB GRAHAM,

Respondents.

APPENDIX TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

VOLUME II

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Attorneys for Dawn K. Roberts, Florida Interim Secretary of State

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

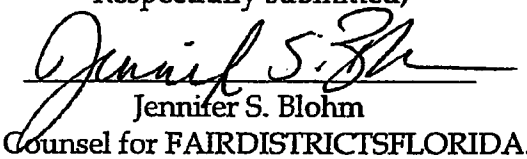
FAIRDISTRICTSFLORIDA.ORG, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO EXPEDITE DISPOSITION

Defendant FAIRDISTRICTSFLORIDA.ORG, Inc. ("Fair Districts"), pursuant to Rule 1.140(b)(1) of the Florida Rules of Civil Procedure, moves to dismiss this action due to lack of subject matter jurisdiction, and moves to expedite disposition of this motion. In support, Fair Districts adopts in full "Defendant's Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction," and "Defendant's Motion for Expedited Disposition," both filed by

Defendant Secretary of State as well as Intervening Defendant Bob Graham's "Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition." These motions are attached and incorporated herein by reference.

WHEREFORE, Fair Districts respectfully requests that this Court expedite consideration of, and, upon consideration, grant, its Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FAIRDISTRICTSFLORIDA.ORG, INC.'S MOTION FOR STAY OF DISCOVERY

Defendant FAIRDISTRICTSFLORIDA.ORG, Inc. ("Fair Districts"), pursuant to Rule 1.280(c) of the Florida Rules of Civil Procedure, moves for an order staying discovery in this case pending resolution of the Defendants' and Intervening Defendant's Motions to Dismiss For Lack of Subject Matter Jurisdiction. In support, Fair Districts adopts in full "Defendant's Motion for Stay of Discovery" filed by Defendant Secretary of State and "Graham's Motion for Stay of Discovery" filed by

Intervening Defendant Bob Graham. These motions are attached and incorporated herein by reference.

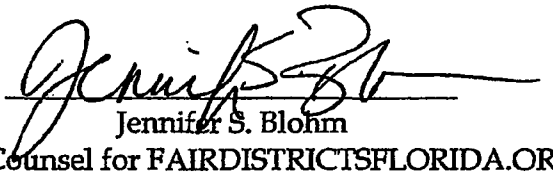
In addition, although the Florida House of Representatives, in its response to the motions filed by the Secretary of State and Graham, attempts to distinguish *Gleneagle Ship Management Co. v. Leondakos*, 602 So. 2d 1282 (Fla. 1992) and *Berens v. Cobb*, 539 So. 2d 24 (Fla. 2d DCA 1989) on the basis that they involve personal jurisdiction, this attempt fails in light of *Seminole Tribe of Florida v. McCor*, 903 So. 2d 353 (Fla. 2nd DCA 2005). In *McCor*, the Court held that "[a] motion to dismiss for lack of subject matter jurisdiction is analogous to a motion to dismiss for lack of personal jurisdiction." 903 So. 2d at 357. Thus, the cases cited by the Secretary of State and Graham are clearly relevant to this matter.

Addressing the motions to dismiss forthwith may result in no discovery being necessary. Subject matter jurisdiction is a threshold issue, and its determination is crucial to further proceedings in this case. For instance, without subject matter jurisdiction, this Court will be unable to rule on any discovery disputes. Ruling on the motions to dismiss will advance the orderly procession of this case, not hinder it. Federal and state courts recognize this fact and the necessity of timely addressing jurisdictional issues. *See, e.g., Chudasama v. Mazda Motor Corporation*, 123 F. 3d 1353, 1367 (11th Cir. 1997)(holding that "neither the parties nor the court have any need for discovery before the court rules on the motion [to dismiss]" and noting that ruling on the motion to dismiss relieves the parties of unnecessary discovery costs); *84 Lumber Co. v. Cooper*, 656 So. 2d 1297, 1300 (Fla. 2nd DCA 1994)(noting that an attorney has an

ethical obligation to immediately bring jurisdictional issues to the court's attention in order to avoid "unnecessary expenditure of precious client and judicial resources").

WHEREFORE, Fair Districts respectfully requests that this Court enter an order staying discovery in this matter pending resolution of the Defendants' and Intervening Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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By

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as the Interim Secretary of State of the State of Florida,

Defendant.
_____/

ORDER GRANTING GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

This cause was considered upon review of Motion for Leave to Appear as Amicus Curiae in Support of Defendant's Motion to Dismiss, dated June 22, 2010. The court having reviewed the file and being advised in the premises, it is:

ORDERED AND ADJUDGED that Governor Charlie Crist's Motion for Leave to Appear as Amicus Curiae in Support of Defendant's Motion to Dismiss is granted.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida this 30th day of June, 2010.

Honorable Jackie L. Fulford

Confirmed copies furnished to:

Stephen M. Cody
C.B. Upton
James A. Scott
Mark Herron
Miguel DeGrandy
Michael G. Tanner
George N. Meros, Jr.
Ronald G. Meyer

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF SERVING INTERROGATORIES TO
DEFENDANT, FAIRDISTRICTSFLORIDA.ORG, INC.,

Pursuant to Florida Rule of Civil Procedure 1.340, Intervening Plaintiff, Florida House of Representatives, serves the following interrogatories upon Defendant, FairDistrictsFlorida.org, Inc., to be answered fully, in writing and under oath, no later than July 21, 2010.

When answering these interrogatories, please refer to the attached Schedule.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by United States Mail and electronic transmission this first day of July, 2010, to the following:

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SCHEDULE TO INTERROGATORIES

These instructions and definitions pertain to the following Interrogatories that immediately follow.

1. **"Identify,"** when used with respect to a person, means:

   A. State the full name, present address, and telephone number of said person;

   B. State the full name, address and telephone number of each of his or her employers, and each entity in which he or she is a principal.

2. **"You"** means FairDistrictsFlorida.org, Inc., its attorneys, representatives, officers, directors, contractors, managers, employees, agents, and any person under its control.

3. If the answer to all or any part of the Interrogatory is not presently known or available, include a statement to that effect and furnish the information known or available and in response to the entire Interrogatory by supplemental answer in writing, and under oath, within three (3) days from the time the entire answer becomes known or available.

4. If it is claimed that any of the information covered by these Interrogatories is privileged or otherwise not subject to discovery pursuant to the Florida Rules of Civil Procedure, identify such information by description and a statement as to the nature of the claim of privilege or the basis for claiming that such information is not subject to discovery, in order that the Court may, if necessary, rule upon such matters.

5. If all the information furnished in answer to all or any part of an interrogatory is not within the personal knowledge of the affiant, identify each person to whom all or any part of the information furnished is a matter of personal knowledge, and each person who communicated to the affiant any part of the information furnished.

INTERROGATORIES

1. In drafting Amendments 5 and 6, did you intend that the provision quoted below have the same legal effect and meaning as the federal Voting Rights Act?

> districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

RESPONSE:

2. If the answer to Interrogatory No. 1 is not "yes," explain how the legal effect and meaning of the provision quoted in Interrogatory No. 1 was intended to differ from the legal effect and meaning of the federal Voting Rights Act?

RESPONSE:

3. Do you agree with the responses provided by Jenner & Block LLP to Questions 7 and 8 in the attached opinion letter, dated December 7, 2009? If not, please state in detail the points of disagreement.

RESPONSE:

4. Will the compactness and political-boundary requirements of Amendments 5 and 6 limit or hinder in any way the Legislature's ability to promote the interests of minority voters? If not, why not?

RESPONSE:

5. Would minority representation be harmed by Amendments 5 and 6? If not, please explain fully.

RESPONSE:

6. Identify each person who drafted or assisted in drafting Amendments 5 and 6, and describe each person's role in the drafting of Amendments 5 and 6.

RESPONSE:

7. What criteria or factors did you intend the Legislature to consider in its assessment of the "opportunity of racial or language minorities to participate in the political process"?

RESPONSE:

8. Is there a difference between (i) a standard that affords an "equal" ability or opportunity, and (ii) a standard that ensures that an ability or opportunity will not "diminish"? Please explain fully.

RESPONSE:

By: _____

Date: _____

STATE OF _____
COUNTY OF _____

Before me, the undersigned authority, personally appeared _____, who swears or affirms that he or she has read the foregoing Answers to Interrogatories and that the same are true and correct to the best of his or her knowledge and belief, and who is personally known to me or has produced _____ as identification.

SWORN TO OR AFFIRMED before me this ____ day of _____, 2010.

_____
Signature of Notary

_____
Print, Type, or Stamp Name of Notary

December 7, 2009

JENNER&BLOCK

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Chicago
Los Angeles
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Honorable Christopher Smith
State Senator
220 Senate Office Building
404 S. Monroe Street
Tallahassee, FL 32399

Honorable Perry Thurston
State Representative
410 House Office Building
402 S. Monroe Street
Tallahassee, FL 32399

Re: Florida Redistricting Initiative

Dear Senator Smith and Representative Thurston,

As you requested, we have reviewed the letter recently sent by United States Representatives Corrine Brown and Mario Diaz-Balart to Dean Cannon, the Speaker of the Florida House of Representatives. In their letter, Reps. Brown and Diaz-Balart listed eighteen questions about the Congressional and Legislative redistricting initiatives that will be on the Florida ballot in 2010. Answers to all eighteen questions are provided below. As is evident from the answers, the initiatives are fully compliant with both the U.S. Constitution and the Voting Rights Act. If enacted, they would dramatically improve the redistricting process in Florida and make Florida's elections fairer for all political parties and candidates. They would also protect, and indeed enhance, the ability of minorities to participate in the political process and elect representatives of their choice. Please feel free to call on us if you have further questions.

1. *The Voting Rights Act requires that a racial minority's opportunity to elect its representatives of choice not be diluted by a plan. How can this be done without the use of political vote histories, which appear to be prohibited by the amendments' requirement that "no apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent"?*

As the Florida Supreme Court has suggested in its opinion concerning the validity of the summary of the ballot measure, nothing in the amendments bars the use of "political vote histories," registration data, or historical election results. What is prohibited is drawing a plan "with the *intent* to favor or disfavor a political party or an incumbent." As long as such information is used for *other* purposes – e.g., compliance with the Voting Rights Act – it is in no way restricted by the amendments. In fact, the use of such information to enable minorities to elect representatives of their choice is perfectly *consistent* with the amendments, which bar

"denying or abridging the equal opportunity of racial or language minorities to participate in the political process" and "diminish[ing] their ability to elect representatives of their choice."

There is no conflict between (1) using political vote histories to ensure compliance with the Voting Rights Act and (2) not drawing districts with the intent to favor or disfavor a political party or an incumbent. Under the amendments, political vote histories and other similar data may validly be used for some purposes, but not in order to help or harm a party or candidate.

2. *The amendments prohibit plans that favor or disfavor an incumbent. Drawing districts that comply with the Voting Rights Act will inevitably include most of the geographical area from an existing district in which members of the minority community live, since they form a politically cohesive and, in some cases, compact community. But how will the amendments deal with this contradiction since such districts by definition will also favor the incumbent legislator who already represents that area, which is prohibited by Subsection 1?*

There is no contradiction here. It is true that the incumbent legislator may fare well in a district that is drawn, consistent with the Voting Rights Act, so that it includes a minority community that is compact and politically cohesive. In this case, however, the purpose behind the district's formation will *not* be to favor that incumbent. The goal, rather, will be to comply with the Voting Rights Act as well as the amendments' mandate that minorities be able to elect representatives of their choice. Notably, the amendments do not prohibit redistricting plans that produce favorable *results* for incumbents – only plans that *intend* to favor incumbents.

3. *If anyone elected from a majority-minority district[] presents to the Legislature information regarding the political makeup and communities of interest in that district, can the Legislature act on that information to ensure that the district (and other majority-minority districts) are protected? If an incumbent who is also African-American or Hispanic presents this relevant and important information to the Legislature or uses it while drawing [a] plan, does he or she jeopardize that district or the overall plan since the amendments require that no district be drawn to "favor or disfavor . . . an incumbent"?*

It is perfectly acceptable, under the amendments, for the Legislature to use "information regarding the political makeup and communities of interest" in order to comply with the Voting Rights Act and the amendments' requirement that minorities be able to elect representatives of their choice. If such "relevant and important information" is presented to the Legislature, even by an incumbent legislator, it can certainly be employed for these purposes. What is prohibited is using the data in order to favor incumbent legislators rather than to protect minorities' voting rights.

4. *How can the Legislature ensure compliance with Section 2 of the VRA, which requires protection of geographically compact minority groups that are politically cohesive, if it cannot consider registration and performance data in the redistricting process?*

The Legislature *can* consider "registration and performance data" in order to ensure compliance with the Voting Rights Act as well as the amendments' requirement that minorities be able to elect representatives of their choice. The Legislature cannot consider such data in order to help or harm a party or candidate.

5. *When a plan is challenged under the amendments on the grounds that it "denies or abridges the equal opportunity of racial or language minorities" to participate or elect representatives of their choice, the court will certainly have to look at relevant political, racial, and performance data to judge the merits of the claim. How can the Legislature be expected to enact a plan to satisfy judicial review if it cannot rely on the same data courts will use for review?*

As discussed above, the Legislature *can* look at "relevant political, racial, and performance data" in order to comply with the amendments' ban on plans that diminish minorities' ability to elect representatives of their choice. Courts will therefore not have access to any data that the Legislature itself cannot also consult for these purposes.

6. *If the VRA does not compel the creation [of] majority/minority districts, would the amendments prohibit the Legislature from creating [them]? If the amendments had been in place in 2000, would the current majority/minority districts be legal, or would our constituents have been divvied up across more than one district? Please also answer for the congressional seats currently represented by African-Americans or Hispanics, as well as those in the Florida Legislature.*

The amendments do not bar the creation of majority-minority districts. Such districts are permissible as long as they are not created for the purpose of favoring or disfavoring any political party or favoring incumbents. In some cases, in fact, majority-minority districts may be necessary so that minorities are able to elect representatives of their choice. In other cases, minorities will be able to elect representatives of their choice even if they do not constitute a numerical majority of the district. But the amendments would not necessarily prohibit their preservation, depending on the reason.

Unfortunately, it is not possible to assess whether current majority/minority districts would be valid had the amendments been in place in 2000. If those districts were drawn to enable minorities to elect representatives of their choice, then they would be permissible. But if they were drawn to favor or disfavor any political party or protect incumbents, then they would be invalid.

7. *How do the amendments coexist with the U.S. Supreme Court ruling in* Bartlett v. Strickland, *129 S. Ct. 1231 (2009), which held Section 2 of the Voting Rights Act requires the drawing of an effective minority district only if the minority group is more than 50 percent of [the] district's voting age population? Since the amendments were drafted before this decision, will the amendments pass constitutional muster given their requirement that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice,"*

when that will clearly be the result of this U.S. Supreme Court ruling if the amendments pass?

While the amendments echo the language of Section 2 of the Voting Rights Act, they are not identical to it, particularly as it has been interpreted by the Supreme Court. It is true that, under *Bartlett*, there can be a Section 2 "effects" violation only if a minority makes up more than 50 percent of a potential district's voting age population. Under the amendments, in contrast, what is crucial is that a plan not "diminish [minorities'] ability to elect representatives of their choice." Under certain circumstances, a minority group will be able to elect representatives of its choice even if it does not constitute a numerical majority of the district. For example, different minority groups may join into a coalition that is reliably able to win a majority of the district's votes. Alternatively, the minority group may be able to persuade a sufficient number of majority voters to "cross over" for it to elect the representative of its choice. The amendments would take these circumstances into account even though, under *Bartlett*, they cannot give rise to Section 2 "effects" violations.

Bartlett, of course, involved only issues of statutory interpretation. Thus, nothing in the decision can possibly cause the amendments not to "pass *constitutional* muster." The timing of the amendments' drafting is also irrelevant to their validity. If enacted, they would simply apply alongside Section 2 of the Voting Rights Act, as interpreted in *Bartlett*. There could be Section 2 "effects" violations only where a minority makes up more than 50 percent of a potential district's voting age population. But, under the amendments, minorities' ability to elect representatives of their choice would be respected even where there was no Section 2 violation. In other words, the amendments seemingly give protection to minority voters even in those districts (*e.g.*, districts less than 50% minority that elect a minority-preferred candidate) that *Bartlett* does not.

8. *The amendments say that districts cannot be drawn to "diminish [minorities'] ability to elect representatives of their choice," but what is the baseline for comparison?*

The amendments' language is quite similar to that of Section 2 of the Voting Rights Act. Their use of the term "diminish" also evokes the anti-retrogression standard of Section 5.

Under Section 5 (which itself applies to part of Florida), redistricting plans are invalid if they would result in a retrogression in the electoral position of racial minorities. By analogy, the amendments would require, at least, that minorities not be made worse off by any plan in terms of their ability to elect representatives of their choice. Under Section 2, conversely, the Supreme Court has held that the *maximization* of majority-minority districts is not required. Similarly, the amendments would not require the maximum possible number of districts in which minorities are able to elect representatives of their choice. Within these two bounds, the Legislature would have substantial discretion. It would be able to – but would not *have* to – formulate a plan under which minorities would be able to elect more representatives of their choice compared to the stats quo.

9. *If compact districts are mandatory except where the racial component of Subsection (1) permits the creation of irregularly shaped districts, wouldn't any irregularly shaped*

district violate Equal Protection, since race would be the sole factor motivating the decision?

It is *not* the case that deviations from compactness are permissible only in order to protect the ability of minorities to elect representatives of their choice. Rather, under the amendments, such deviations are also permissible in order to (1) ensure that districts are not drawn with the intent to favor or disfavor a political party or an incumbent; (2) comply with federal law (e.g., Sections 2 and 5 of the Voting Rights Act); (3) comply with the requirement of equal population for all districts; and (4) to the extent feasible, respect existing political and geographical boundaries. Therefore, it certainly would not be possible to conclude that any irregularly shaped district was primarily motivated by the amendments' prohibition of diminishing minorities' ability to elect representatives of their choice, let alone by bare racial considerations. Instead, any of the above factors could (and likely would) explain the district's lack of compactness.

10. If compact districts are mandatory except where the racial component of Subsection (1) permits the creation of irregularly shaped districts, how can the abutting districts which don't qualify under Subsection 1 be permissible under the amendments when they too will have to be non-compact simply because they must fit next to non-compact but permissible districts?

Deviations from compactness are *not* only permissible in order to protect the ability of minorities to elect representatives of their choice. As also discussed above, the protection of minorities' ability to elect representatives of their choice would be unlikely to result in irregularly shaped, non-compact districts. The scenario envisioned by this question – a non-compact, majority-controlled district abutting a non-compact district in which a minority can elect the representative of its choice – would therefore be extremely rare. In any event, under such a scenario, the same factors that justified the creation of the minority-controlled district would also shield the majority-controlled district from attack. In other words, the non-compact, majority-controlled district would be an inevitable (and permissible) byproduct of the protection of minorities' ability to elect representatives of their choice.

11. The sponsors of the amendments indicate that if the amendments had been in place in 2002, the plan proposed in litigation by opponents of the Legislature's plan would have found strong support. How many districts where racial or language minorities would have had the opportunity to elect representatives of their choice would that plan have created. Please answer also if the ruling of Bartlett v. Strickland *had been in place at that time.*

It is difficult to say exactly how many districts in which minorities are able to elect representatives of their choice would have been created by any given alternative 2002 plan. More than seven years have passed since such plans were proposed and, of course, none was never actually implemented. But it is clear that there were alternatives presented at that time that maintained a comparable ability of minorities to elect candidates of choice while avoiding some of the other ills, like undue non-compactness, that are among the targets of the amendments.

The Supreme Court's *Bartlett v. Strickland* decision has no bearing on this analysis. As discussed above, *Bartlett* held that there can be a Section 2 "effects" violation only if a minority makes up more than 50 percent of a potential district's voting age population. But *Bartlett* said nothing at all about how states may draw districts in which minorities are able to elect representatives of their choice in circumstances where there is *not* a Section 2 violation. *Bartlett* certainly did not say that minority-controlled districts may be drawn only when there *is* a Section 2 violation. *Bartlett* should therefore have very little impact on Florida's future redistricting decisions. The decision means that Florida's potential exposure to Section 2 liability is somewhat reduced, but it in no way restricts Florida in drawing districts in which minorities are able to elect representatives of their choice.

12. *If the Legislature fails to use registration data to redraw a district which is well-known historically to have a Democratic majority of 55%, and as a result of redrawing the district the Democrats are reduced to 42%, won't the failure to use registration data be evidence of intent to disfavor Democrats and/or an incumbent? If the district is currently represented by a racial or language minority group member, wouldn't that be a violation of the amendments' other provision that those districts be preserved? How must the Legislature resolve this conflict if the amendments pass?*

Registration data *can* be used to protect the ability of minorities to elect representatives of their choice, but cannot be used with the intent of helping or harming a party or candidate. Standing alone, then, changes in the political composition of a redrawn district would not be proof that the redrawing was aimed at helping or hurting a party or candidate. In fact, that the redrawing was carried out without reference to registration data would suggest that it was motivated by other, legitimate considerations, *e.g.*, improving compactness or respecting existing political and geographical boundaries. Put another way, changes in districts' political composition can be a *side effect* of redistricting, but they cannot be its *goal*.

If the district in question is represented by a minority group member, or is one where a minority group could potentially elect the representative of its choice, then there would be no problem with the Legislature's consideration of demographic and political data. The Legislature would therefore be able to avoid this question's scenario – a minority-controlled district being redrawn so that the minority is no longer able to elect the representative of its choice – by taking into account the implications of its actions for minorities. If, however, the Legislature *did* redraw a district and thereby destroy a minority group's current ability to elect the representative of its choice, then that could indeed be a violation of the amendments.

13. *If the Legislature uses registration data to redraw that same district to keep it at 55% (and thus avoid an intent to disfavor the Democratic Party) isn't that use evidence of an intent to favor the Democrat incumbent?*

Assuming that the district is *not* one in which a minority group could potentially elect the representative of its choice, then the use of registration data in order to preserve one party's advantage could be evidence of political motivations that are improper under the amendments. However, if the district is one in which a minority group could potentially elect the

representative of its choice, then the use of registration data would not be done to favor an incumbent or political party, but would instead be evidence of an intent to preserve the right of minority voters to elect their preferred candidate. Furthermore, the amendments would likely be interpreted as allowing consideration of political data for various districts as part of an effort to produce an overall plan that is politically balanced and does not disfavor any political party.

14. If the Legislature fails to use registration or performance data to draw a district in an area of high minority population, and as a result fractures a politically cohesive minority community of interest, isn't that failure clear evidence of "diminish[ing the minority's] ability to elect representati[ves] of their choice"?

As noted above, the amendments do not prohibit use of registration or performance data in drawing districts. The amendments prohibit minorities being made worse off in terms of their ability to elect representatives of their choice. The amendments also do not require the *maximization* of districts in which minorities are able to elect representatives of their choice, a point which is entirely consistent with current federal law. In the abstract, the fracturing of a politically cohesive community of interest, therefore, would not *necessarily* violate the amendments or any provision of the Voting Rights Act. If the minority had also been fractured under the previous plan, then its ability to elect the representative of its choice would not have been *"diminish[ed]"* by the new plan. In addition, if the minority is not numerous enough to elect the representative of its choice under *any* plan, then its fracturing would likely not give rise to a violation of the amendments or a violation of the federal Voting Rights Act.

However, if a minority is sufficiently numerous to elect the representative of its choice, and if the previous plan enabled the minority to do so, then its fracturing would indeed violate the amendments. It is precisely to avoid this scenario that the Legislature may consult demographic and political data. Armed with such data, the Legislature can draw districts in such a way that minorities that were previously able to elect representatives of their choice can continue to have the ability to do so.

15. If the Legislature fails to use registration or performance data to draw a district in an area of high minority population, and as a result does not include non-racial or language minority voters who are needed to elect the minority candidate, isn't that failure clear evidence of "diminish[ing the minority's] ability to elect representati[ves] of their choice"?

This is essentially the same as the previous question, as there is no appreciable difference between fracturing a minority group among more than one district, and excluding certain members of that group from a district. In both cases, assuming sufficient numbers, a minority group that *could* elect the representative of its choice is denied the ability to do so. If that minority group had previously been able to elect the representative of its choice, then the amendments would be violated. Nothing hinges on whether the issue is framed as the "fracturing" of the minority group or the "exclusion" of certain members of that group.

16. Florida's congressional districts have withstood every legal challenge, and they incorporate like-minded communities of interest. Are the framers of this petition correct when they assert that some of Florida's districts are "presumptively unconstitutional"?

Under the U.S. Constitution, electoral districts can be unconstitutional either because they (1) violate the equipopulation requirement; (2) were drawn with race as the predominant factor; or (3) are partisan gerrymanders. However, while the entire Supreme Court agrees that partisan gerrymanders are unconstitutional, the Court has been unable to agree on the appropriate *standard* for determining when gerrymanders cross the line into unconstitutionality.

The framers of the amendments do not contend that Florida's congressional districts violate the equipopulation requirement. Perhaps it has been suggested that some individual districts were drawn with race playing too large a role. There is a stronger argument, however, that some of the existing districts may be unconstitutional because they are partisan gerrymanders. That courts have upheld those districts does not mean that they are constitutionally valid since, as noted above, there is currently no operational standard for determining when partisan gerrymanders are unconstitutional. Notably, a federal court in Florida concluded in 2002 that the "overriding goal" of the Legislature's plan was to "maximize the number of districts likely to perform for" one particular party.

The amendments would ensure that Florida's future districts are not unconstitutional partisan gerrymanders. If districts cannot be drawn "with the intent to favor or disfavor a political party or an incumbent," partisan gerrymandering becomes essentially impossible to carry out. The two main goals of partisan gerrymandering – advancing one party's interests at the expense of another's, and protecting incumbents from challenges – are precisely what is prohibited by the amendments.

17. If the sponsors of this amendment are correct that subsection one incorporates the Voting Rights Act into Florida law, isn't it unconstitutional to say in subsection (3) that the incumbency standard is on equal footing with the VRA standards?

The amendments' provisions regarding minority voting rights are similar, but not identical, to Section 2 of the Voting Rights Act. The Voting Rights Act is not, therefore, incorporated into Florida law. All that is incorporated is the principle that minorities should have an equal opportunity to participate in the political process, with no diminishment of their ability to elect representatives of their choice.

Even if the amendments were identical to the Voting Rights Act, no constitutional problems would ensue. As a binding federal law, the Voting Rights Act, of course, *already* applies to Florida elections and redistricting. There is also no tension between the Voting Rights Act and the amendments' requirement that redistricting not have the intent to help or harm a party or incumbent. The Voting Rights Act aims to safeguard minority voting rights. It certainly does not seek to protect incumbents or to allow one party to exploit the other during redistricting. Lastly, the amendments do not raise any Supremacy Clause issue. They involve only state constitutional law, and thus do not (and could not) somehow subordinate the Voting Rights Act to the amendments' incumbency standard.

18. Is it a violation of the U.S. Constitution for an initiative petition to impose standards on the Florida Legislature in creating congressional districts?

Absolutely not. It is clear that there is nothing problematic about there being standards for congressional redistricting. Almost all states, including Florida, currently have in place some such standards. It is also clear that it is irrelevant whether those standards are imposed by legislative action or popular initiative. In several states, in fact – *e.g.*, Arizona, Arkansas, California, Colorado – popular initiatives not only imposed standards on redistricting, but also took away the state legislatures' responsibility for redistricting and gave it to new independent commissions. No court has ever found such an initiative – let alone a more limited one like Florida's – unconstitutional.

Sincerely,

Paul M. Smith Michael B. DeSanctis

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida corporation,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

SUPPLEMENT TO MOTIONS TO DISMISS
BY DEFENDANTS GRAHAM AND FAIRDISTRICTSFLORIDA.ORG, INC.

Defendant FairDistrictsFlorida.org, Inc. and Intervening Defendant Bob Graham, pursuant to Rule 1.140(b), file this supplement to their previously filed motions to dismiss this action. FairDistrictsFlorida.org, Inc. and Graham set forth why the claims of Plaintiffs and each of the Intervening Plaintiffs must be dismissed.

FairDistrictsFlorida.org, Inc. also asserts an additional ground as to why it must be dismissed from the case.

Common Claims by Plaintiffs and Intervening Plaintiffs

The claims brought by Plaintiffs and Intervening Plaintiff the Florida House of Representatives all challenge the accuracy of the ballot title and summary of Amendment 5 and/or Amendment 6. (Amended Complaint for Declaratory and Injunctive Relief, filed June 29, 2010; Florida House of Representatives' Amended Motion to Intervene, filed June 25, 2010). Specifically, the "wherefore" clause of each count in Plaintiffs' amended complaint seeks a declaration that ballot summary for Amendment 6 violates section 101.161, Florida Statutes. The House, in its Amended Motion to Intervene, adopts in full Counts I through VI of the Plaintiffs' complaint, and seeks to apply these claims to the ballot summary for Amendment 5. (Amended Motion to Intervene ¶¶ 16-17.) The House also asserts an additional ground for challenging the ballot summaries of Amendments 5 and 6 (failure to disclose alleged purpose and intent of moving redistricting process from Legislature to Florida Supreme Court), and an additional ground for challenging the ballot summary of Amendment 5 only (failure to disclose alleged effect on Florida Supreme Court's mandatory review of redistricting plans). (*Id.* ¶¶ 18, 19-32). The Florida Senate expressly adopts and incorporates the claims of the Plaintiffs and the Florida House of Representatives. (Intervenor's Complaint of the Florida Senate, filed June 14, 2010, at ¶ 1). The Senate asserts two additional claims, addressed separately below.

The Florida Supreme Court has ruled that the ballot summaries for Amendments 5 and 6 comply with section 101.161, Florida Statutes. *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries,* 2 So. 3d 175 (Fla. 2009). Therefore, Plaintiffs' and the Florida House's attempts to relitigate this issue, if they are to be adjudicated at all, can only be adjudicated by the Florida Supreme Court. This is because, since 1986, the Florida Supreme Court has had mandatory and exclusive jurisdiction over all challenges to the validity of an initiative petition. *See* Art. V, § 10, Fla. Const. ("The attorney general shall . . . request the opinion of the justices of the supreme court *as to the validity of any initiative petition* circulated pursuant to Section 3 of Article XI. The justices shall . . . permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters . . . .") (emphasis added); Art. V, § (b)(10) ("JURISDICTION.—The supreme court . . . [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law."); § 16.061(1), Fla. Stat. ("the Attorney General shall . . . petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161. The petition may enumerate any specific factual issues that the Attorney General believes would require a judicial determination.")

The case of *Fla. League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1982), holds that in "truly extraordinary cases," *the Florida Supreme Court* may allow the issue of the clarity of a ballot summary to be relitigated via mandamus petition to that Court. *Id.* at 399. But no reading of this case suggests the Court intended to relinquish its exclusive jurisdiction over such a claim to any other court. *Id.* at 398 ("Initially, we must address the question of whether our earlier advisory proceeding precludes *us* from considering the present cause.") (emphasis added); *id.* at 399 (cautioning that relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored and "almost always will result in *this Court* refusing to exercise its discretionary jurisdiction") (emphasis added). The Court was simply answering the question posed to it, *i.e.*, whether its previously issued advisory opinion approving the proposed amendment's ballot summary pursuant to article IV, section 10 of the Florida Constitution, served as an absolute bar to its consideration of the accuracy of the ballot summary a second time, this time in the form of a petition for writ of mandamus. The fact that the Court answered this question in the negative can only stand for this proposition; it cannot be interpreted to allow litigants to circumvent the Florida Supreme Court's exclusive jurisdiction over such claims.

Most, if not all, of Plaintiffs' and Intervening Plaintiffs' challenges to the ballot summaries were considered and rejected by the Florida Supreme Court in *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009). To the extent Plaintiffs and Intervening Plaintiffs assert they should be permitted to challenge Amendments 5 and 6 on grounds that are not expressly

addressed in that decision, the Florida Supreme Court has said otherwise. In *Advisory Opinion to the Attorney Gen. re Referenda Required for Adoption and Amendment of Local Govt. Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court applied the doctrines of law of the case and res judicata to bar claims that were or could have been raised in the consideration of a prior iteration of the ballot summary, stating:

> . . . [B]ecause our opinions addressing citizen initiatives are intended to enable proponents to remedy any flaws in the ballot language, the fact that we found only the first sentence of the ballot summary defective indicates that we implicitly rejected other challenges to the ballot summary. To hold otherwise would allow serial attacks on a proposed amendment, thwarting a proponent's efforts indefinitely. . . . All alleged deficiencies with the terms in the ballot title and summary should have been raised in the first case in which we considered this proposed amendment. Allowing only piecemeal attacks on a proposed amendment would not only be fundamentally unfair to the proponent of an amendment, it would be a misuse of the process for approval of citizen initiatives.

Id. at 505.

Accordingly, the common claims of Plaintiffs, the Florida House, and Florida Senate must be dismissed because this court lacks subject matter jurisdiction over such claims.

Additional Claims by the Florida Senate

The claims brought by Intervening Plaintiff the Florida Senate do not challenge the ballot summaries of Amendments 5 and 6 but rather allege that these amendments cannot be implemented in a manner consistent with the Voting Rights Act and the Florida Constitution. (Intervenor's Complaint of the Florida Senate, filed June 14,

2010).[1] These claims must also be dismissed because the Florida Supreme Court has repeatedly held that challenges to the substance and effect of a proposed amendment are not justiciable in a pre-election proceeding relating to the validity of a proposed constitutional amendment, whether proposed by initiative petition or by the legislature. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 801 n.1 (1998) (declining to pass on constitutionality of proposed amendment because Court's jurisdiction to issue advisory opinions regarding proposed amendments is limited to the single subject requirement and accuracy of ballot title and summary); *Advisory Opinion to the Attorney Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991) (finding opponents' "various constitutional challenges" to proposed constitutional amendment "not justiciable in the instant proceeding") (citing Art. XI, § 3, Fla. Const., Art. IV, § 10, Fla. Const.; § 16.061(1), Fla. Stat.); *Grose v. Firestone*, 422 So. 2d 303, 306 (1982) (refusing to engage in pre-election consideration of whether constitutional amendment proposed by the legislature was unconstitutional because such argument "is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented.")

These cases recognize that challenges to the substance and operation of a proposed amendment are not yet ripe—and therefore are not justiciable—until the amendment has been approved by the voters *and* appropriate facts are developed and presented to the court in an appropriate proceeding to evaluate how the amendment will operate on a real set of existing facts. *Dade County v. Dade County League of*

[1] The Senate has not filed an amended complaint adding FairDistrictsFlorida.org, Inc. as a party.

Municipalities, 104 So. 2d 512, 515 (Fla. 1958) (courts will not interfere with placement of proposed amendment on the ballot if, upon approval, the proposal can have a valid field of operation "even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law"); *Gray v. Winthrop*, 156 So. 270, 272 (Fla. 1934) (holding submission of proposed amendment to electorate should not be enjoined if amendment is not wholly void, "even though, if adopted, it may in appropriate procedure by proper parties, allegations of facts, and proof or admissions, be shown that the amendment violates paramount federal law"); *Gray v. Moss*, 156 So. 262, 266 (Fla. 1934) (rejecting effort to enjoin Secretary of State from placing proposed constitutional amendment on ballot and noting if adopted "the amendment may by due procedure be shown to be invalid if and to the extent that it operates to violate any controlling provision of the . . . Federal Constitution"); *Grose*, 422 So. 2d at 306 (constitutionality of proposed amendment may be raised in an appropriate proceeding in due course when the issues is properly presented). In light of these authorities, the Senate's claims regarding the substance and operation of Amendments 5 and 6 are not justiciable in *any* court unless and until the amendments are approved by the requisite percentage of Florida voters and a set of operative facts is developed against which to evaluate the new provisions. At that time, an interested party may bring an appropriate action to challenge the effect of the amendments as applied to a real set of facts.

The Senate asserts a right to challenge proposed amendments before the election based upon alleged conflict with federal law, citing *Gray v. Winthrop*, 156 So. 270 (Fla.

1934). As the above discussion demonstrates, the Florida Supreme Court has squarely held such claims are not justiciable before the election. *Advisory Opinion to the Attorney Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991); *see also id.* at 229-30 (Overton, J., dissenting, stating that the majority's construction means that a claim of unconstitutionality must wait until after the election to be addressed); *Grose*, 422 So. 2d at 306 (argument that substance of legislatively-proposed constitutional amendment was unconstitutional was not justiciable in proceeding seeking to enjoin submission of amendment to the electorate but may be raised in appropriate proceeding in due course when the issue is properly presented).

Even if *Gray v. Winthrop* were applicable in the present proceeding, which it is not, the principles espoused in that case and its progeny would not save the Senate's claims from dismissal. In *Gray v. Winthrop*, the Florida Supreme Court held that a court could enjoin the submission of a proposed amendment to the electorate when the amendment, on its face, violated the Federal Constitution such that no portion of the amendment could legally be effective. 156 So. at 272. However, that high standard was not met in *Gray v. Winthrop*: "The language of the amendment does not express or imply an intent that [its terms] shall operate to violate any provision of the paramount Federal Constitution, and it must be assumed, in the absence of express terms to the contrary, that the . . . amendment was intended to be operative in accord with such dominant federal law." *Id.* (reversing denial of motion to dismiss); *see also Gray v. Moss*, 156 So. 262, 264 (Fla. 1934) (reversing denial of motion to dismiss in action for injunction to prevent proposed amendment from being placed on the ballot, because amendment

did not specifically violate a provision of the Federal Constitution and was not wholly void and inoperative; therefore court was not "authorized to interfere with the processes prescribed by the Constitution for proposing and adopting amendments to the Constitution").

The Senate makes no claim that Amendments 5 and 6 expressly violate the Federal Constitution. Moreover, since the inception of the case Plaintiffs and Intervening Plaintiffs have asserted their claims are not facial claims but rather will require significant factual development.[2] Accordingly, to the extent the Senate seeks to apply the principles of *Gray v. Winthrop* to its claims in the present case, those principles necessitate dismissal of their claims.

Additional Ground for Dismissal as to FairDistrictsFlorida.org, Inc.

FairDistrictsFlorida.org, Inc., should be dismissed as a defendant because no cause of action is brought against it. Although the Florida House of Representatives orally moved for and was granted leave of court to add FairDistrictsFlorida.org, Inc. as a party defendant, neither Plaintiffs nor either of the Intervening Plaintiffs have brought any cause of action against FairDistrictsFlorida.org, Inc.

Plaintiffs' Amended Complaint merely added FairDistrictsFlorida.org, Inc. to the style of the action and added a paragraph asserting that FairDistrictsFlorida.Org, Inc. is a Florida corporation and the political committee that sponsored the Congressional

[2] Graham and FairDistrictsFlorida.org, Inc. dispute that the type of factual development Plaintiffs and Intervening Plaintiffs seek in this case is relevant, and have moved to stay discovery pending resolution of the motions to dismiss.

Amendment. (Amended Complaint ¶ 13). But none of the eight counts in Plaintiffs' Amended Complaint seeks relief from FairDistrictsFlorida.Org, Inc. Likewise, the Florida House of Representatives' Amended Motion to Intervene adds FairDistrictsFlorida.Org, Inc. to the style of the case but adds no substantive claims against it and seeks no relief from it.

Accordingly, this action should be dismissed as to FairDistrictsFlorida.org, Inc. for failure to state a cause of action.

WHEREFORE, Bob Graham and FairDistrictsFlorida.org, Inc. respectfully requests that this Court enter an order dismissing this action in its entirety, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

Lynn C. Hearn

Lynn C. Hearn
On Behalf of Counsel for FairDistrictsFlorida.org, Inc. and Bob Graham

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided to the following by United States Postal Service and by electronic mail on this 6th day of July, 2010 to:

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

Case No. 2010-CA-1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation,

Defendants,

and

BOB GRAHAM,

Intervening Defendant.

RESPONSE TO MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiffs CORRINE BROWN and MARIO DIAZ-BALART, by and through their undersigned counsel, respond to the motions to dismiss filed by Defendant DAWN K. ROBERTS, Interim Secretary of State of the State of Florida and Intervening Defendant BOB GRAHAM.[1]

[1] Defendant FAIRDISTRICTSFLORIDA.ORG, INC. has filed a notice adopting and incorporating the motions filed by Defendants Roberts and Graham. This response should also be taken as a response to the notice by FAIRDISTRICTSFLORIDA.ORG.

Both Defendants Roberts and Graham ask this Court to dismiss this action on the grounds that this Court lacks jurisdiction to hear the challenge originally filed by the Plaintiffs or the separate challenges filed by the Florida House of Representatives and the Florida Senate. Through their respective motions, both Defendants Roberts and Graham show a fundamental misunderstanding of the role of both the Florida Supreme Court and the lower courts in determining whether a proposed constitutional amendment that made its way onto the ballot via petition signatures should remain on the ballot.

Plaintiffs brought this action to challenge proposed Amendment 6, which alters the discretion of the Florida Legislature employs in drafting Congressional districts. This response is intended only to the issue of whether this Court has jurisdiction to consider a challenge to proposed Amendment 6.[2]

PRELIMINARY STATEMENT

On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by Defendant FairDistrictsFlorida.org, Inc. for circulation that establishes new criteria for Congressional redistricting. The Congressional Petition has since obtained the necessary number of signatures and has been certified for placement on the November 2010 general election ballot. The Secretary of State has designated the proposed Congressional redistricting amendment as proposed Amendment 6.

The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

[2] It is anticipated that both the Florida House and Senate will adequately address this Court's jurisdiction to consider the challenge to proposed Amendment 5.

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title and summary for the proposed Congressional Amendment is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Pursuant to Article IV, section 10, Florida Constitution, the Florida Supreme Court reviewed the Petitions and rendered an advisory opinion that their summaries are clear and

unambiguous and that the proposed amendments are limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).[3]

Plaintiffs brought this action setting forth eight independent grounds to challenge the placement of proposed Amendment 6 on the November 2010 ballot. All counts pray for injunctive and declaratory relief. In summary, Count I claims that the proposed amendment's prohibition against diminishment of the ability of language and racial minorities to elect representatives of their choice differs from the ballot summary's description, that Congressional districts will not be drawn to deny those minorities and "equal opportunity" to elect representatives of their choice, to such a degree that it is misleading. In Count II, the Amended Complaint alleges that the ballot summary fails to inform the voters that the new overriding criteria of compactness and the use of existing political and geographic boundaries will actually decrease, rather than increase or even preserve the Florida Legislature's ability to draw districts to protect minority voting interests. Count III misleads the voters by inference, setting forth a requirement that Congressional districts will be "as equal in population as feasible", neglecting to inform the voters that exact equality of population is already a requirement of federal law and is a feature of the present Congressional redistricting plan. Count IV alleges that the ballot summary is misleading because of the inconsistent and confusing manner in which it utilizes the phrase "drawn to". Count V asserts that the ballot summary's promise to the voters that the Legislature will ignore incumbency in drawing Congressional districts when Section 5 of the Voting Rights Act not only requires the Legislature to take it into consideration, but explain during the pre-clearance process how its failure to do so should not be considered as a sign of intentionally retrogressing the voting rights of protected minorities. Count VI asks for a

[3] A copy of the opinion is attached to this memorandum.

declaration that the use of undefined terms in the ballot summary, like "compact", "political or geographic boundaries", "feasible", and "intent", renders the proposal misleading. Count VII asks for a declaration that the use of the undefined phrase "language minorities" in the ballot summary is misleading, implying that speakers of many languages in Florida will be protected, when in fact only Spanish speakers in a handful of Florida's 67 counties could conceivably benefit. Finally, Count VIII asks the Court to declare that, because the 2010 Census will not be collecting data language usage and it will be impossible to accurately determine where members of language minorities reside, the ballot summary falsely promises that the Legislature will be able to draw districts that do not have the "intent or result" of "denying or abridging the equal opportunity" of "language minorities."

Each of the claims raised in the Amended Complaint requires the introduction of evidence and for this Court to make findings of fact, findings that the Supreme Court is unable to make when it performs its constitutionally limited review.

ARGUMENT

THIS COURT HAS JURISDICTION TO HEAR THE CLAIMS BROUGHT BY THE PLAINTIFFS

Defendants Roberts and Graham have moved this Court to dismiss Plaintiff's case claiming that it lacks jurisdiction to hear the case. It argues that the Supreme Court's decision in *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009) was the first, last, and only word on the subject of whether the ballot summary composed by Defendant FairDistrictsFlorida.org is misleading. By announcing its decision in 2009, the Defendants argue, the Supreme Court divested all other courts of jurisdiction.

The Defendants are wrong.

The Florida Supreme Court has stated that "jurisdiction" is the power to act, the authority to adjudicate the subject matter. *Bush v. State*, 945 So. 2d 1207, 1211 (Fla. 2006)(citing *Williams v. Ferrentino*, 199 So.2d 504, 510 (Fla. 2d DCA 1967). It is widely accepted that "subject matter jurisdiction", the power of the trial court to deal with a class of cases to which a particular case belongs, is conferred upon a court by constitution or by statute. *Ben-David v. Education Resources Institute, Inc.*, 974 So. 2d 1138 (Fla. 3d DCA 2008); *M.A. v. State*, 959 So. 2d 380 (Fla. 4th DCA 2007); *In re D.N.H.W.*, 955 So. 2d 1236 (Fla. 2d DCA 2007); Wardell v. State, 944 So. 2d 1089 (Fla. 5th DCA 2006).

The Supreme Court's jurisdiction is proscribed only in the Florida Constitution. Article V, section 3, which provides in relevant part:

> SECTION 3. Supreme court.-- ...
>
> (b) JURISDICTION.--The supreme court: ...
>
> (8) May issue writs of mandamus and quo warranto to state officers and state agencies.
>
> (10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Article IV, section 10, referenced in Article V, section 3(b)(10) provides:

> SECTION 10. Attorney General.--The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.

The Defendants' focus entirely upon Article V, section 3(b)(10) and from its language assert that the Supreme Court has the exclusive jurisdiction to issue relief regarding a misleading ballot summary.

The Supreme Court held in *Florida League of Cities v. Smith*, 607 So.2d 397, 398-99 (Fla. 1992) that the effect of an advisory opinion is limited. Specifically, the Court found:

> It is true that article IV, section 10 and article V, subsection 3(b)(10) are silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction.
>
> When those provisions were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent[3] and *would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised.* Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986) (available from Fla. Div. of Archives); Staff of Fla.H.R.Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986) (available from Fla. Div. of Archives).[4] *This necessarily implies that other legal challenges would continue to be permissible under existing precedent; and our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution. E.g., Askew* [*v. Firestone*, 421 So.2d 151, 155 (Fla.1982)]; *Smith v. American Airlines, Inc.*, 606 So.2d 618 (Fla.1992).
>
> [3]This is entirely consistent with settled law holding that *advisory opinions "are not binding judicial precedents, [although] they are frequently very persuasive and usually adhered to." Lee v. Dowda*, 155 Fla. 68, 73, 19 So.2d 570, 572 (1944). As a corollary, we note that *advisory opinions are only persuasive as to issues they actually address, not as to issues such as the one before us today that were not addressed at all in a prior advisory opinion.*
>
> [4]Although the committee substitutes discussed in these summaries were not themselves adopted, they differ in no relevant way from House Joint Resolution 71, which ultimately was adopted, placed

> before the voters, and approved. *See* Fla. HJR 71, 1986 Fla. Laws 2281, 2281-83.

Emphasis added.

The Supreme Court's use of the term "other legal challenges" in *Smith* implies that legal actions, such as the instant one, are permitted. Moreover, the persuasive effect of the advisory opinion in *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009) only extends to the issues raised before the Court at that time. When the Court examined the ballot title and summary in question, it considered whether proposed Amendment concerned a single subject [2 So.3d at 181-83], whether it affected multiple governmental functions [*Id.* at 183-84], whether the ballot summary was misleading for not informing voters that the judiciary will apply the redistricting standards if the Legislature fails to draw a plan [*Id.* at 185], whether the ballot summary misleads by allowing a plan to be drawn which favors an incumbent or a party, so long as there is no "intent" to favor an incumbent or a party [*Id.* at 185-86], whether the ballot summary misleads by failing to inform voters that the authority to reapportion will be shifted to the judiciary [*Id.* at 187], whether the ballot summary's use of the phrase "city, county and geographical boundaries" is misleading [*Id.* at 187-88], whether the use of the word "or" multiple times is misleading [*Id.* at 188-89], and whether the term "language minorities" is misleading [*Id.* at 189].[4] There is little overlap between the issues considered by the Florida Supreme Court in their advisory opinion and the claims raised in the Plaintiff's Amended Complaint.

[4] The Legislature's argument that the proposed amendment will impliedly repeal the Legislature's authority to draw multimember districts has non application to Congressional districts. *See* 2 U.S.C. § 2c.

The issue, then, is whether this Court has jurisdiction to hear a claim seeking both injunctive and declaratory relief. Article V, section 5 specifically provides:

> SECTION 5. Circuit courts.--
>
> (a) ORGANIZATION.--There shall be a circuit court serving each judicial circuit.
>
> (b) JURISDICTION.--The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and *all writs necessary or proper to the complete exercise of their jurisdiction.* Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

Emphasis added. The Legislature has further delineated the jurisdiction of the circuit courts, in relevant part, as follows:

> 26.012 Jurisdiction of circuit court.--
>
> (2) They [circuit courts] shall have exclusive original jurisdiction: ...
>
> (c) *In all cases in equity* including all cases relating to juveniles except traffic offenses as provided in chapters 316 and 985; ...
>
> (3) The circuit court may issue injunctions. ...
>
> (5) A circuit court is a trial court.

Further, section 86.011 further sets the jurisdiction of this Court as follows:

> 86.011 Jurisdiction of trial court.--The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

> (1) Of any immunity, power, privilege, or right; or
>
> (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

Because the Plaintiffs seek both declaratory and injunctive relief, jurisdiction is properly vested in this Court.[5]

Unlike the Florida Supreme Court, the Florida Constitution vests this Court with the authority to conduct trials, and by implication, to hear testimony, accept evidence into the record, and make findings of fact. Clearly, if the Attorney General had commenced an action seeking an advisory opinion in this Court, the Court would have been barred from issuing such an advisory opinion. However, the scheme contained in Article IV, section 10 and Article V, subsection 3(b)(10) is not a bar to this proceeding.

In the instant case, the Plaintiffs intend to introduce testimony and other evidence that bears on the claims contained in the Amended Complaint. For instance, the Plaintiffs intend to introduce evidence in support of Counts VII and VIII which deals with the scope of the 2010 and the American Community Surveys conducted by the United States Bureau of the Census and demonstrate that the ballot summary is misleading in telling the voters that the Legislature will be able to discern with any degree of accuracy where "language minorities" reside. Since the Census no longer collects language usage data, the ballot summary "flies under false colors", promising what the Legislature cannot possibly deliver. The advisory opinion process is ill

[5] To the extent that the Amended Complaint can be read as a plea for relief via mandamus, Article V, section 5(b) of the Florida Constitution grants this Court the authority to issue writs of mandamus.

suited to consider claims that are fact intense, such as Counts VII and VIII. The Florida Constitution clearly vests this Court with jurisdiction to hear the claims brought by the Plaintiffs, to weigh the evidence, and render a judgment.

CONCLUSION

The Defendants' assertion that this Court lacks jurisdiction to hear the claims raised in the Amended Complaint is simply wrong. An advisory opinion is clear that — advisory. It is persuasive, not dispositive. There is no authority for the proposition that further relief is barred in a case where the Supreme Court has issued an advisory opinion. The Supreme Court's use of the term "other legal challenges" in *Smith* implies that legal actions, such as the instant one, are permitted. Moreover, the persuasive effect of the advisory opinion is limited to those issues actually considered by the Supreme Court. This Court clearly has jurisdiction and the case should proceed to trial.

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed to the persons on the attached service list this July 6, 2010.

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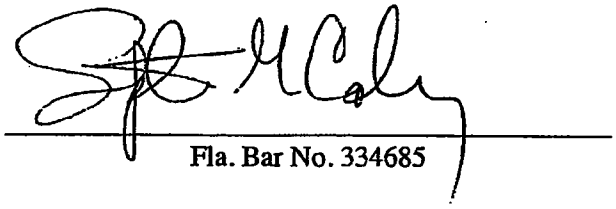

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ADVISORY OPINION TO the ATTORNEY GENERAL RE STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES.

Advisory Opinion to the Attorney General Re Standards for Legislature to Follow in Congressional Redistricting.

No. SC08-986.

No. SC08-1149.

Supreme Court of Florida.

January 29, 2009.

[2 So.3d 178]

Bill McCollum, Attorney General, Louis F. Hubener, Solicitor General, Tallahassee, FL, for Petitioner.

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Jason Vail, General Counsel, Florida Senate, and Jeremiah M. Hawkes, General Counsel, Florida House of Representatives, Tallahassee, FL, on behalf of The Florida Legislature, as Opponents.

LEWIS, J.

The Attorney General of Florida has requested an opinion from this Court with regard to the validity of two initiative petitions sponsored by FairDistrictsFlorida.org, a political committee. We have jurisdiction. See art. IV, § 10, art. V, § 3(b)(10), Fla. Const. We conclude that

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the proposed amendments comply with the single-subject requirement of article XI, section 3 of the Florida Constitution, and that the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008).

I. THE PROPOSED AMENDMENTS

The two amendments and their respective ballot titles and summaries are nearly identical except for references to legislative versus congressional boundaries. The full text of the proposed amendment that governs legislative-district boundaries states:

Section 21. Add a new Section 21 to Article III

STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for this proposed initiative is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING.

The ballot summary provides:

Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

The full text of the proposed amendment that governs congressional-district boundaries states:

Add a new Section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:

(1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly

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equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

The ballot title for this proposal is:

STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.

The ballot summary provides:

Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

II. ANALYSIS

A. Single-Subject Requirement

Article XI, section 3 of the Florida Constitution provides: "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, shall embrace but one subject and matter directly connected therewith." (Emphasis supplied.) This Court has previously explained the rationale behind the single-subject requirement:

The single-subject limitation exists because the initiative process does not provide the opportunity for public hearing and debate that accompanies the other methods of proposing

amendments. Consequently, "[the] single-subject provision is a rule of restraint designed to insulate Florida's organic law from precipitous and cataclysmic change." This Court requires "strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions, including the adoption of any laws by the legislature." The single-subject requirement also prevents logrolling, a practice that combines separate issues into a single proposal to secure passage of an unpopular issue. Thus, voters are protected by the single-subject requirement because they are not forced to "accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support."

Advisory Op. to Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So.2d 888, 891 (Fla.2000) (citations omitted) (quoting In re Advisory Op. to Att'y Gen.—Save Our Everglades, 636 So.2d 1336, 1339 (Fla.1994); Fine v. Firestone, 448 So.2d 984, 988-89 (Fla.1984)). To determine whether a proposed amendment addresses a single subject, this Court must evaluate whether the proposal "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Advisory Op. to Att'y Gen. re Patients' Right to Know About Adverse Med. Incidents, 880 So.2d 617, 620 (Fla. 2004) (quoting Fine v. Firestone, 448 So.2d 984, 990 (Fla.1984)).

A proposed amendment is not invalid merely because it affects more than one branch of government or may interact

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with other provisions of the Florida Constitution. See Advisory Op. to Att'y Gen. re Limited Casinos, 644 So.2d 71, 74 (Fla. 1994) ("[W]e find it difficult to conceive of a constitutional amendment that would not affect other aspects of government to some extent."). We have further explained that "the fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule." Advisory Op. to Att'y Gen. re Protect People, Especially Youth, From Addiction, Disease, & Other Health Hazards of Using Tobacco, 926 So.2d 1186, 1192 (Fla.2006). Rather, "it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." Patients' Right to Know, 880 So.2d at 620. Finally, speculation about possible impacts of a proposed amendment on other branches of government is premature when determining whether a proposed amendment, on its face, meets the single-subject requirement. See In re Advisory Op. to Att'y Gen. re English—The Official Language of Fla., 520 So.2d 11, 13 (Fla.1988) (approving placement of proposed amendment on the ballot even where "the amendment could have broad ramifications" because, "on its face[,] it deals with only one subject").

With regard to reapportionment, article III, section 16(a) of the Florida Constitution currently provides, in relevant part:

(a) SENATORIAL AND REPRESENTATIVE DISTRICTS. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

We conclude that the proposed amendments (1) encompass a single subject, (2) do not engage in logrolling, and (3) do not substantially alter the functions of multiple branches of government. The proposed amendments address a single function of a single

branch of government—establishing additional guidelines for the Legislature to apply when it redistricts legislative and congressional boundaries. This Court has previously stated that under the state and federal Constitutions, the only requirements for a redistricting plan are: (1) compliance with the equal protection standard of one-person, one-vote—i.e., that "legislatures be apportioned in such a way that each person's vote carries the same weight"; and (2) that districts consist of contiguous, overlapping, or identical territory. In re Constitutionality of House Joint Resolution 1987, 81,7 So.2d 819 (Fla.2002) (quoting In re Constitutionality of Senate Joint Resolution 2G, 59,7 So.2d 276 (Fla.1992)).

Logrolling — Although the Legislature contends that the proposals violate the single-subject rule because they implement multiple reapportionment standards, such an interpretation of the rule is far too narrow. The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations. Although the proposed amendments delineate a number of guidelines, we conclude that these components possess "a natural relation and connection as component parts or aspects of a single dominant plan or

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scheme." Patients' Right to Know, 880 So.2d at 620 (quoting Fine, 448 So.2d at 990).

The instant case is distinguishable from others in which this Court has determined that proposals have violated the single-subject requirement. For example, in In re Advisory Opinion to Attorney General—Restricts Laws Related to Discrimination, 632 So.2d 1018, 1019 (Fla.1994) (Discrimination), the proposed amendment sought to prohibit discrimination based on ten separate classifications—race, color, religion, sex, national origin, age, handicap, ethnic background, marital status, and familial status. While the sponsor contended that the amendment addressed the single subject of discrimination, we rejected this contention and instead concluded that the proposal "enfold[ed] disparate subjects within the cloak of a broad generality" in violation of the single-subject requirement. Id. at 1020 (quoting Evans v. Firestone, 457 So.2d 1351, 1353 (Fla.1984)). We explained:

> The voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions. For example, a voter may want to support protection from discrimination for people based on race and religion, but oppose protection based on marital status and familial status. Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation.

Id. at 1020. Unlike the provision in Discrimination, the proposals in the instant cases do not group multiple subjects under the cloak of "redistricting." Rather, they address solely the guidelines to be applied in legislative and congressional reapportionment. Thus, the instant proposals are also distinguishable from the proposed amendment in Advisory Opinion to Attorney General re Independent Nonpartisan Commission to Apportion Legislative & Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla.2006) (Nonpartisan), which we determined to be in violation of the single-subject requirement. The proposal in Nonpartisan sought not only to implement redistricting standards, but to also create an entirely new commission to replace the Legislature as the entity responsible for reapportionment in Florida. See id. at 1225. The proposed amendments here do not encompass two such disparate functions.

The proposed amendments here are more similar to proposals we have previously approved because they encompassed a single plan and merely enumerated various elements necessary to accomplish that plan. In Health Hazards of Using Tobacco, 926 So.2d at 1189,

this Court approved for placement on the ballot a proposed amendment that would create a comprehensive statewide tobacco education and prevention program. The program was designed to encompass an advertising campaign, the creation of programs to educate youth about tobacco, enforcement of laws against the sale of tobacco to minors, and annual evaluations of the effectiveness of the program. See id. Further, the proposal included a provision which required that the Legislature appropriate fifteen percent of the gross funds collected from a tobacco settlement to the program. See id. This Court held that despite the various components, the proposal did not engage in logrolling:

> It addresses a single comprehensive plan for the education of youth about the health hazards related to tobacco. Although this plan includes a list of components such as advertising, school curricula,
>
> [2 So.3d 183]
>
> and law enforcement, all of these components are related to the single unifying purpose. It does not "combine subjects in such a manner as to force voters to accept one proposition they might not support in order to vote for one they favor." Advisory Op. to Att'y Gen. re Fla.'s Amendment to Reduce Class Size, 816 So.2d 580, 583 (Fla.2002). In other words, the proposed amendment does not combine unrelated provisions, some of which are popular and others that may be disfavored.

Id. at 1191-92. Similarly, here, the various components within the proposed amendments are directed to the single unified purpose of establishing standards by which legislative and congressional districts are to be drawn. Accordingly, we hold that the proposed amendments address a single subject.

Multiple Government Functions— The Legislature next asserts that the proposals will essentially shift the duty of reapportionment to the judiciary and, therefore, the proposals impact multiple branches of government in violation of the single-subject rule. This contention is without merit. Under the Florida Constitution, after the Legislature drafts a reapportionment plan, the attorney general files a request with this Court for a "declaratory judgment" with regard to the validity of the plan. Art. III, § 16(c), Fla. Const. If this Court rejects the plan, the Governor must reconvene the Legislature for an "extraordinary apportionment session," during which the Legislature must adopt a joint resolution that conforms to this Court's judgment. Id. § 16(d). If the extraordinary session fails to produce a resolution of apportionment, or if this Court holds that the subsequent apportionment is invalid, the Court "shall, not later than sixty days after receiving the petition of the attorney general, file with the custodian of state records an order making such apportionment." Id. § 16(f).

As noted by FairDistrictsFlorida.org, the Florida Constitution currently contains no guidelines for congressional districting. However, article I, section 2 of the United States Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States...." The Fourteenth Amendment of the United States Constitution provides that "[r]epresentatives shall be apportioned among the several states according to their respective numbers." The United States Supreme Court has held that the federal Constitution "leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." Growe v. Emison, 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993). In Wesberry v. Sanders, 376 U.S. 1, 4, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), the Supreme Court held that a one-person, one-vote constitutional challenge to congressional reapportionment by a state legislature is a justiciable issue.

The proposed amendments do not alter the functions of the judiciary. They merely change the standard of review to be applied when either the attorney general seeks a "declaratory judgment" with regard to the validity of a legislative apportionment, or a redistricting plan is challenged. This effect of the proposed

amendments does not constitute a substantial alteration of the functions of the judicial branch. See Health Hazards of Using Tobacco, 926 So.2d at 1192 ("[T]he fact that [a] branch of government is required to comply with a provision of the Florida Constitution does not necessarily constitute the usurpation of the branch's function within the meaning of the single-subject rule.").

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The contention of the Legislature that a redistricting plan can never comply with the amendment guidelines and, therefore, the role of reapportionment will always fall upon the courts—thereby substantially changing a function of the courts—is speculative argument. There is no basis that the judiciary will reject any redistricting plan that the Legislature adopts for failure to comply with the guidelines. We must assume the Legislature will comply with the law at the time an apportionment plan is adopted. Moreover, such speculation with regard to a possible impact of the proposals on the judicial branch is premature because we need only determine at this time whether the proposed amendments, on their face, satisfy the single-subject requirement. See English—The Official Language, 520 So.2d at 13.

In light of the foregoing, we hold that the proposed amendments comply with article XI, section 3 of the Florida Constitution.

B. Ballot Title and Summary

The requirement that a ballot title and summary comply with section 101.161(1), Florida Statutes (2008), was recently explained by this Court as follows:

[A]ny proposed constitutional amendment must be "accurately represented on the ballot; otherwise, voter approval would be a nullity." Armstrong v. Harris, 773 So.2d 7, 12 (Fla.2000). Section 101.161(1), Florida Statutes (2007), codifies this principle:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot.... Except for amendments and ballot language proposed by joint resolution, the substance 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.... The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

(Emphasis supplied.) See also Askew v. Firestone, 421 So.2d 151, 155 (Fla.1982) ("[T]he voter should not be misled.... All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide.... What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." (alteration in original) (quoting Hill v. Milander, 72 So.2d 796, 798 (Fla. 1954))).... To determine whether the ballot title and summary of [the proposed amendment] satisfy the requirements of section 101.161, Florida Statutes (2007), the Court must consider two questions: "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the public." Advisory Opinion to Attorney Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So.2d 210, 213-14 (Fla.2007) (quoting Advisory Opinion to Attorney Gen. re Fla. Marriage Prot. Amendment, 926 So.2d 1229, 1236 (Fla.2006)). We do not consider, nor do we address, the substantive merit of the proposed amendment.

... This Court has recognized that it must exercise extreme caution and restraint before removing a constitutional amendment from Florida voters. See Advisory Opinion to Attorney Gen. re

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Fla. Marriage Prot. Amendment, 926 So.2d 1229, 1233 (Fla.2006). We have further noted that we have no authority to inject this Court into the process, unless the laws governing the process have been "clearly and conclusively" violated. Advisory Opinion to the Attorney Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So.2d 491, 498-99 (Fla.2002).

Fla. Dep't of Rev. v. Slough, 992 So.2d 142, 146-47 (Fla.2008). Despite these various requirements, we have also noted that even though a ballot summary could have better explained the text of the amendment, that fact alone does not require a proposal to be struck:

> There is no requirement that the referendum question set forth the [text] verbatim nor explain its complete terms at great and undue length. Such [requirements] would hamper instead of aiding the intelligent exercise of the privilege of voting. Under our system of free elections, the voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth. If he does not, it is no function of the ballot question to provide him with that needed education. What the law very simply requires is that the ballot give the voter fair notice of the question he must decide so that he may intelligently cast his vote.

Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So.2d 491, 498 (Fla. 2002) (quoting Metro. Dade County v. Shiver, 365 So.2d 210, 213 (Fla. 3d DCA 1978), aff'd sub nom. Miami Dolphins v. Metro. Dade County, 394 So.2d 981 (Fla. 1981)). Moreover, inadvertent use of different but clearly synonymous terms in the proposed amendment and the summary will not render a ballot summary fatally defective where "[t]he differing use of terminology could not reasonably mislead the voters." English—The Official Language, 520 So.2d at 13 (use of the phrase "to implement this article" in the ballot summary not misleading where the text of the proposed amendment actually provided "to enforce this section" (alteration in original)).

The Legislature presents multiple claims that the ballot titles and summaries for the proposed amendments are misleading. We address each of those arguments.

Ballot title — The Legislature first asserts that the titles are misleading because they indicate that only the Legislature must comply with the new redistricting standards where, in fact, the judiciary will be similarly obligated to apply these standards when a legislative attempt at reapportionment fails and the courts are required to redraw the districts. We conclude that this challenge is without merit.

As previously discussed, the proposed amendments have one chief purpose: to provide the Legislature with guidelines to follow when it draws legislative and congressional boundaries. Thus, it is logical that the titles would only reference the Legislature. Although the Legislature might ultimately fail to comply with these standards, this contingency does not translate into a need for the ballot titles to indicate that the standards apply to the judiciary. Rather, it can logically be presumed that if the Legislature fails to comply with the Constitution and follow the applicable standards, the entity responsible for redrawing the boundaries must also comply with these standards. The failure to mention the judiciary in the ballot titles does not render them misleading.

"Drawn to favor" vs. "Drawn with the intent to favor" — The amendment summaries provide that redistricting plans

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"shall not be drawn to favor or disfavor an incumbent or political party"; however, the body of the proposals provide that districting plans "shall not be drawn with the intent to favor or disfavor an incumbent or political party." (Emphasis supplied.) According to the Legislature, the summaries indicate that the effect of a reapportionment plan cannot be to

favor or disfavor anyone or any party; however, under the proposed amendments, proof of intent to favor an incumbent or party must be demonstrated before a reapportionment plan will be rejected for noncompliance. The Legislature contends that the summaries are misleading because voters will believe that the proposals prohibit reapportionment plans whose effect is to favor a party or incumbent, while the amendments actually permit districts that favor a party or incumbent, provided that the district lines were drawn without intending that result.

We reject this assertion. The ballot summaries are currently seventy-four words in length. Hence, to add the words "with the intent" to the ballot summaries would exceed the statutory word limit. Thus, at issue in this case is whether the omission of these three words from the summaries (likely in an attempt to comply with the statutory word limit) causes them to be fatally misleading. As previously noted, a ballot summary need not (and because of the statutory word limit, often cannot) explain "at great and undue length" the complete details of a proposed amendment, and some onus falls upon voters to educate themselves about the substance of the proposed amendment. Right to Treatment & Rehabilitation, 818 So.2d at 498 (voters must acquaint themselves with the details of a proposed amendment together with the pros and cons thereon before they enter the voting booth and if they do not, it is no function of the ballot to provide that needed education). Here, the proposed amendments are relatively short and straightforward. The text clearly highlights that for a redistricting plan to run afoul of the proposals, the conduct by the Legislature must be intentional.

Additionally, such an intent requirement has been historically applied with regard to allegations of gerrymandering in reapportionment. For example, this Court has held that a discriminatory effect is not sufficient to prove racial discrimination in redistricting; rather, a discriminatory intent must be demonstrated:

This invidious intent or purpose of racial discrimination, the Supreme Court explained, cannot be proved by merely showing that the group discriminated against has not elected representatives in proportion to its numbers. Disproportionate effects alone will not establish a claim of unconstitutional racial vote dilution. Rather, "[a] plaintiff must prove that the disputed plan was conceived or operated as a purposeful device to further racial discrimination." Proof of a discriminatory effect is not sufficient.

Milton v. Smathers, 389 So.2d 978, 981-82 (Fla.1980) (quoting City of Mobile v. Bolden, 446 U.S. 55, 66, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)). Thus, when implementing additional constitutional apportionment standards—here, that district boundaries not be drawn to favor a party or incumbent—it is logical to presume (and the text of the amendments require) that the intent of the entity that draws the districts must similarly be considered when determining whether those standards have been violated.

Moreover, to add the "with the intent" language to the proposed summaries would require removal of at least two other words for the summaries to comply with the seventy-five-word statutory limit. The

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Legislature fails to indicate which of the current seventy-four words could be removed without creating another claim that the summaries are vague or misleading. Indeed, it is likely impossible to draft summaries that explain all of the details sought by the Legislature within the statutory-word limit. While ideal summaries for these amendments might have included the words "with the intent," we conclude that—given the strict word limits—the failure of the summaries to include these three words does not render them so misleading as to clearly and conclusively violate section 101.161, Florida Statutes. See Right to Treatment & Rehabilitation, 818 So.2d at 498 (holding that failure of ballot summary to explain that proposed amendment is self-effectuating did not

render the summary misleading and noting that "imperfection is not necessarily fatal given the seventy-five word statutory maximum").

Shift of Authority — The Legislature next contends that the summaries are misleading because they fail to mention that the proposed amendments divest the Legislature of its responsibility to draw legislative and congressional districts and transfer this role to the judiciary. However, we have already concluded that the proposed amendments do not substantially alter the functions of multiple branches of government. Rather, under the proposals, the judiciary maintains the same role as it has always possessed—to only review apportionment plans for compliance with state and federal constitutional requirements and to adjudicate challenges to redistricting plans. The proposed amendments do not shift in any way the authority of the Legislature to draw legislative and congressional districts to the judicial branch. Accordingly, the summaries are not misleading for the failure to mention this purported "effect" of the proposals.

"City/County" boundaries vs. "Political" Boundaries — The ballot summaries state that district boundaries shall, where feasible, utilize existing "city, county and geographical boundaries"; however, the body of the amendments provide that districts must use "existing political and geographical boundaries." (Emphasis supplied.) The Legislature asserts that the term "political boundaries" encompasses more than city or county boundaries, and under the Florida Statutes, this State has many special districts—such as voting precincts and water-management districts— the borders of which would constitute "political boundaries." Thus, to the extent that the summaries use language inconsistent with that of the proposed amendments, the Legislature contends that they are misleading.

Although the phrase "political and geographical boundaries" used in the proposed amendments may be technically broader than the "city, county, and geographical boundaries" phrase used in the summaries, we conclude that this differing use of terminology could not reasonably mislead voters. The sponsor asserts that the terms "city" and "county" are utilized in the summaries because they are more understandable to the average citizen than the legal concept of "political" boundaries. We agree that most voters clearly understand the concept of a city or county boundary, but may be perplexed to define exactly what a "political boundary" may encompass. See Askew v. Firestone, 421 So.2d 151, 155 (Fla.1982) (noting that voters "must be able to comprehend the sweep of each proposal" (quoting Smathers v. Smith, 338 So.2d 825, 829 (Fla.1976))). The purpose of the standards in section (2) of the proposals is to require legislative and congressional districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts—such

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as one senate district that was challenged in Resolution 1987, 817 So.2d at 824-25—are avoided.[1] Since the "city" and "county" terminology honors this community-based standard for drawing legislative and congressional boundaries, and further describes the standards in terms that are readily understandable to the average voter, we conclude that the use of different terminology does not render the summaries misleading.

The And/Or Distinction — Under this challenge, the Legislature contends that the summaries are misleading because while they provide that "[d]istricts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice," the proposed amendments provide that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." (Emphasis supplied.) According to the Legislature, the "or" in the proposals demonstrates that an apportionment plan need satisfy only one of the two conditions to comply with the amendment—

either districts must not be drawn to deny racial or language minorities the equal opportunity to participate in the political process or districts must not be drawn to diminish the ability of racial or language minorities to elect representatives of their choice. According to the Legislature, both standards need not be accomplished. Conversely, the Legislature posits that use of the word "and" in the summary indicates that both standards must be satisfied to comply with the amendments—thus, the summaries are misleading because they promise more than is required under the proposed amendments.

We conclude that the logic of the Legislature is faulty. In support of its assertion, the Legislature relies upon the case Armstrong v. Harris, 773 So.2d 7, 16 (Fla. 2000), in which this Court held that a ballot title which read "United States Supreme Court Interpretation of Cruel and Unusual Punishment" and a summary which provided that the proposed amendment "[r]equires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment" were affirmatively misleading. See 773 So.2d at 16-17. This Court explained that although the title offered the impression that "the amendment will promote the rights of Florida citizens through the rulings of the United States Supreme Court," the amendment actually restricted the rights of Floridians because the United States Constitution ban against "cruel and unusual" punishment provided fewer protections than the Florida Constitution ban on "cruel or unusual punishment." Id. at 17. Thus, the "or" carried special significance because it prohibited punishment that is either cruel or unusual, whereas under the United States Constitution, the punishment is prohibited only if it is both cruel and unusual.

However, the proposal in Armstrong is distinguishable from the proposed amendments that we review today. While the word "or" in the Armstrong proposal was used in conjunction with two adjectives, here the word "or" separates two clauses of a sentence which share the same negative

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verb; i.e., "shall not be drawn." This verb modifies both clauses, thereby indicating that both clauses impose a restrictive imperative, each of which must be satisfied. For example, if a statute provides that "one person shall not kill another or cause him/her grievous bodily harm," it is illogical to suggest that the statute prohibits one action but not the other. Rather, the "shall not" unquestionably applies to both actions—both killing and causing grievous bodily harm are prohibited. Similarly, the negative verb "shall not be drawn" in the proposed amendments modifies both clauses "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process" and "to diminish their ability to elect representatives of their choice." Under this sentence, both effects are prohibited.[2] Thus, use of the word "or" in the proposals is synonymous with the word "and" in the summaries. Because the use of synonymous terms is not misleading, this challenge by the Legislature fails. See English—The Official Language, 520 So.2d at 13 (use of synonymous terms will not render summary fatally defective where the use of different terms could not reasonably mislead voters).

Language Minorities — The Legislature's claim that this term is vague or ambiguous is not persuasive. The term "language minorities" is both legally and commonly understood to refer to any language other than English. See, e.g., 42 U.S.C. § 1973b(f)(1) ("The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English." (emphasis supplied)); Briscoe v. Bell, 432 U.S. 404, 405, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977) ("[A]s part of the 1975 amendments to the Voting Rights Act ... Congress extended the Act's strong protections to cover language minorities; that is, citizens living in environments where the dominant

language is not English." (emphasis supplied)); Biddulph v. Mortham, 89 F.3d 1491, 1498 (11th Cir.1996) ("The plaintiffs argued that the proposal's sponsors failed to comply with a provision of the Voting Rights Act requiring that certain jurisdictions subject to rules prohibiting discrimination against language minorities provide 'materials or information relating to the electoral process' in the minority group's language as well as English." (emphasis supplied)). The Legislature's contention that voters may be confused by the term "language minorities" is even more dubious in light of the fact that the Florida Constitution contains a provision providing that English is the official language of Florida. See art. II, § 9, Fla. Const. Use of this term does not render the summaries misleading.

Elimination of Multi-Member Districts — Lastly, the Legislature contends that the summary of the legislative-boundary proposal is misleading because it fails to inform voters that it changes the Florida Constitution to no longer permit multi-member legislative districts and to mandate single-member legislative districts.[3]

[2 So.3d 190]

The Florida Constitution currently mandates that legislative districts consist of either "contiguous, overlapping or identical territory." Art. III, § 16(a), Fla. Const. In 1972, we held that this language permits multi-member legislative districts:

[T]he Constitution requires that there be one senator elected from each Senatorial district and one member of the House of Representatives elected from each representative district. This, standing alone, would require single-member districts. However, the Constitution further provides that districts may be "identical territory." This means that multi-members of the Senate or the House of Representatives may be elected from the identical territory if such territory were designated as constituting several districts. To require single-member districts would void the provision of Fla. Const., art. III, § 16(a) ... authorizing the creation of districts in "identical territory."

. . . .

Under the provisions of Fla. Const., art. III, § 1 and 16 ... multi-member districts are permissible and such multi-member districts may coexist with single-member districts in the same plan.

In re Apportionment Law Senate Joint Resolution No. 1305, 26,3 So.2d 797 (Fla.1972).

The Legislature contends that adoption of the proposed legislative-boundary amendment—which includes a "contiguous" requirement but does not mention overlapping or identical districts—operates to repeal article III, section 16(a) of the Florida Constitution. Under this rationale the Legislature argues that because identical districts are no longer permitted, the proposal amends the Florida Constitution to implement a single-member district requirement, and the ballot summary fails to inform voters of this significant change. See Nonpartisan, 926 So.2d at 1226 (noting that the "identical territory" provision in article III, section 16(a) permits the creation of multi-member districts).

We disagree that adoption of the legislative-boundary proposal will have the asserted effect. This Court has explained:

A new constitutional provision prevails over prior provisions of the Constitution (a) if it specifically repeals them or (b) if it cannot be harmonized with them. Nevertheless, it is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.

Jackson v. City of Jacksonville, 225 So.2d 497, 500-501 (Fla.1969) (emphasis supplied). Since the legislative-boundary proposal does not expressly repeal section 16(a), this constitutional

provision will be considered repealed by implication only if it cannot be harmonized with the proposal.

We conclude that harmonization of these two provisions is possible and, therefore, "identical" multi-member districts in Florida will still be constitutionally permissible even if the legislative-boundary proposal is adopted. In 1982, this Court clarified that the word "contiguous" in article III, section 16(a) "means only that each district must be contiguous within itself" and does not refer "to the relationship of the districts to each other." In re Apportionment Law Appearing as Senate Joint Resolution No. 1E, 41,4 So.2d 1040 (Fla.1982) (emphasis supplied).

[2 So.3d 191]

Thus, under this Court's prior case law, the reference to "contiguous" in the proposed legislative-boundary amendment solely addresses the characteristics of an individual district—not its relationship with any other district. Accordingly, a constitutional contiguity requirement for each individual district may exist, but—at the same time—an individual district may still overlap with, or be identical to, another individual district. Because these two provisions can be harmonized in such a manner, the proposed legislative-boundary proposal would not operate to repeal article III, section 16(a).[4]

Since the legislative-boundary proposal does not have the effect of prohibiting multi-member districts, the ballot summary is not misleading for the failure to mention this purported "effect."

III. CONCLUSION

In conclusion, we hold that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008). Accordingly, we approve the amendments for placement on the ballot.

It is so ordered.

QUINCE, C.J., and ANSTEAD, Senior Justice, concur.

WELLS, CANADY, and POLSTON, JJ., concur in result only.

PARIENTE, J., recused.

Notes:

1. That senate district connected a region of Lee County with a region of Palm Beach County across the waters of Lake Okeechobee without any connecting territory on either the northern or southern shores of the lake. See id. at 828. Thus, the only way to travel from one end of the district to the other without passing through another district was by boat.

2. One legal dictionary has explained:

"[O]r" has an inclusive sense as well as an exclusive sense. Hence:

. . . .

• The "inclusive or": A or B, or both

• The "exclusive or": A or B, but not both.

Bryan A. Garner, A Dictionary of Modern Legal Usage 624 (2d ed.1995).

3. In Branch v. Smith, 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003), the Supreme Court determined that "that in enacting 2 U.S.C. § 2c, Congress mandated that States are to provide for the election of their Representatives from single-member districts." Thus, even if the congressional-boundary amendment were interpreted to mandate single-member districts, this proposal would be consistent with federal law.

4. The proposals here are decidedly different from the proposed amendment that this Court struck from the ballot in Nonpartisan. In Nonpartisan, the proposal deleted article III, section 16(a) in its entirety and inserted a new section 16(a), which would have required "single-member" districts of "convenient contiguous territory." See 926 So.2d at 1221. Thus, in Nonpartisan, there was an express repeal of the

constitutional provision that allowed districts to be overlapping and identical.

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

CASE NO: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S RESPONSE IN OPPOSITION TO SECRETARY OF STATE'S MOTIONS TO DISMISS PLAINTIFFS' COMPLAINTS FOR LACK OF SUBJECT MATTER JURISDICTION

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel, and hereby files this Response in Opposition to Secretary of State's Motions to Dismiss Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss")[1] in the above-styled litigation, and in support of its response asserts the following:

I. INTRODUCTION

As plead by the Florida Senate, this case involves a pre-election challenge to the legality of two proposed redistricting amendments that are currently set to be on the November, 2010 general election ballot. Proposed Amendments 5 and 6 would not only radically alter the duties, powers, and scope of legislative and congressional reapportionment in this State but would also likely set back minority voting rights in Florida by a generation or more. Such perniciousness should not be countenanced by this Court.

[1] In addition, the other defendants in this case, Sen, Robert Graham and FairDistrictsFlorida.org have both filed Motions to Dismiss adopting in full the arguments made by the Secretary of State in her Motions to Dismiss. The Florida Senate's response herein serves as a response in opposition to the Motions to Dismiss of these other defendants as well.

In its Complaint, the Florida Senate asserts two separate claims:[2] both for a declaratory judgment and an injunction against the Secretary of State, asking that the proposed constitutional amendments at issue in this litigation be barred from the upcoming ballot because they plainly violate paramount federal law and also because they violate the separation of powers scheme set up in the Florida Constitution and are flatly unworkable. The Florida Senate believes quite strongly that these proposals are illegal and impermissibly violate paramount federal law (and would actually largely eviscerate the power of minority voting rights in Florida), and thus, contends that it is neither legally right nor appropriate for these two proposed constitutional amendments to be placed on the general election ballot in November, 2010. Accordingly, the Florida Senate has, in good faith and in support of the elected Plaintiffs and in accordance with established Florida law, sought pre-election judicial review of their legality prior to having them submitted to the electorate. Should this Court determine the proposed Amendments 5 and 6 to be unconstitutional and/or invalid, the Florida Senate respectfully requests the Court prohibit the Secretary of State from putting them on the upcoming general election ballot.

In her Motion to Dismiss, the Florida Secretary of State claims that pre-election review of the Florida Senate's claims is precluded, that only the Florida Supreme Court has exclusive jurisdiction to hear such claims, and that, therefore, this Court lacks subject matter jurisdiction to hear this case. However, the Secretary's Motion to Dismiss contains three fatal errors: 1) it falsely asserts that the Florida Supreme Court's advisory—and limited-- review of the proposed constitutional amendments precludes more substantive review by this Court; 2) it ignores Florida Supreme Court decisions which expressly allow substantive pre-election review of initiative proposals that violate federal and other constitutional laws; and 3) it ignores the constitutional role of the Circuit Courts of this State (which are primarily vested with the judicial trial power in

[2] In addition to asserting its own claims, the Florida Senate has adopted the claims asserted in the Florida House's Amended Complaint. However, the claims asserted directly by the Florida Senate in its Complaint have not been raised by any other Plaintiff in this case.

deciding the very kinds of issues presented here). Because the Secretary of State's Motion to Dismiss is based wholly on an inaccurate analysis of the controlling law and the Florida Senate's claims, the Secretary's Motion to Dismiss must be denied in all respects.

II. MEMORANDUM OF LAW

A. This Court Has Jurisdiction To Hear The Florida Senate's Claims

1. The Florida Supreme Court's Previous Review Was Both Limited And Advisory.

a. Florida Supreme Court Ballot Summary And Single Subject Review Is Limited.

For her first argument in favor of dismissal, the Secretary of State contends that only the Florida Supreme Court has jurisdiction to consider pre-election challenges to voter initiative amendments. This argument is easily disproven by a number of Florida Supreme Court cases and holdings, as set out in more detail below.

The Florida Constitution and § 101.161, Fla. Stat., do provide the Florida Supreme Court with limited advisory authority to review proposed voter initiatives for their compliance with ballot summary and single-subject requirements prior to their placement upon any ballot. This review is purely "advisory" in nature. It is certainly true that the Florida Supreme Court reviewed proposed Amendments 5 and 6 earlier pursuant to the statutory procedure set out in § 101.161. *Advisory Opinion to the Attorney General Re: Standards for Establishing Legislative District Boundaries*, 1 So.3d 175 (Fla. 2009). However, the holdings from the § 101.161 process are very limited and the Florida Supreme Court itself has characterized its preliminary limited review over the initiatives here as "advisory" only. With respect to the proposed constitutional amendments at issue, the Florida Supreme Court's earlier review held only that "the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and [their] ballot title summaries comply with section 101.161(1), Florida Statutes." *Advisory Opinion to the Attorney General Re: Standards for Establishing Legislative District Boundaries,*

1 So.3d 175, 191 (Fla. 2009).

But, as the Florida Supreme Court itself acknowledges, its early review of such voter initiatives is quite limited in nature.[3] The Florida Supreme Court ably laid down the elements of this review in *Advisory Opinion to Atty. Gen. ex rel. Amendment*, 778 So.2d 888 (Fla. 2000), as follows:

> The court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999). *See Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 565 (Fla. 1998); *Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So.2d 972, 974 (Fla. 1997). In order for the Court to invalidate a proposed amendment, the record must show that the proposal is clearly and conclusively defective on either ground. *See Askew v. Firestone*, 421 So.2d 151, 154 (Fla. 1982). In determining the propriety of the initiative petitions, the Court does not review the merits of the proposed amendments. *See Right of Citizens to Choose Health Care Providers*, 705 So.2d at 565; *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So.2d 1304, 1306 (Fla. 1997). . . This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments...."

In that same case, moreover, the Florida Supreme Court held that specifically that other substantive challenges are ***not*** justiciable in this type of § 101.161 advisory proceeding. 778 So.2d at 891. *See also Advisory Opinion to the Attorney General-Limited Political Terms in Certain Elective Offices*, 592 So.2d 225, 227 (Fla. 1991).

Since *Grose v. Firestone*, 422 So.2d 303 (Fla. 1982), the Florida Supreme Court has consistently adhered to the holding that "other constitutional challenges are not justiciable in this

[3] Moreover, review of the ballot summary and single-subject issues is not strictly foreclosed by Florida Supreme Court review under § 101.161, as the Florida Supreme Court stated in *Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992), that re-litigation of the ballot summary and single-subject issues was "strongly disfavored" and should be "entertained only in truly extraordinary cases." It should be noted that the claims raised by the Florida Senate in its Complaint do not attempt to relitigate, in any way, the ballot summary or single-issue limitations previously reviewed by the Florida Supreme Court. Hence, this proposition is inapposite to this Court's jurisdiction to review the Florida Senate's case and to hear its claims. *See also* 12A Fla. Jur. 2d Courts and Judges § 98 ("Advisory opinions")(confirming that the Florida Supreme Court has jurisdiction to reconsider its advisory opinions as they would not be binding precedent and noting that other challenges were permissible by implication).

type of [ballot summary] proceeding" but that other substantive claims may be raised about the amendments in other proceedings. More specifically, the *Grose* Court ruled:

> Appellants' argument that the substance of the amendment is unconstitutional is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented. *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270 (1934); *Gray v. Moss* 115 Fla. 701, 156 So. 262 (1934).

422 So.2d at 306. More importantly, the Florida Supreme Court has expressly ruled that substantive voting rights issues, such as those raised by the Florida Senate in the case at bar, are not properly heard during advisory opinion proceedings but should instead be heard at trial. Specifically, in the case of *In re Constitutionality of House Joint Resolution 1987*, 817 So.2d 819, 829 (Fla. 2002), wherein the parties raised substantive voting rights issues during the advisory review of a reapportionment plan, the Court declined to address such issues and held:

> with the advancement of redistricting technology, the continued development of case law in this area, and the unique fact intensive circumstances presented in the instant case we determine that we are not in a position to properly address such issues in the present proceeding, especially in light of the constitutional time limitations placed on the Court. Such claims are better suited for a court of competent jurisdiction where there is an opportunity to present evidence and witness testimony and where the court has the ability to make factual findings on the evidence presented.

Hence, it is clear from the Florida Supreme Court's own opinions and holdings that its § 101.161 review of proposed ballot initiatives is strictly limited to two narrow issues, and that other substantive claims can be raised in appropriate proceedings before appropriate tribunals such as this Court. *See Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982); *In re Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226-27 (Fla. 1991); *In re Prohibiting Public Funding of Political Candidates' Campaign*, 693 So. 2d 972, 976 (Fla. 1997).

Thus, while it is clear that the Florida Supreme Court has exclusive authority to review the ballot summaries under a § 101.161 ballot advisory review early on, it is simply untrue for the Secretary of State to assert, as she does repeatedly in her Motion to Dismiss, that the Florida Supreme Court has exclusive jurisdiction to review ballot initiatives for substantive defects and

illegalities or that such substantive pre-election review is wholly precluded by a lack of subject matter jurisdiction by this Court.

b. Advisory Opinions Are Meant To Be "Advisory."

The Florida Supreme Court has also acknowledged that its advisory opinions are "not strictly binding precedent." *Fla. League of Cities v. Smith*, 607 So.2d 397, 399 (Fla. 1992). Hence, the mere fact that the Florida Supreme Court has undergone a cursory advisory review of these proposed initiatives for two minimal requirements does not, in any way, preclude more substantive judicial review of these proposed constitutional amendments, especially where, as here, the Florida Senate has alleged that they patently violate paramount federal law, namely the Voting Rights Act, and improperly impinge on minority voting rights in ways that are so fundamental as to be both incurable and plainly illegal.[4]

c. The Florida Supreme Court Lacks Authority To Review These Proposals For The Substantive Constitutional Issues Raised By The Senate.

As noted above, the Florida Supreme Court has already held that it lacks the authority to review substantive constitutional issues in a § 16.061 advisory opinion proceeding. *See Advisory Opinion to Attorney General – Limited Political Terms*, 592 So.2d 225, 227 (Fla. 1991); *Advisory Opinion to Attorney General – Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1019, n.1 (Fla. 1994). This means that the Florida Supreme Court does not have "exclusive" jurisdiction to review the Florida Senate's claims in the first instance and that the

[4] Indeed, the Secretary of State's use of the *Florida League of Cities* case for the proposition that jurisdiction over the claims raised by the Florida Senate here lies only in the Florida Supreme Court is refuted by that case itself. In that case, the Florida Supreme Court noted that relitigation of the ballot summary and single-issue claims previously reviewed was "strongly disfavored" and that it would not generally exercise its discretionary jurisdiction to rehear such "renewed litigation" absent extraordinary circumstances. But, reference to the Florida Supreme Court's discretionary jurisdiction further implies that such a case could be heard by the courts below. Regardless, in this case, the Florida Senate has raised independent substantive challenges to the proposed constitutional amendments that were not previously heard by the Florida Supreme Court. Hence, the *Florida League of Cities* quote from page 11 of the Motion to Dismiss is plainly inapposite to the jurisdiction of ***this*** Court to hear the pending matters.

Secretary of State's arguments to the contrary must be wrong. Thus, her Motion to Dismiss should be denied accordingly.

2. The Florida Supreme Court Has Allowed More Substantive Review Of Proposed Constitutional Initiatives By The Lower Courts.

In her Motion to Dismiss, the Secretary of State also argues that only constitutional amendments proposed by joint resolution of the Florida Legislature can be reviewed in the lower courts by declaratory judgment action. This, too, is flat wrong. In *Dade County v. Dade County League of Municipalities*, 104 So.2d 512, 514 (Fla. 1958), the Florida Supreme Court confirmed that pre-election review of constitutional questions over voter-proposed initiatives was appropriate for ballot initiatives being challenged on a substantive basis:

> At the outset we dispose of the matter of the propriety of considering the constitutionality of the proposal in advance of an election called to enable the electorate to express its approval or disapproval of the subject proposal. There is adequate precedent for doing so. We are not here confronted with an election in which the people are to have the privilege of expressing their choice as between candidates for public office. If the latter were the situation, the matter for determination would be purely political rather than judicial and the courts would not interfere. *State ex rel. Landis v. Tedder*, 106 Fla. 140, 143 So. 148. We are here dealing with an election involving a matter with reference to which the public interest and public rights may be determined in advance of the ballot, in order to preclude or forestall possible expenditure of substantial sums of public monies in the doing of what could be a vain and useless thing. *Duval County v. Jennings*, 121 Fla. 584, 164 So. 356; *Dubose v. Kelly*, 132 Fla. 548, 181 So. 11; *Gray v. Moss*, 115 Fla. 701, 156 So. 262; *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804.

See also West Palm Beach Ass'n of Firefighters v. Bd of City Commisioners, 448 So.2d 1212, 1213-1214 (Fla. 4th DCA 1984)(questioning why City had not sought declaratory relief as to validity of proposed ballot initiative and noting that would have been the preferred procedure).

3. The Florida Constitution Vest This Court With The Power To Hear This Case.

Now that the Florida Senate has wholly refuted the Secretary of State's arguments and established that the Florida Supreme Court does not have exclusive jurisdiction to hear

substantive challenges to proposed constitutional amendments and that substantive challenges to voter initiatives can be heard prior to an election, we reach the next issue: Whether the Florida trial courts have jurisdiction to hear substantive pre-election challenges to constitutional amendments proposed by voter initiative. As discussed in detail below, the Florida Circuit Courts are the ***only*** place where such claims can be heard in the first instance.

As the Fourth District Court of Appeal held in a redistricting case brought by Plaintiff Brown, Brown v. Butterworth, 831 So.2d 683, 686 (Fla. 4th DCA 2002), held:

> We begin with the proposition that, as the Circuit Judge himself noted, the circuit courts in Florida are the primary trial courts of general jurisdiction. As our supreme court has explained,
>
> > "In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be.... 'The circuit courts of the State of Florida are courts of general jurisdiction similar to the Court of King's Bench in England clothed with most generous powers under the Constitution, which are beyond the competency of the legislature to curtail. They are superior courts of general jurisdiction, subject of course to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and as a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly out side of and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto.' " [c.o.]
>
> *English v. McCrary,* 348 So.2d 293, 297 (Fla.1977) (quoting *State ex rel. B.F. Goodrich Co. v. Trammell,* 140 Fla. 500, 192 So. 175 (1939)). We find nothing in the Florida Constitution that expressly and clearly vests all apportionment claims in some court other than the circuit court.

The same result is, thus, demanded here. There is simply nothing in any Florida Supreme court case or other authority that somehow divests the jurisdiction of this Court to hear the Florida Senate's claims, and the Secretary of State has pointed to none. Thus, there is simply no real question as to this Court's jurisdiction to hear the Florida Senate's claims in this case.

Similarly, in *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So.2d 1144, 1147 (Fla. 2d DCA 2006), the Florida appellate court confirmed the circuit court's jurisdiction to hear pre-election claims. It held that, if the opponent of a proposed amendment "in good faith questions the constitutionality of the ordinance in its entirety and on its face[,] the court may properly consider that question in advance of an election concerning its approval." *W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs of the City of W. Palm Beach*, 448 So.2d 1212, 1214 (Fla. 4th DCA 1984)." *See also Gaines v. City of Orlando*, 450 So.2d 1174, 1178 (Fla. 5th DCA 1984)(holding that circuit court has discretion to make a pre-election determination of the facial constitutionality of any proposed amendment slated to appear on the ballot) *See also Fine v. Firestone,* 448 So.2d 984 (Fla.1984); *City of Miami Beach v. Smith*, 165 So.2d 748 (Fla. 1964); *Dade County v. Dade County League of Municipalities,* 104 So.2d 512 (Fla. 1958).

Therefore, contrary to the assertions made by the Secretary of State (and the other defendants), this Court absolutely has jurisdiction to hear the Florida Senate's claims here. Indeed, it is the only court where a trial can actually be held on the matter. It is similarly not true that only amendments proposed by joint resolution can be reviewed in advance of an election as the many cases cited above confirm that even voter-proposed initiatives can be substantively reviewed by the circuit courts prior to their submission to the ballot to keep the voters from voting on "a vain and useless thing."

B. **The Florida Senate Correctly Relies on *Gray v. Winthrop* In Challenging The Validity of the Proposed Amendments.**

The Secretary of State's Motion to Dismiss also claims that the Florida Senate's reliance on the Florida Supreme Court's seminal case of *Gray v. Winthrop*, 115 Fla. 721 (Fla. 1934)(allowing substantive pre-election review of constitutional initiatives) is misplaced because the Florida Supreme Court later held in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So.2d 225, 229 (Fla. 1991) that its jurisdiction was limited to addressing whether the proposed amendment and ballot summaries of proposed constitutional ballot initiatives complied with the Florida Constitution and § 101.161, Fla. Stat. Motion to Dismiss, p. 12. The Secretary of State's argument plainly misreads this case, intentionally or otherwise.

The Florida Supreme Court's decisions in the *Limited Political Terms* and related cases, stand only—with respect to this case and the jurisdictional issue raised in the pending Motion to Dismiss-- for the proposition that other constitutional/illegality challenges (such as the kind raised by the Florida Senate in its Complaint here) are not reviewable in the first instance by the Florida Supreme Court in a § 101.161 ballot review advisory proceeding. The Florida Supreme Court's own opinions do not stand for the proposition, and the Florida Supreme Court has never held, that substantive challenges to voter initiatives are not justiciable by the circuit courts before an election, and the Secretary of State's twisted interpretations to the contrary are simply incorrect. The fact that Justice Overton wanted to expand the scope of the Florida Supreme Court's § 101.161 review to include other constitutional issues but could not carry the majority has no bearing on the fact that the Florida courts have repeatedly held that other, substantive challenges to proposed constitutional amendments can be raised in the circuit courts prior to an election.

That pre-elections suits for injunction are available where a proposed citizen initiative will clearly violate state or federal law is also confirmed by Florida Jurisprudence 2d:

> There are some exceptions to the general rule against the availability of an injunctive remedy. Thus, where an election is to be held in violation of the law or contrary to some well-established legal requirements, or when it will result in some substantial injury to any suitor or to the public generally, the election may be enjoined in the absence of other legal remedy. Moreover, in elections not involving the right to public office, where asserted vested contract or property rights can be more effectually protected by restraining in advance a threatened unlawful election tending toward their encroachment, a court of equity is not bound to speculate upon the likely or probable result of the election if held, but may enjoin the holding of such election in a clear case.

21 Fla. Jur. 2d Elections § 178 ("When injunction may be available")(citations omitted). Thus, the Secretary of State's Motion to Dismiss must fail for being flatly contrary to both established case law and recognized Florida authority confirming the Florida Senate's positions.

C. <u>The Jurisdiction For-- And Standards Of—Pre-Election Judicial Review Are Clear</u>.

It is beyond peradventure that this Court has subject matter jurisdiction to hear the Florida Senate's claims in this case. As Florida Jurisprudence 2d further confirms:

> If a proposed amendment to the state constitution by its terms specifically and necessarily violates the Federal Constitution, its submission to the electorate of the state for adoption or rejection may be enjoined at the suit of proper parties in order to avoid the expenses of submission.

10 Fla. Jur 2d Constitutional Law § 35 ("Injunction when amendment violates United States Constitution")(citing to the continued viability of *Gray v. Winthorp*, 156 So. 274 (1934)). This authority also further refutes the Secretary of State's assertion in her Motion to Dismiss that the *Gray* case is no longer valid. The above quote from Florida Jurisprudence 2d confirms the continued viability of the *Gray* case and its holding that proposed amendments can be enjoined from the ballot where, as here, they are plainly illegal.

Admittedly, pre-election challenges must satisfy exacting standards. The standard applied when evaluating a pre-election challenge, as stated by the Florida Supreme Court is clear: this

court has jurisdiction to hear pre-election challenges to proposed constitutional amendments, but courts are not to invalidate such initiatives lightly. Even so, a plainly unconstitutional or illegal initiative must be kept from the ballot.

III. CONCLUSION

The Florida Senate fully supports the right of Floridians to appropriately amend the Florida Constitution. However, it is clear from the very text of the proposed constitutional amendments at issue that they are violative of paramount federal law and are wholly unworkable. The wholesale restructuring of Florida voting rights and reapportionment contemplated by proposed Amendments 5 and 6 are suspicious and demand careful judicial scrutiny. Too often such "redistricting reforms" have been shills for disfranchising minorities and the Florida Senate believes that these amendments are so plainly violative of the Voting Rights Act that there would be no way to implement them without Florida minorities losing at least half their state and federal seats in Florida, thereby setting minority voting rights in Florida back a generation or more. This would be both illegal and unconscionable. Thus, the Florida Senate is rightfully concerned and legitimately asking this Court to exercise its lawful jurisdiction and review these proposed constitutional amendments for the protection of all Floridians and the Florida Constitution.

WHEREFORE, for all the foregoing reasons, the Florida Senate respectfully requests that this Honorable Court enter an Order denying the Secretary of State's Motion to Dismiss (and all the other related Motions to Dismiss) in their entirety and awarding all such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 6th day of July, 2010.

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Corrine Brown and Mario Diaz-Balart et al v. Dawn K. Roberts, et al.
Case No.: 2010-CA-1824
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S NOTICE OF ADOPTING ITS RESPONSE IN OPPOSITION TO DEFENDANT SECRETARY OF STATE'S MOTIONS TO DISMISS AS RESPONSE TO SAME MOTIONS TO DISMISS FILED BY DEFENDANTS GRAHAM AND FAIRDISTRICTSFLORIDA.ORG

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel, and hereby files this Notice that it adopts and reincorporates its Response in Opposition to Secretary of State's Motions to Dismiss Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction filed on July 6, 2010 as its response in opposition as if fully stated herein to the following Motions:

1. Defendant GRAHAM's Motion to Dismiss for Lack of Subject Matter and Motion to Expedite Disposition filed on June 24, 2010.

2. Defendant FAIRDISTRICTSFLORIDA.ORG, INC.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Expedite Disposition filed on June 29, 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 6th day of July, 2010.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES'
RESPONSE TO THE SECRETARY'S MOTION TO DISMISS

Intervening Plaintiff, Florida House of Representatives (the "House"), responds to the Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction filed by Defendant, Dawn K. Roberts, as Interim Secretary of State of the State of Florida (the "Secretary"), on June 22, 2010. Because the Motions to Dismiss for Lack of Subject Matter Jurisdiction filed by Bob Graham and by Defendant, FairDistrictsFlorida.org, Inc., merely adopt the Secretary's argument, this response also addresses their positions.

Introduction

The Motion to Dismiss fails for three compelling reasons.

First: The Secretary confuses the Supreme Court's exclusive jurisdiction to render advisory opinions with jurisdiction generally. Circuit Courts have long been recognized to possess general jurisdiction over challenges to initiative petitions. Nothing in the Florida Constitution or Florida Statutes—not a word—deprives this Court of jurisdiction in this matter.

Second: The Supreme Court advisory proceeding under Article V, Section 3(b)(10) of the Florida Constitution is just that—advisory and non-binding. It is an abbreviated, facial look at initiative petitions, intended to save the sponsor time and money if a petition is obviously deficient. Nothing in the Constitution or statutes even hints at the notion that aggrieved voters—in this case, two voters who serve in Congress on behalf of well over one million constituents—have been deprived of traditional adjudicatory rights to prove that, in fact, an initiative petition violates the accuracy requirement set forth in Section 101.161(1), Florida Statutes.

Third: The Supreme Court has determined that "[d]eception of the voting public is intolerable," *Armstrong v. Harris*, 773 So. 2d 7, 20 (Fla. 2000), and Plaintiffs will prove with real facts that these petitions mislead. The ballot summaries promise the protection of minority voting rights when, in reality, those rights will be lost. They proclaim that incumbents will not be favored, but omit the fact that *some* incumbents will have to be favored. Perhaps worst of all, they fail to reveal that, in the Supreme Court's own words, it will be "impossible" to conduct the constitutionally required review of state legislative redistricting plans in the short time provided, casting the process into disarray and likely depriving interested persons of due process.

The Secretary cannot point to any clear constitutional or statutory deprivation of the Circuit Court's plenary jurisdiction over this case. The Motion to Dismiss must be denied.

Background

The Florida Constitution authorizes the issuance of advisory opinions in two circumstances. First, since 1868, the Constitution has directed the Supreme Court, on the request of the Governor, to issue advisory opinions regarding the Governor's constitutional duties and powers. Art. IV, § 1(c), Fla. Const.; *see also* Art. V, § 16, Fla. Const. of 1868.

Since 1986, the Constitution has also required the Attorney General to "request the opinion of the justices . . . as to the validity of any initiative petition" to amend the Constitution. Art. IV, § 10, Fla. Const.[1] The Constitution directs the Court to "render an advisory opinion of the justices, addressing issues as provided by general law." Art. V, § 3(b)(10), Fla. Const.

In advisory opinions to the Attorney General, the Court considers whether the ballot title and summary of the initiative petition are clear and unambiguous, as required by Section 101.161(1), Florida Statutes, and whether the proposal is limited to a single subject, as required by Article XI, Section 3, Florida Constitution. *See* § 16.061(1), Fla. Stat. (2009). It does not consider other challenges against the amendments, including attacks on their merits or wisdom, *Adv. Opinion to Att'y Gen. re Fla. Marriage Protection Amend.*, 926 So. 2d 1229, 1233 (Fla. 2006), or their constitutionality under provisions such as due process, *Adv. Opinion to the Att'y Gen.–Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226-27 (Fla. 1991).

[1] To propose a constitutional amendment by initiative petition, the sponsor must collect a number of signatures equal to eight percent of the number of votes cast in the last presidential election, both statewide and within one half of Florida's congressional districts. Art. XI, § 3, Fla. Const. Once the sponsor has collected ten percent of the needed signatures, the Secretary must submit the proposed amendment to the Attorney General, § 15.21, Fla. Stat. (2009), who, within thirty days, must submit the proposal to the Court for an advisory opinion, *id.* § 16.061(1).

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Memorandum of Law

The Secretary's position defies binding precedent. The Florida Supreme Court has recognized that Circuit Courts have jurisdiction over all matters, except in those rare instances where jurisdiction is expressly denied by the Constitution or Florida Statutes. And consistent with this principle, the Court has held that the creation of the advisory opinion process did not restrict the right to challenge initiative petitions according to precedent—precedent that includes not only challenges in the Supreme Court, but declaratory judgment actions in Circuit Court.

I. Circuit Courts Have Jurisdiction Unless Jurisdiction Is Expressly Denied.

"Florida's circuit courts are tribunals of plenary jurisdiction. Art. V, § 5, Fla. Const. They have authority over any matter not ***expressly*** denied them by the constitution or applicable statutes." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (emphasis added); *accord Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 895 (Fla. 2003); *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 854 (Fla. 1992) ("[C]ircuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which *clearly* and *specially* appears so to be." (quoting *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977))).

The opinion in *Wardell v. State*, 944 So. 2d 1089 (Fla. 5th DCA 2006), illustrates this principle. In *Wardell*, a defendant was charged with crimes in different Circuit Courts. In one, the defendant was found incompetent and was hospitalized. *Id.* at 1090. When the other court convicted him, the defendant argued lack of jurisdiction, citing a statute directing the committing court to retain jurisdiction. *Id.* at 1091. The Court disagreed. It noted that Circuit Courts have jurisdiction in *all* matters except those "expressly denied them by the Constitution or applicable statutes," and that the statute did not "expressly state" that jurisdiction was "exclusive." *Id.*

By contrast, in *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373 (Fla. 1991), the Court held that, once a proceeding to validate bonds approved

by referendum was brought in one court, all other courts were deprived of jurisdiction. There, the applicable statute contained the express statement that "*exclusive* jurisdiction to determine the legality of such referendum . . . shall be vested in the court hearing and determining the validation proceedings." *Id.* at 1377 (quoting § 100.321, Fla. Stat. (1989)) (emphasis added).[2]

Neither the Constitution nor Florida Statutes come close to expressly denying Circuit Courts subject-matter jurisdiction over challenges to initiative petitions. The Constitution gives the Supreme Court power to issue an "*advisory opinion.*" Art. V, § 3(b)(10), Fla. Const. It does this to give the petition sponsor an opportunity to seek advice and instruction from the Supreme Court before the sponsor incurs considerable expenditures of time and resources. *See* Frederick O. Goddard, *et al.*, Analysis: Florida Constitutional Amendments to be on Ballot November 4, 1986.[3] But the Florida Constitution does not expressly state—or even imply—that the Supreme Court has exclusive subject-matter jurisdiction over challenges to initiative petitions.

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[2] Perhaps the most obvious example of an express exception to the jurisdiction of Circuit Courts is contained in Article V, Section 5(b) of the Florida Constitution, which expressly denies Circuit Courts subject-matter jurisdiction over matters committed to County Courts.

[3] Before creation of the advisory opinion process, the Supreme Court recognized that "the initiative method did not provide a filtering legislative process for the drafting of" proposed amendments. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). By contrast, the "legislative, revision commission, and constitutional convention processes of [Article XI, Sections 1, 2, and 4 of the Florida Constitution] all afford an opportunity for public hearing and debate not only on the proposal itself but also in the drafting of any constitutional proposal. That opportunity for input in the drafting of a proposal is not present under the initiative process . . . ." *Id.* Thus, the advisory opinion process provides a filter otherwise absent in the drafting of initiative petitions. But, as with amendments proposed by the Legislature and filtered through the medium of public hearing and debate, amendments proposed by initiative are filtered through the advisory opinion process not immune from further judicial scrutiny.

II. The Advisory Opinion Process Does Not Deprive Circuit Courts of Jurisdiction.

The creation of an advisory proceeding in 1986 did not abolish legal challenges available under existing precedents. In fact, the Supreme Court has affirmed that all other legal challenges permissible under those precedents remain available, despite the issuance of an advisory opinion:

> When [the] provisions [creating the advisory process] were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would *not* be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised. ***This necessarily implies that other legal challenges would continue to be permissible under existing precedent*** . . . .

Fla. League of Cities v. Smith, 607 So. 2d 397, 398-99 (Fla. 1992) (notes and citations omitted; second emphasis added). Thus, any challenge permissible under existing precedents survived the creation of the advisory proceeding in 1986. Significantly, those precedents recognized not only mandamus actions, but also challenges to initiative petitions in Circuit Court. *See Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984).

Nothing in *Smith* indicates that the Supreme Court is the exclusive forum for challenges to initiative petitions. In fact, the Court's express holding that all previously available challenges remain available is the polar opposite of the Secretary's position. If the Court had intended to overturn established precedent recognizing the plenary jurisdiction of Circuit Courts—restricting future challenges to the Supreme Court—it would have been explicit. It would not have declared categorically that "challenges would continue to be permissible under existing precedent."

In *Smith*, the petitioners brought a mandamus action in the Supreme Court, arguing that the summary of an initiative petition was misleading. The Court had earlier concluded in an advisory opinion that the summary was not misleading, but the petitioners raised arguments not addressed in the advisory opinion. *Id.* at 399 n.3. The Court concluded that, under existing precedent, "mandamus is *an appropriate method* for challenging an allegedly defective proposed

amendment to the Constitution." *Id.* at 399 (emphasis added). It did *not* state that mandamus is *the* appropriate—or the *exclusive*—method to challenge initiative petitions. Indeed, it could not have done so. The Court had affirmed the continued vitality of existing precedents—precedents that included Circuit Court challenges, as well as mandamus actions in the Supreme Court.[4]

The Supreme Court recognized in *Smith* that advisory opinions in initiative-petition cases are akin to advisory opinions to the Governor. *See id.* at 399 n.3 (explaining that the non-binding nature of advisory opinions in initiative-petition cases is "entirely consistent with settled law holding that advisory opinions 'are not binding judicial precedents . . . .'" (quoting *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944))).[5] The Court has long stated that its advisory opinions to the Governor "do not necessarily control in litigated cases," *State ex rel. Williams v. Lee*, 164 So. 2d 536, 538 (Fla. 1935), and "are merely legal opinions of the individual justices, offered for the Governor's guidance," *In re Adv. Opinion to the Gov.*, 509 So. 2d 292, 301 (Fla. 1987).

In *In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987), the Court was asked to evaluate the constitutionality of a tax-reform measure enacted by the Legislature, in order to determine whether the Governor was under a constitutional obligation to propose a new budget with alternative revenue sources. The Court rejected various facial attacks against the challenged law, including arguments that it violated the equal protection, due process, and the contracts clause. The Court emphasized that its opinion did not bar actual litigation on the very

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[4] Precedent also includes a mandamus action brought in the District Court of Appeal and certified to the Supreme Court as a question of great public importance. *See Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). Circuit Courts have the same mandamus jurisdiction as District Courts of Appeal. *Compare* Art. V, § 4(b)(3), Fla. Const., *with* Art. V, § 5(b), Fla. Const.

[5] The Supreme Court has also applied the same internal procedures to the issuance of advisory opinions in both contexts. *See* Manual of Internal Operating Procedures, § 2(G).

same constitutional questions, and that all interested parties would remain "free to initiate lawsuits . . . to argue that [the advisory opinion] has been wrongly decided." *Id.* at 302.[6]

When the Legislature proposed the initiative-petition advisory opinion process in 1986, it understood that advisory opinions do not bar further litigation and can even be challenged as wrongly decided. *Cf. Seagrave v. State*, 802 So. 2d 281, 290 (Fla. 2001) ("[T]he legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.'" (quoting *Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996))). It knew that other avenues of redress would remain available.

The Constitution knows how to create binding proceedings and exclusive jurisdiction. In the constitutional revision of 1968, the Legislature proposed—and voters adopted—a 30-day process for automatic, Supreme Court review of state legislative redistricting plans. *See* Fla. HJR 1-2X (1968). This process requires the Supreme Court to enter a "declaratory judgment determining the validity of the apportionment," Art. III, § 16(c), Fla. Const., and the declaratory judgment entered by the Court is "binding upon all the citizens of the state," Art. III, § 16(d), Fla. Const. Because the Supreme Court renders a *judgment* that expressly binds all citizens, that Court alone can revisit its determination. *In re Apportionment Law Senate Joint Resolution No. 1305*, 263 So. 2d 797, 822 (Fla. 1972) ("By classifying the proceeding as one for 'declaratory judgment,' the Florida Constitution contemplates that we retain exclusive state jurisdiction and consider any and all future proceeding related to the validity of the apportionment plan.").

In the case of initiative petitions, however, the Constitution classifies the Court's determination as an "advisory opinion"—not a "declaratory judgment." The Legislature chose, and the voters approved, an advisory process, with full knowledge of the distinction between

[6] In the present case, Plaintiffs do not argue that, as to the issues actually addressed, the advisory opinion was wrongly decided. Plaintiffs raise new issues not addressed in that opinion.

judgments and advisory opinions. *Cf. Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236 (Fla. 1953) ("The difference between a declaratory judgment and a purely advisory opinion is that the former is a binding adjudication of the rights of the parties . . . ." (quoting *Ready v. Safeway Rock Co.*, 24 So. 2d 808, 811 (Fla. 1946) (Brown, J., concurring))). To treat advisory opinions as a barrier to further litigation—and as vesting exclusive jurisdiction in the Florida Supreme Court—is to transform them into final adjudications, contrary to the deliberate choice of the voters.

III. Circuit Court Is An Appropriate Forum for Challenges to Ballot Measures.

Under *Smith*, all legal challenges permissible when the advisory opinion process was created continue to be permissible. Challenges in Circuit Court were permissible, *see Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), and therefore continue to be permissible. The fact that challenges to initiative petitions have not been brought in Circuit Court does not indicate that Circuit Court challenges are no longer viable.

Indeed, challenges to the summaries of other ballot measures are routinely brought in Circuit Court. These cases include challenges to constitutional amendments proposed by the Taxation and Budget Reform Commission under Article XI, Section 6 of the Constitution, *see Fla. Dep't of State v. Slough*, 992 So. 2d 142 (Fla. 2008); *Ford v. Browning*, 992 So. 2d 132 (Fla. 2008); *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618 (Fla. 1992), to amendments proposed by the Legislature under Article XI, Section 1, *see Fla. Hometown Democracy, Inc. v. Cobb*, 953 So. 2d 666 (Fla. 1st DCA 2007); *Sancho v. Smith*, 830 So. 2d 856 (Fla. 1st DCA 2002); *Fla. Ass'n of Realtors, Inc. v. Smith*, 825 So. 2d 532 (Fla. 1st DCA 2002); *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000); and measures that propose to amend county and municipal charters, *see Citizens for Term Limits & Accountability, Inc. v. Lyons*, 995 So. 2d 1051 (Fla. 1st DCA 2008); *Miami-Dade County v. Vill. of Pinecrest*, 994 So. 2d 456 (Fla. 3d DCA 2008); *Elected County Mayor Political*

Comm., Inc. v. Shirk, 989 So. 2d 1267 (Fla. 2d DCA 2008); *Seminole County v. City of Winter Springs*, 935 So. 2d 521 (Fla. 5th DCA 2006); *Harris v. Moore*, 752 So. 2d 1241 (Fla. 4th DCA 2000). There is nothing unusual about challenges to ballot measures in Circuit Court.

It would make little sense to restrict challenges to advisory opinions and mandamus actions in the Supreme Court. One recognized limitation of advisory opinions is that they are "rendered without the benefit of a record or a specific factual scenario." *In re Adv. Opinion to the Gov.*, 509 So. 2d 292, 301 (Fla. 1987). Similarly, mandamus is appropriate in disputes that involve "straightforward legal questions which do not require fact-finding." *Fine v. Firestone*, 448 So. 2d 984, 987 (Fla. 1984); *accord Brown v. Firestone*, 382 So. 2d 654, 671 (Fla. 1980). The Supreme Court is "ill-equipped to handle" cases that require factual determinations, and has historically declined to exercise its discretionary mandamus jurisdiction in cases that present "substantial issues of fact." *Harvard v. Singletary*, 733 So. 2d 1020, 1022 (Fla. 1999).

A Circuit Court, by contrast, "is a trial court." § 26.012(5), Fla. Stat. (2009). It is the appropriate tribunal to hear and decide cases involving discovery, the examination and cross-examination of witnesses, and other factual presentations. No precedent supports the Secretary's position that initiative petitions are uniquely exempt from the fact-finding processes of a Circuit Court, all of which are routinely available in challenges to other ballot measures.[7]

In this case, Plaintiffs and Intervening Plaintiffs have raised questions of fact, and are entitled to present evidence in support of their claims. For example, Plaintiffs have alleged that

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[7] The Florida Constitution, moreover, contains a broad and explicit guarantee of access to the courts. Art. I, § 21, Fla. Const.; *see also Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992), *receded from on other grounds by AHCA. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996) ("The history of the provision shows the courts' intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes."). It would ill comport with this provision to construe the creation of the advisory opinion process as a bar to traditional, fact-based adjudication in Circuit Courts.

the compactness and political boundary requirements will restrain the ability of the Legislature to draw districts in which minorities will be able to elect representatives of their choice. (Compl., Ct. II.) To support this allegation, Plaintiffs are entitled to present testimony concerning the vital importance of flexible district boundaries to the advancement of minority representation, and the detrimental effect of compactness and political-boundary restrictions on minority interests.

Furthermore, the Florida House has argued that Amendments 5 and 6 will substantially affect Article III, Section 16(c) of the Florida Constitution, which requires the Supreme Court to determine the validity of redistricting plans in thirty days. It is entitled to prove the complexity of the standards imposed by Amendments 5 and 6 and the practical impossibility of determining compliance with those standards within the existing constitutional timeframe. And Plaintiffs have alleged that the new voting rights promised to language minorities are illusory because the Census did not collect the data necessary to effectuate those rights. (Compl., Ct. VIII.) They are entitled to show that, as a factual matter, the summary makes promises that cannot be fulfilled.

IV. The Secretary's Position Is Founded on Misinterpretations of Precedent.

The Secretary's chief argument hinges on the Supreme Court's perfunctory notation of "exclusive jurisdiction" in two of the scores of advisory opinions it has issued. But these are only statements of the obvious: the Supreme Court has exclusive jurisdiction to render advisory opinions under Article V, Section 3(b)(10), Florida Constitution, just as it has exclusive authority to render advisory opinions to the Governor. *See, e.g., McMullen v. Bennis*, 20 So. 3d 890, 892 (Fla. 3d DCA 2009); *Schwarz v. Nourse*, 390 So. 2d 389, 392 (Fla. 4th DCA 1980).

The Secretary repeatedly states that the Supreme Court has exclusive jurisdiction over "pre-election" challenges to initiative petitions, with the implication that this very action might be brought in Circuit Court after the election. (Motion to Dismiss at 1, 6, 8, 10.) There is no

principled basis for the distinction. If the Secretary means to suggest that review at this stage is not ripe, the suggestion is contradicted by long-standing precedent holding that challenges which aim to invalidate ballot measures in their entirety are appropriately brought *before* the election. *See Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 514-15 (Fla. 1958).

The Secretary seizes on the phrase "extraordinary cases" in *Smith*, but this standard is not relevant to Circuit Court challenges. Rather, it regulates the Supreme Court's exercise of *discretionary* jurisdiction in mandamus proceedings. *Smith* explained that the Supreme Court will "almost always . . . refus[e] to exercise its discretionary jurisdiction" in a mandamus action unless vital issues were not addressed in the earlier advisory opinion, or other "extraordinary" circumstances exist. 607 So. 2d at 399. This standard guides *that* Court's decision to accept or decline jurisdiction, but is irrelevant to a Circuit Court, the jurisdiction of which is mandatory.[8]

Even if this standard were applicable, it would be satisfied here. None of the claims raised in this litigation was addressed in the advisory opinion. Thus, the advisory opinion did not

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[8] *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), confirms this position, and is consistent with *Smith*. In *Advisory Opinion to the Attorney General–Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225 (Fla. 1991) ("*Limited Political Terms*"), the Court approved a proposed amendment to impose term limits on certain public offices, including members of the Florida Legislature and Congress. Two Justices dissented, arguing that the inclusion of federal offices violated the United States Constitution, which prescribes the exclusive qualifications of members of Congress. *Id.* at 229-31 (Overton, J., dissenting). They opined that the inclusion of state and federal offices in the same proposal violated the single-subject requirement. *Id.* at 231.

Voters approved the amendment in 1992. Three years later, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), the Court invalidated Arkansas' attempt to impose term limits on members of Congress. As a result, in *Ray*, candidates for state office argued in Circuit Court that the entire amendment must be stricken because the unconstitutional provisions—those applicable to federal offices—were not severable. 742 So. 2d at 1280. On appeal, *amici curiae* argued, for the first time, that the Court should revisit its single-subject determination, and adopt the position urged by the dissent in *Limited Political Terms*. *Id.* at 1284. The *amici* raised no arguments not previously addressed in the earlier advisory opinion, *see* Brief of Amici Curiae James T. Hargrett and George G. Kirkpatrick, *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999) (*available at* 1999 WL 33626707), and the Court properly declined to revisit its earlier decision on the *identical* issue.

consider that the ballot summaries promise racial minorities an "*equal* opportunity . . . to elect representatives of their choice"—while the amendments ensure only that the ability of minorities to elect representatives of their choice will not be *diminished.* A promise of equality, where the amendments prohibit a bare deterioration of the status quo, is an intolerable mischaracterization.

Thus, unless new arguments are presented or other extraordinary circumstances exist, the Supreme Court will decline to exercise its discretionary jurisdiction to reconsider an advisory opinion. This case, however, is a different cause of action—and a different proceeding. It is not part of the advisory proceeding, or even a mandamus action in the Supreme Court. It is an action for declaratory and injunctive relief, and involves new and critical factual issues not discussed in the Supreme Court's advisory opinion. There is no jurisdictional obstacle to this challenge.[9]

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[9] The Governor's brief is nothing more than political rhetoric. While in this case the Governor bewails the "unacceptable obstacles to the people's right to shape their government's defining document," the Governor has filed a similar brief in opposition to Amendment 7, urging the Court to remove it from the ballot, *without* a vote of the "people." *See Fla. State Conference of NAACP Branches v. Dep't of State,* Case No. 2010-CA-1803 (Fla. 2d Cir. Ct.). Of course, the true question is whether ballot summaries of the proposed amendments mislead the public:

> The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. . . . [A]n accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.

In re Adv. Opinion to the Att'y Gen. re Add'l Homestead Tax Exemption, 880 So. 2d 646, 653-54 (Fla. 2004). The purpose of accurate ballot language is "to ensure that each voter will cast a ballot based on the *full* truth. To function effectively—and remain viable—a constitutional democracy must require no less." *Armstrong,* 773 So. 2d at 21 (emphasis in original).

Conclusion

The Secretary points to no provision in the Constitution or Florida Statutes which, in express terms, denies Circuit Courts jurisdiction over challenges to initiative petitions. Further, the Secretary cannot avoid the Supreme Court's express determination that all legal challenges to initiative petitions available before creation of the advisory opinion process in 1986 continue to be permissible. This Court, therefore, has jurisdiction. And, as a trial court, it is the appropriate tribunal to receive evidence and find those facts which Plaintiffs and Intervening Plaintiffs seek to present. This action must proceed to the merits.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES'
RESPONSE TO SUPPLEMENT TO MOTION TO DISMISS

Intervening Plaintiff, Florida House of Representatives, responds to the Supplement to Motion to Dismiss filed yesterday by Defendants Bob Graham and FairDistrictsFlorida.org, Inc.

1. In their Supplement, Defendants continue to treat *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992), as controlling—which it is. But Defendants maintain that arguments not addressed in the Supreme Court's advisory opinion are forever barred. (Supp. at 4-5.) They are not. Defendants' new argument—which does not relate to jurisdiction at all—relies on a misreading of *Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Land Use Plans*, 938 So. 2d 501 (Fla. 2006).

2. In *Advisory Opinion to the Attorney General re Referenda Requested for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 902 So. 2d 763 (Fla. 2005), the Court concluded that the first sentence of the ballot summary of a proposed amendment was misleading. In reliance on the Court's opinion, the sponsor rewrote the ballot summary, deleting the first sentence in its entirety, and then circulated the corrected petition.

3. When the corrected petition was presented to the Court for advisory review, its opponents again attacked it as misleading. *Adv. Opinion to the Att'y Gen. re Referenda Required for Adoption & Amend. of Local Gov't Land Use Plans*, 938 So. 2d 501 (Fla. 2006) ("*Land Use Plans*"). The Court recognized that the advisory process "is not a true adversarial proceeding," but, by analogy, used *res judicata* and the law-of-the-case doctrine to discourage the litigation of new issues ***after*** the sponsor had corrected a deficiency in reliance on an advisory opinion. *Id.* at 505. Nevertheless, the Court then proceeded to address each of the opponents' arguments on the merits, *see id.* at 505-06, and to hold that the corrected summary is not misleading, *id.* at 506.

4. *Land Use Plans* has nothing to do with this Court's jurisdiction. It reflects the Supreme Court's management of its own advisory proceeding—and its reluctance to consider arguments directed to an initiative petition specifically revised and corrected by the sponsor in reliance on an earlier opinion of the Court. Further, even under the unique circumstances of the case, the Court proceeded to address those arguments on their merits and hold that the summary complied with the accuracy requirement of Section 101.161(1), Florida Statutes. The Court's discussion of *res judicata* and law of the case was unessential to its holding and therefore *dictum*.

5. *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992), remains the law, as Defendants recognize. *Land Use Plans* does not mention—much less overrule—*Smith*. Indeed, the Supreme Court "does not intentionally overrule itself *sub silentio*." *Puryear v. State*, 810 So.

2d 901, 905 (Fla. 2002). Thus, "[w]here a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding." *Id.*; *accord Puryear v. State*, 774 So. 2d 846, 853-54 (Fla. 4th DCA 2000) (Farmer, J., dissenting) (approved by the Supreme Court in *Puryear*, 810 So. 2d at 903).

6. *Land Use Plans*, therefore, does not silently overrule decades of Supreme Court precedent holding that advisory opinions are not binding and may even be shown in subsequent litigation to have been "wrongly decided." *See In re Adv. Opinion to the Governor*, 509 So. 2d 292, 302 (Fla. 1987); *accord Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 n.3 (Fla. 1992).

WHEREFORE, Intervening Plaintiff, Florida House of Representatives, requests that the Court deny the Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction filed by Defendant, Dawn K. Roberts, and the Motions to Dismiss for Lack of Subject Matter Jurisdiction filed by Bob Graham and FairDistrictsFlorida.org, Inc.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, INC., a Florida corporation.

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

PLEASE TAKE NOTICE that at the July 8, 2010 hearing on Defendant Dawn K. Roberts' Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction, Defendant intends to rely upon the following authority not previously cited in her motion to dismiss:

- *Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d 1129 (Fla. 2003) (holding that the Supreme Court has exclusive jurisdiction to review judicial assignments).

Defendant intends to rely on *Pfeifler*, and the authorities cited therein, in regard to the manner in which the Florida Supreme Court determines whether its jurisdiction is exclusive or concurrent with the Florida circuit courts. *Id.* at 1132-34 (citations omitted).

Dated this 7th day of July, 2010.

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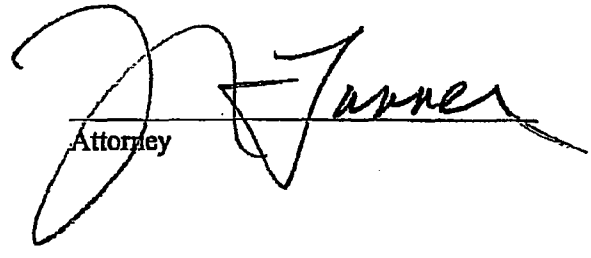

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846 So.2d 1129, 28 Fla. L. Weekly S370
(Cite as: 846 So.2d 1129)

C

Supreme Court of Florida.
PHYSICIANS HEALTHCARE PLANS, INC., et al., Petitioners,
v.
Raymond PFEIFLER, et ux., Respondents.
Kurshid Kahn, M.D., et al., Petitioners,
v.
Raymond Pfeifler, et ux., Respondents.
Nos. SC01-2062, SC01-2079.

May 1, 2003.

Medical malpractice action was brought and set for trial on the senior judges' docket in the circuit court. Defendant physicians filed motion to return the case to the elected circuit judge. The Circuit Court, Seventeenth Judicial Circuit, denied motion. Defendant physicians then petitioned for writ of prohibition. The Supreme Court held that: (1) appointment of nonelected judges as senior judges did not violate suffrage rights; (2) use of senior judge docket amounted to a proper "temporary assignment"; (3) use of senior judges to relieve overcrowding of dockets did not constitute a "division" that had to be created by local rule and approved by the Supreme Court; and (4) eligibility for temporary appointment as a retired judge was not restricted to only those judges who reached retirement age.

Petition denied.

Wells, J., filed concurring opinion.

Lewis, J., filed opinion concurring in part and dissenting in part.

Pariente and Quince, JJ., concurred in result only.

West Headnotes

[1] Courts 106 ⇐472.2

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)1 In General
106k472 Exclusive or Concurrent Jurisdiction
106k472.2 k. Appellate or Supreme Courts. Most Cited Cases
The Supreme Court has exclusive jurisdiction to review judicial assignments. West's F.S.A. Const. Art. 5, § 2(a, b).

[2] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
When a chief judge of a judicial circuit exercises his or her delegated assignment authority, the judge is acting under the Chief Justice's constitutional power to make temporary judicial assignments to ensure the speedy, efficient, and proper administration of justice within the various circuits. West's F.S.A. Const. Art. 5, § 2(a, b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

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846 So.2d 1129, 28 Fla. L. Weekly S370
(Cite as: 846 So.2d 1129)

[3] Courts 106 ⇐472.2

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(A) Courts of Same State
106VII(A)1 In General
106k472 Exclusive or Concurrent Jurisdiction
106k472.2 k. Appellate or Supreme Courts. Most Cited Cases
Because of the vital role temporary judicial assignments play in the administration of the state court system, the Supreme Court must have exclusive jurisdiction to review such assignments under its constitutional authority to oversee the administrative supervision of all courts. West's F.S.A. Const. Art. 5, § 2(a); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[4] Prohibition 314 ⇐17

314 Prohibition
314II Procedure
314k17 k. Presentation of Objections in Original Proceeding. Most Cited Cases
The Supreme Court should not address by writ of prohibition issues relating to judicial assignments that have not been raised to the trial court.

[5] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Constitutional provision specifically granting the Chief Justice power to assign retired justices or judges to temporary duty in any court for which they were qualified, together with the authority to delegate this power to the chief judge of a judicial circuit, permitted appointment of nonelected judges, and thus such appointment was not a violation of suffrage rights. West's F.S.A. Const. Art. 5, §§ 2(b), 10(b).

[6] Constitutional Law 92 ⇐602

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k595 Intrinsic Aids to Construction
92k602 k. In Pari Materia. Most Cited Cases
(Formerly 92k15)
Constitutional provisions must be read in pari materia to form a congruous whole so as not to render any language superfluous.

[7] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Use of senior judge docket in one circuit amounted to a "temporary assignment," and not an improper permanent assignment in violation of Chief Justice's constitutional authority to assign retired judges to temporary duty, even if some senior judge assignments were successive, where assignment records and docket records indicated that cases were assigned to senior judges primar-

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ily to relieve overcrowded and backlogged calendars in both the civil and criminal court dockets or because a case was likely to be one of long duration, and not all long-duration trials were transferred to senior judge docket. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[8] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
A county judge cannot be assigned to perform solely circuit court work, and vice versa, unless the assignment is for a relatively short time. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[9] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
A judge may be assigned to hear other court work on a temporary, regular basis as long as the assignment is directed to a specified class of cases, is used to maximize the efficient administration of justice, and supplements and assists the judges in the other court rather than replaces them. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[10] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
In determining whether a judicial assignment is a "temporary assignment," the Supreme Court considers more than the duration of the individual assignment; the successive nature of the assignment, the type of case covered by the assignment, and the practical effect of the assignment on the court's jurisdiction over a particular type of case also must be considered. West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[11] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Successive and repetitive judicial assignments of nonelected judges, which might be valid if considered individually, are not temporary where the practical effect is to create a de facto permanent circuit judge by administrative order. West's F.S.A. R.Jud.Admin.Rule 2.050(b)(4).

[12] Courts 106 ⇐50

106 Courts
106II Establishment, Organization, and Procedure

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106II(A) Creation and Constitution
106k50 k. Divisions and Parts of Courts. Most Cited Cases

Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
Use of senior judges to relieve overcrowding of the civil and criminal dockets in a judicial circuit by assigning them to cases of long duration did not constitute a complex case "division" that had to be created by local rule and approved by the Supreme Court, but could be created by administrative order of the chief judge of the circuit court. West's F.S.A. Const. Art. 5, § 7; West's F.S.A. § 43.30; West's F.S.A. R.Jud.Admin.Rule 2.050.

[13] Courts 106 ⇐50

106 Courts
106II Establishment, Organization, and Procedure
106II(A) Creation and Constitution
106k50 k. Divisions and Parts of Courts. Most Cited Cases
A special court division may not be created by means of the temporary appointment power of the Chief Justice which is delegated to the chief judges of the circuit courts. West's F.S.A. Const. Art. 5, §§ 2(b), 7.

[14] Courts 106 ⇐81

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k81 k. Making and Promulgation of Rules. Most Cited Cases
Unlike local court rules, administrative orders of a chief judge of a judicial circuit generally do not have to be approved by the Supreme Court. West's F.S.A. Const. Art. 5, § 7; West's F.S.A. § 43.30; West's F.S.A. R.Jud.Admin.Rule 2.050.

[15] Judges 227 ⇐16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
A senior judge may be assigned temporarily to serve in a circuit other than the one in which he or she resides. West's F.S.A. Const. Art. 5, § 8.

[16] Judges 227 ⇐16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
The accountability for senior judges rests with the Chief Justice rather than the voters of a particular circuit or district; because the Chief Justice's authority and responsibility extend throughout the state, the Chief Justice can assign a senior judge to duty without limitation to the jurisdiction of the senior judge's prior service. West's F.S.A. Const. Art. 5, § 8.

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[17] Courts 106 ⇐70

106 Courts
106II Establishment, Organization, and Procedure
106II(E) Places and Times of Holding Court
106k70 k. Designation or Assignment of Judges. Most Cited Cases
As the administrative officer of all courts within a judicial circuit, the chief judge is best equipped to assess the needs of each trial court and to allocate the judicial labor available within the circuit accordingly. West's F.S.A. R.Jud.Admin.Rule 2.050(b)(3).

[18] Judges 227 ⇐16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
Eligibility for temporary appointment as a "retired judge" was not restricted to only those judges who reached retirement age. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. § 25.073(1); West's F.S.A. R.Jud.Admin.Rule 2.030(a)(3)(B).

[19] Judges 227 ⇐16(2)

227 Judges
227II Special or Substitute Judges
227k16 Appointment, Qualification, and Tenure
227k16(2) k. Qualification. Most Cited Cases
Under both the Rules of Judicial Administration and statutory definition of a retired judge, there are only two restrictions on the eligibility of retired judges who may be assigned to temporary judicial duty: they may not be engaged in the practice of law; and they may not have been defeated for reelection or retention in their last judicial office. West's F.S.A. Const. Art. 5, § 2(b); West's F.S.A. § 25.073(1); West's F.S.A. R.Jud.Admin.Rule 2.030(a)(3)(B).

[20] Judges 227 ⇐15(1)

227 Judges
227II Special or Substitute Judges
227k15 Necessity and Grounds for Appointment
227k15(1) k. In General. Most Cited Cases
The express language of the constitutional provision that gives the Chief Justice the power to appoint temporary judges does not restrict the power to emergencies. West's F.S.A. Const. Art. 5, § 2(b).

***1131** Louise H. McMurray and Douglas M. McIntosh of McIntosh, Sawran, Peltz & Cartaya, Miami, FL, on behalf of Physicians Healthcare Plans, Inc.; F. Bryant Blevins of Marlow, Connell, Valerius, Abrams, Adler & Newman, Miami, FL, on behalf of Ronald S. Gup, M.A., etc.; Kevin P. O'Connor of O'Connor, Chimpoulis, Restani, Marreo & McAllister, P.A., Coral Gables, FL, on behalf of Ralph Greenwasser, Jr., D.O.; and Nancy W. Gregoire and Michael J. Rotundo of Bunnell, Woulfe, Kirschbaum, Keller, McIntyre & Gregoire, P.A., Fort Lauderdale, FL, on behalf of Khurshid Khan, M.D., et al., Petitioners.

Gary M. Farmer, Jr. of Gillespie, Goldman, Kronengold & Farmer, P.A., Fort ***1132** Lauderdale, FL; Charles J. Crist, Jr., Attorney General, and Charles M. Fahlbusch, As-

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sistant Attorney General, Fort Lauderdale, FL; and Michael S. Freedland of The Law Offices of Freedland & Glassman, Weston, FL, for Respondents.

PER CURIAM.

Physicians Healthcare Plans, Inc., Dr. Kurshid Kahn, and others petition this Court for a writ of prohibition. We have jurisdiction. *See* art. V, § 3(b)(7), Fla. Const.

The instant case arose from a 1998 medical malpractice action by Raymond and Cynthia Pfeifler against Physicians Healthcare Plans, Inc. (Physicians), Dr. Kurshid Kahn (Kahn), and others, which was set for trial on the senior judges' docket in the Seventeenth Judicial Circuit. In July 2000, the codefendants filed a motion in circuit court to return the case to the elected circuit judge, arguing that the assignment to a senior judge violated both this Court's general guidelines and procedures for the assignment of senior judges and the Florida Constitution. The circuit court heard argument in November 2000, denied the motion, but certified the issue as being of great public importance and invited the codefendants to seek a writ of prohibition to resolve the issues presented.

Petitioners Physicians and Kahn have filed two separate petitions for writs of prohibition with this Court. Both petitions raise a number of challenges to the senior judges' docket in the Seventeenth Judicial Circuit and ask this Court to prohibit the assignment of senior judges to preside over "long trial" medical malpractice and other "complex litigation" cases.[FN1] We have consolidated the cases as they present the same issues for the Court's resolution.

FN1. In our recent review of the Report and Recommendations of the Committee On Appointment and Assignment of Senior Judges, "we acknowledge [d] the reality of problems in isolated cases with senior judges presiding over complex and lengthy trials" and urged chief judges "to respond directly to concerns expressed when such problems are presented to them." *In re Report & Recommendations of the Comm. on Appointment & Assignment of Senior Judges*, op. at 15, 847 So.2d 415, 422, 2003 WL 1987980 (Fla. May 1, 2003). Despite such problems, we declined to adopt "either a per se prohibition on the assignment of senior judges to complex cases or a requirement that chief judges be required to show a good cause for such assignments," recognizing that "[c]hief judges must be afforded deference and latitude in the management of judicial assignments and dockets." *Id.* at 15-16, at 422. Finally, we reminded the chief judges of their duty to "select senior judges with the proper skills and experience to preside over complex cases when such assignments are necessary" and their responsibility to "periodically review[ ] the progress of *all* cases assigned to senior judges to ensure expeditious and proper handling." *Id.* at 16, at 422.

Before considering the challenges raised in the petitions, we find it necessary to explain the background relating to the assignment of senior judges. For the purposes of judicial administration, a "retired judge" is defined as a judge not engaged in the practice of law

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who has been a judicial officer of this state. *See* Fla. R. Jud. Admin. 2.030(a)(3)(B). Section 25.073(1), Florida Statutes (2001), also specifies that a retired judge may not have been defeated in seeking reelection or retention to his or her last judicial office. In 1990, Florida Rule of Judicial Administration 2.030(a)(3) was amended to provide that a retired judge serving on assignment to temporary judicial duty may be referred to by the honorary designation "senior judge." This designation had no effect on the responsibilities or conduct of the retired judge. *See In re Amendment to Rules of Judicial Admin.*, 560 So.2d 786, 787 (Fla.1990).

***1133** [1][2][3] This Court has exclusive jurisdiction to review judicial assignments based upon article V, section 2(a)-(b) of the Florida Constitution. Article V, section 2(a) gives this Court authority to adopt rules for the administrative supervision of all courts. Article V, section 2(b) gives the chief justice of this Court, as the chief administrative officer of the judicial system, "the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in that circuit." Florida Rule of Judicial Administration 2.050(b)(4) delegates the chief justice's assignment power to the chief judges of the judicial circuits to "assign any judge to temporary service for which the judge is qualified in any court in the same circuit." "When a chief judge exercises this delegated assignment authority, the judge is acting under the Chief Justice's constitutional power to make temporary judicial assignments to ensure the speedy, efficient, and proper administration of justice within the various circuits." *Wild v. Dozier*, 672 So.2d 16, 18 (Fla.1996). Because of the vital role temporary judicial assignments play in the administration of our court system, this Court must have exclusive jurisdiction to review such assignments under its article V, section 2(a) authority to oversee the administrative supervision of all courts. *See id.*

This Court has long recognized the necessity of assigning retired judges and justices to judicial service in Florida courts. *See In re Assignments of Justices & Judges*, 222 So.2d 22 (Fla.1969). As we have explained, "unless retired justices and judges are assigned to ... other courts, long delays in the discharge of case loads of some of the trial courts will result." *Id.* at 23. Thus, retired judges have provided valuable service to Florida's judicial system for many years by assisting with increased caseloads and providing relief to active judges when they are ill or disqualified. *See In re Rules Governing Assignment to Duty of Retired Justices & Judges*, 239 So.2d 254 (Fla.1970). "Were it not for the availability of this resource, the delays in scheduling hearings and trials ... would be much greater." *In re Certification of Judicial Manpower*, 592 So.2d 241, 246 (Fla.1992). Furthermore, "[t]he use of retired judges is the most cost effective and flexible program we have to address calendaring problems and emergencies as they arise." *In re Certification of Judicial Manpower*, 576 So.2d 1303, 1307 (Fla.1991). We have repeatedly noted that the services of retired judges "are available at much less expense than full-time judges." *In re Certification of Need for Additional Judges*, 669 So.2d 1037, 1039 (Fla.1996). Senior judges currently perform the work of approximately thirty-five full-time judges, at a cost of about $2.9 million, a small fraction of the cost of

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that number of full-time judges. *See* Comm. On Appointment and Assignment of Senior Judges, *Report and Recommendations of the Committee On Appointment and Assignment of Senior Judges,* 4 (Feb. 22, 2002) (on file with Clerk, Fla. Sup. Ct.).

[4] It is against this background that we address the petitioners' challenges to the assignment of senior judges. The petitioners claim that the use of senior judges violates the suffrage rights of voters; the assignment of cases to the senior judges' docket in the Seventeenth Judicial Circuit constitutes an improper permanent assignment and violates the constitutional prohibition against the creation of special court divisions; the assignment of a retired judge who resides in another judicial circuit violates the constitutional judicial *1134 qualifications; the assignment of complex cases to the senior judge docket results in delay which constitutes an unconstitutional restraint on access to courts; judges younger than seventy years of age and those who are not eligible for retirement benefits under the state retirement system do not meet the constitutional definition of a retired judge; and senior judges may not be appointed for matters of convenience. [FN2]

> FN2. The Kahn petition makes two challenges that were not raised below: the time standards for civil litigation are violated by the use of senior judges and the intent of the Medical Malpractice Reform Act is similarly violated. This Court should not address issues relating to judicial assignments that have not been raised to the trial court. *See Wild.* Accordingly, we decline to address these challenges.

[5][6] The petitioners argue that the use of senior judges violates their suffrage rights. *See* Art. V, § 10(b) Fla. Const. (providing for election of circuit court and county court judges unless a majority of the voters in the jurisdiction approve a local option to select judges by merit selection and retention); *id.* § 11(b) (providing that when a vacancy occurs on a circuit or county court where the judges are elected by the voters the governor shall appoint a judge to fill the vacancy but an election shall be held to fill the judicial office at the end of the appointed term). The petitioners contend that voters are being deprived of the right to have their cases tried by judges who are accountable to the public because senior judges are not elected to judicial office. However, constitutional provisions must be read in pari materia "to form [a] congruous whole so as not to render any language superfluous." *Department of Envtl. Prot. v. Millender,* 666 So.2d 882, 886 (Fla.1996). The Florida Constitution specifically grants the chief justice power to assign retired justices or judges to temporary duty in any court for which they are qualified and the authority to delegate this power to the chief judge of a judicial circuit. *See* art. V, § 2(b), Fla. Const. Thus, where appointments fall within the parameters outlined in this provision, the Florida Constitution obviously permits appointment of nonelected judges and does not consider this to be a violation of suffrage rights.

[7][8][9] Next the petitioners contend that the use of senior judges in the Seventeenth Judicial Circuit constitutes an improper permanent assignment, which violates the chief justice's constitutional authority to assign retired judges to "temporary duty." Art. V, § 2(b). Based upon our previous cases,

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we can glean some basic constitutional parameters relating to the temporal nature of judicial assignments. A county judge cannot be assigned to perform solely circuit court work, and vice versa, unless the assignment is for a relatively short time. *See* Payret v. Adams, 500 So.2d 136 (Fla.1986); Crusoe v. Rowls, 472 So.2d 1163 (Fla.1985). However, a judge may be assigned to hear other court work on a temporary, regular basis as long as the assignment is directed to a specified class of cases, is used to maximize the efficient administration of justice, and supplements and assists the judges in the other court rather than replaces them. *See* Holsman v. Cohen, 667 So.2d 769 (Fla.1996); *Wild; Crusoe.*

[10][11] In determining whether a judicial assignment is a temporary assignment under Florida Rule of Judicial Administration 2.050(b)(4), this Court considers more than the *duration* of the individual assignment. The successive nature of the assignment, the type of case covered by the assignment, and the practical effect of the assignment on the court's jurisdiction over a particular type of case also must be considered. *See Wild.* At one end of the ***1135** spectrum, this Court has concluded that successive assignments totaling more than two years may be considered temporary where the class of cases covered by the assignment is limited and the practical effect is to assist the judges rather than usurp the court's jurisdiction over a particular type of case. *See Crusoe.* However, successive and repetitive assignments which might be valid if considered individually are not temporary where the practical effect is to create a de facto permanent circuit judge by administrative order. *See Payret.*

The petitioners have not challenged specific successive senior judge assignments, but instead make a blanket claim that the senior judge docket in the Seventeenth Judicial Circuit is not a temporary assignment. However, even assuming that some of the senior judge assignments have been successive, this Court has approved other successive judicial assignments. *See Wild* (approving successive six-month assignments spanning four years of county judge to preside in circuit court over half of all felony cases in a county); Rivkind v. Patterson, 672 So.2d 819, 820-21 (Fla.1996) (approving successive monthly assignments spanning several years as "a logical and lawful means to ensure the expeditious and efficient resolution of domestic violence issues in the Eleventh Circuit"); J.G. v. Holtzendorf, 669 So.2d 1043 (Fla.1996)(approving successive six-month assignments of county judge to hear most, though not all, of the juvenile cases in the county and a few other circuit court actions over the course of five years); *Holsman* (approving successive monthly assignments spanning several years of circuit court judge to handle a limited number of county court domestic violence misdemeanors in special domestic violence court); *but see Payret.* (disapproving successive one-year assignments of county court judge assigned to hear all circuit court matters in special jury district of Fifteenth Judicial Circuit over five years).

Under *Wild,* however, the successive nature of the assignment is only one of three factors to be considered in determining whether an assignment is temporary. The type of case covered by the assignment and the practical effect of the assignment on circuit court jurisdiction over a particular type of case must also be considered. *See* Wild, 672 So.2d at 19. In the instant case, there is a factual dis-

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pute over the type of cases handled by the senior judge docket. The petitioners contend that the senior judge docket handles only complex, long-duration cases. The respondents counter that the records of the senior judge docket show that a wide range of circuit court cases and matters are being handled by senior judges. In fact, the circuit court's assignment records indicate that cases are assigned to senior judges primarily because of overcrowded and backlogged calendars in both the civil and criminal court dockets or because the case is likely to be one of long duration. The docket records of the elected judges also indicate that not *all* long-duration trials are transferred to the senior judge docket. Senior judge utilization statistics reflect senior judge assignments in each division of the Seventeenth Judicial Circuit, and far more in the criminal division than in any other. Further, as noted in the procedures for assignment of senior judges issued by this Court and the forms for senior judge assignments, we conclude that the senior judge assignments in the Seventeenth Judicial Circuit are compatible with the instructions and the guidance of this Court.

As to the final *Wild* factor of the practical effect of the assignment on circuit court jurisdiction, the senior judge assignments here are used to maximize the efficient administration of justice and have ***1136** the practical effect of supplementing and assisting the circuit court judges rather than usurping the judges' jurisdiction over a particular type of case. Under these criteria, we conclude the senior judge assignments are temporary and thus do not violate the constitutional parameters of article V, section 2(b).

[12][13] Unlike the judicial assignment cases cited above, the petitioners here challenge more than the temporal nature of the senior judge assignments. The petitioners also contend that the senior judge docket is a de facto complex case division which cannot be established by administrative order, but must be established through a local rule which is approved by this Court.[FN3] The petitioners note that the administrative judge who handles requests for transfer to the senior judge docket in the Seventeenth Judicial Circuit has described the docket as "our complex litigation division," handling "cases that take more than three weeks to try."

FN3. Article V, section 7 of the Florida Constitution provides that "[a]ll courts except the supreme court may sit in divisions as may be established by general law." Section 43.30, Florida Statutes (2001), provides that divisions may be created by a local rule which is approved by this Court. Thus, a special division may not be created by means of the temporary appointment power of the chief justice which is delegated to the chief judges of the circuit courts.

[14] Pursuant to Florida Rule of Judicial Administration 2.050(b), chief judges of the circuit courts issue administrative orders to coordinate administrative matters within their jurisdiction. Unlike local rules, administrative orders generally do not have to be approved by this Court. As explained in *In re Report of Commission on Family Courts*, 646 So.2d 178, 181 (Fla.1994), divisions of Florida courts are to be established through local rules approved by this Court. *See also* art. V, § 7, Fla. Const.; § 43.30, Fla. Stat. (2001). Under the provisions of rule 2.050, local rules must be approved by a majority

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of the judges in a circuit, must be noticed and advertised, and must be approved by this Court.

Thus, if the senior judge docket is deemed a "division" it would need to be created by local rule and approved by this Court. However, this Court has approved the creation of a drug "division" of the criminal court created by administrative order in the Thirteenth Judicial Circuit. *See* *Mann v. Chief Judge of the Thirteenth Judicial Circuit*, 696 So.2d 1184 (Fla.1997). As this Court explained, despite its characterization as a division, the drug court was "more properly viewed as a specialized section or subdivision of the criminal division of the circuit court." *Id.* at 1185. In *Mann*, we cited our previous opinion in *Administrative Order Fourth Judicial Circuit (Division of Courts)*, 378 So.2d 286, 286 (Fla.1979), for the proposition that the Florida Constitution "only requires the establishment of subject matter divisions, i.e., criminal, civil, juvenile, probate, and traffic." Accordingly, we concluded that the drug court division at issue in *Mann* was properly created by administrative order. 696 So.2d at 1185. We further noted that it would place "too great a burden upon the efficient administration of justice ... [t]o require every specialized section of the major subject-matter divisions of a court to be approved by local rule." *Id.*

In light of our reasoning in *Mann* and the senior judge utilization statistics for the circuit, we conclude that the use of senior judges to relieve overcrowding of the civil and criminal dockets in the Seventeenth Judicial Circuit does not constitute a complex case division that requires approval*1137 by local rule. Thus, the senior judge assignments are proper via administrative order of the chief judge.

[15][16] Next the petitioners argue that the assignment of a retired judge who resides in a different judicial circuit violates the constitutional eligibility requirements of article V, section 8 of the Florida Constitution. This section provides in pertinent part that "[n]o person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court." Despite this seeming constitutional restriction, this Court has ruled that a circuit judge may be assigned temporarily to serve in a circuit other than the one in which he or she was elected. *See* *Card v. State*, 497 So.2d 1169 (Fla.1986); *see also* *Judges of Polk County Court v. Ernst*, 615 So.2d 276 (Fla. 2d DCA 1993) (concluding that a county judge may be temporarily assigned to serve outside the county where elected). Based upon these cases, we find no impediment to a similar temporary assignment of a senior judge. Further, as we explained in *In re Report & Recommendations of the Committee on Appointment & Assignment of Senior Judges*, 847 So.2d 415, 2003 WL 1987980 (Fla. May 1, 2003), "the accountability for senior judges rests with the chief justice rather than the voters of a particular circuit or district. Because the chief justice's authority and responsibility extend throughout the state, the chief justice can assign a senior judge to duty without limitation to the jurisdiction of the senior judge's prior service." op. at 423. Thus, we find no merit to this challenge.

[17] The petitioners argue that the assignment of complex cases to the senior judge docket results in delay which constitutes an unconstitutional restraint on access to courts. *See* art. I, § 21, Fla. Const. ("The courts

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shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay."). However, most of the petitioners' delay arguments seem to be addressed to the crowded civil docket and the resulting delay of civil litigation in general. The petitioners have made no convincing arguments that these cases would be resolved any more quickly if they remained on the regular civil docket. Statistics indicate that the Seventeenth Judicial Circuit is very efficient in its management and administration of judges and the conduct of its jury trials. It is counterintuitive to assume judicial efficiency would improve if we reduced the number of judges handling cases in the circuit by eliminating the use of senior judges. As noted above, senior judges currently perform the work of approximately thirty-five full-time judges statewide. Our judicial system would be severely hamstrung without these services. *See, e.g., In re Certification of Judicial Manpower*, 592 So.2d 241, 246 (Fla.1992) ("Florida trial courts have continued to address workload pressures by relying heavily on the temporary assignment of senior judges."). We would all like to see cases disposed of expeditiously. However, limited judicial resources and burgeoning court dockets require that the chief judges retain the freedom to manage the resources for "the efficient and proper administration of all courts within [the] circuit." Fla. R. Jud. Admin. 2.050(b)(3). "[A]s the administrative officer of all courts within a judicial circuit, the chief judge is best equipped to assess the needs of each trial court and to allocate the judicial labor available within the circuit accordingly." *Wild*, 672 So.2d at 17-18 (footnote omitted).

[18] The petitioners make two challenges relating to the definition of a "retired judge." First, they argue that only ***1138** those judges who have reached the constitutional age of retirement, seventy years of age, meet the definition of a retired judge who may be temporarily appointed to judicial service under article V, section 2(b). The petitioners rely upon the judicial eligibility provision in article V, section 8 of the Florida Constitution, which provides, in pertinent part, that "[n]o justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served." The petitioners contend that when the mandatory retirement provision in article V, section 8 is read in pari materia with the judicial appointment power in article V, section 2(b), we must conclude that only those judges who have reached retirement age are eligible for temporary appointment. Second, the petitioners contend that only those judges who are eligible for retirement benefits under the state retirement system qualify as retired judges who may be temporarily appointed to judicial service under article V, section 2(b). Thus, the petitioners argue, persons who have resigned from judicial office or have chosen not to seek reelection to judicial office are not qualified for appointment as senior judges. The petitioners argue that these eligibility restrictions on the appointment of senior judges diminish the intrusion on the constitutional right to suffrage as the judges who have performed the required years of judicial service have withstood the challenge of election and reelection and have a demonstrated history of support by their electors.

[19] We are not persuaded by either argument. The Florida Constitution gives the chief justice authority to assign "retired justices or judges" to temporary duty. Art. V, §

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2(b), Fla. Const. For the purpose of judicial administration, a retired judge is defined as "a judge not engaged in the practice of law who has been a judicial officer of this state." Fla. R. Jud. Admin. 2.030(a)(3)(B). Florida Statutes also define a retired judge as "*any* former justice or judge" who has not been defeated in seeking reelection or retention in his or her last judicial office and is not engaged in the practice of law. *See* § 25.073(1), Fla. Stat. (2001) (emphasis added). Thus, under both the Rules of Judicial Administration and the Florida Statutes there are only two restrictions on the eligibility of retired judges who may be assigned to temporary judicial duty: they may not be engaged in the practice of law; and they may not have been defeated for reelection or retention in their last judicial office.

In our recent review of the Report and Recommendations of the Committee on the Appointment and Assignment of Senior Judges, we concluded that "deference to the constitutional electoral process dictate[s]" that "judges or justices who fail to win reelection or retention in their last judicial position are not eligible for senior judge service." *In re Report & Recommendations of the Committee on Appointment & Assignment of Senior Judges*, op. at 6, 847 So.2d 415, 418, 2003 WL 1987980 (Fla. May 1, 2003). However, the same concerns do not attend the temporary assignment of qualified and competent judges who have chosen to resign from judicial office before reaching the constitutional age of retirement or who are not yet eligible for retirement benefits under the state retirement system. Thus, we find no merit to the definition challenges raised by the petitioners.

Finally, the petitioners argue that senior judges may not be appointed for matters of convenience and instead all senior judge appointments must be measured by an "emergency of public business" standard. The petitioners cite our opinion in *Spector v. Glisson*, 305 So.2d 777 (Fla.1974), to ***1139** support the "emergency of public business" standard. *Spector* involved the question of whether a Supreme Court justice's resignation tendered for a future date created a current vacancy that should be filled during an upcoming general election. In concluding that a present vacancy had been created and that the vacancy could be filled in the upcoming election,[FN4] this Court stated:

> FN4. At the time of our decision in *Spector*, appellate judges and Supreme Court justices were subject to election by the voters. In November 1976, Florida voters approved an amendment whereby appellate judges and justices are subject to merit selection and retention. *See* art. V, § 10(a), Fla. Const.

> It has been said that the only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business and that when an elective office is made vacant the policy of the law is to give the people a chance to fill it as soon as possible.
> *Id.* at 781 (quoting 63 Am.Jur.2d, *Public Officers and Employees* § 128). When considered in its proper context, this opinion neither addressed the chief justice's constitutional power to assign judges to temporary duty nor created an "emergency of public business" before that power could be exercised.

[20] The express language of the constitu-

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tional provision which gives the chief justice the power to appoint judges does not restrict the power to "emergencies." Indeed, this Court has consistently measured the power to make temporary assignments by a standard of flexibility and efficiency. *See, e.g., Rivkind*, 672 So.2d at 820-21 ("We find that the judicial assignments at issue constitute a logical and lawful means to ensure the *expeditious and efficient* resolution of domestic violence issues in the Eleventh Circuit.") (emphasis added); *Wild*, 672 So.2d at 18 ("When a chief judge exercises this delegated assignment authority, the judge is acting under the Chief Justice's constitutional power to make temporary judicial assignments *to ensure the speedy, efficient, and proper administration of justice* within the various circuits.") (emphasis added); *Holsman*, 667 So.2d at 772 ("The assignment ... is used to maximize the efficient administration of justice...."); *Crusoe*, 472 So.2d at 1165 ("Flexibility must be given the chief judge to utilize effectively judicial manpower in the mutual assistance of each trial court."). Thus, we conclude that an assignment which meets the constitutional requirement of "temporary duty" need not be based on an emergency of public business.

For the reasons discussed above, we conclude that the assignment of cases to the senior judge docket in the Seventeenth Judicial Circuit is constitutional and in accord with applicable law. Thus, we deny the petitions for writ of prohibition, lift the stay on further proceedings below, and remand this cause to the Seventeenth Judicial Circuit.

It is so ordered.

ANSTEAD, C.J., WELLS, J., and SHAW and HARDING, Senior Justices, concur.

WELLS, J., concurs with an opinion.
LEWIS, J., concurs in part and dissents in part with an opinion.
PARIENTE and QUINCE, JJ., concur in result only. WELLS, J., concurring.
I concur with the majority's decision.

I write to express my view, however, that it is clearly necessary to the proper administration of justice in our trial courts for the chief judge and trial counsel in each circuit to have an ongoing meaningful ***1140** discussion about the type of problems which have been raised in these proceedings and before our Committee on the Appointment and Assignment of Senior Judges. We on this Court are very dependent on the chief judges of the circuits to exercise their discretion in the administration of the circuits because each circuit has different problems which can only be effectively worked upon by those who have daily experience at the local level. The chief judges and their administrative judges benefit from regular and substantive meetings with trial counsel. Many of our chief judges presently do this. However, I believe that there needs to be a regularly working committee in each circuit for this purpose. I urge that in each circuit a bench-bar committee be established and that there be a meeting of this committee at least once every three months. This committee should consist of the chief judge of the circuit, all administrative judges in the circuit, and selected counsel participants who are active trial lawyers in the circuit. I suggest that the counsel participants be either some or all of the circuit's representatives on the Board of Governors of The Florida Bar or their nominees.
LEWIS, J., concurring in part and dissenting in part.
While I agree with the rejection of several

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846 So.2d 1129, 28 Fla. L. Weekly S370
(Cite as: 846 So.2d 1129)

challenges presented here, I write to express my disagreement with the majority's determination that the assignments of senior judges in the Seventeenth Judicial Circuit are indeed "temporary," and that the circuit has not effectively created a special senior division for the purpose of trying complex civil cases.[FN5] I believe that the pattern of assigning such cases in that circuit exceeds the constitutional parameters permitting the assignment of senior judges for temporary service. In approving this *de facto* division, I believe this Court has permitted the concept of temporary assignment-conceived to serve important public interests-to evolve into a constitutionally impermissible broad rule of convenience. Moreover, I believe a separate "complex case" or "senior judges' " docket has been created in violation of this State's constitutionally mandated court structure. Thus, for the reasons articulated herein, I must dissent from the majority's determination that the assignment process in the Seventeenth Judicial Circuit is constitutionally proper.

> FN5. While the problem presented here may be unique to the Seventeenth Judicial Circuit, that fact, standing alone, does not relieve this Court of its responsibility to ensure that the circuit adhere to constitutional constructs governing judicial assignments.

The ability of the Chief Justice of this Court to make temporary judicial assignments is grounded in the need to ensure the speedy, efficient, and proper administration of justice. *See Wild v. Dozier*, 672 So.2d 16, 18 (Fla.1996). Senior judges are a vital part of achieving this important goal. By appointing senior judges, judicial circuits can increase case disposition, address court emergencies, and solve calendar conflicts in a cost-effective manner. However, neither the need for efficiency nor the corresponding ability of senior judges to meet that objective justifies exceeding the constitutional requirement that nonelected judges receive assignment on a temporary basis, only. *See* art. V, § 2(b), Fla. Const. We cannot allow the goal of judicial efficiency, however laudable it may be, to trammel clear and direct constitutional directives. *See Wild*, 672 So.2d at 21 (Kogan, J., concurring in part and dissenting in part).

In reaching its decision, the majority must engage in a "judicial wink" as it considers the true definition of "temporary." As recognized by this Court, "[t]emporary is an antonym for permanent." ***1141** *Crusoe v. Rowls*, 472 So.2d 1163, 1165 (Fla.1985) (internal quotation marks omitted). A temporary assignment, by definition, cannot "usurp, supplant, or effectively deprive circuit court jurisdiction of a particular type of case on a permanent basis." *Id.* Our decision in *Payret v. Adams*, 500 So.2d 136 (Fla.1986), compels us to be wary against circumstances rendering de facto permanency to allegedly temporary assignments. *See id.* at 138 (invalidating an assignment that was successive and repetitive, having been renewed annually for a period of five years). Thus, we must examine the judicial assignment's duration as well as its nature, the type of cases covered, and the practical effect of the assignment on circuit court jurisdiction over a particular type of case. *See Wild*, 672 So.2d at 19.

The regularized process of assigning complex civil cases to senior judges in the Seventeenth Circuit effectively supplants the

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jurisdiction of active judges over those matters. The invalidity of this process is not mitigated by the fact that not every complex civil litigation matter is assigned to the senior judges' docket. A substantial percentage are, with consequent impact on the rights of the parties involved. There is no corresponding emergency, such as a violation of the speedy trial rules, to justify consistent reassignment of these cases. Indeed, the only justification offered is the mantra of judicial efficiency, which, however noble, cannot create its own constitutional foundation that so clearly violates constitutional strictures.

In determining that no special division has been created in the Seventeenth Judicial Circuit, the majority, in my opinion, glosses over the practical de facto effect of the process in operation there. By giving notice that the trial of a case will likely exceed two-and-a-half weeks, attorneys can almost ensure placement on the docket slated for hearing by a senior judge. The process effectively allocates cases to a distinct group of judges-not by subject matter-but by the complexity of the case and projected length of trial. *Cf. Mann v. Chief Judge of the Thirteenth Judicial Circuit*, 696 So.2d 1184, 1185 (Fla.1997). Thus, a distinct de facto "complex case" division has been created in the Seventeenth Judicial Circuit without issuance of a local rule in accordance with proper procedure.

In Broward County, senior judges have become a de facto permanent circuit division for the trial of complex civil cases not by the method authorized by the Florida Constitution, but by judicial direction. While I understand the demands placed upon those responsible for the administration of the local system and the current status of resources, a de facto system such as this exists beyond constitutional parameters, and I must respectfully dissent from the majority opinion as outlined herein.

Fla.,2003.
Physicians Healthcare Plans, Inc. v. Pfeifler
846 So.2d 1129, 28 Fla. L. Weekly S370

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Date: February 18, 1986
Revised: _____
Final: _____

HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY
STAFF ANALYSIS

BILL# PCS/HJR 71

SPONSOR Rep.Robinson & others

EFFECTIVE DATE _____

IDENTICAL/SIMILAR BILLS PCS/HB 72

RELATING TO Initiative petitions

OTHER COMMITTEES OF REFERENCE _____

I. SUMMARY:

A. Present Situation:

Article XI, Section 3 of the Florida Constitution, reserves to the people of Florida the power to propose revisions or amendments to the Constitution, provided that such revisions or amendments embrace but one subject and matter directly connected therewith. Section 100.371, F.S., sets out the procedure for placing constitutional amendments proposed by initiative on the ballot. Section 101.161, F.S., requires that a summary of a proposed amendment be printed in clear and unambiguous language on the ballot and that the ballot title appear as a caption consisting of the name by which the measure is commonly referred.

B. Effect of Proposed Changes:

PCS/HJR 71 proposes the addition of Section 10 to Article IV of the Florida Constitution, providing that the Attorney General shall request the state Supreme Court to render a written opinion as to the validity of an initiative petition. The section would further require that such an opinion be rendered not later than 30 days after a request is filed and docketed.

II. ECONOMIC IMPACT:

A. Public:

None

B. Government:

None

III. STATE COMPREHENSIVE PLAN IMPACT:

None

IV. COMMENTS:

The Florida Supreme Court has previously found constitutional amendments proposed by initiative to have violated the single subject requirement of Section 3 of Article XI of the Florida Constitution. See Evans v. Firestone, 457 So.2d 1351 (Fla. 1984); Fine v. Firestone, 448 So.2d 984 (Fla. 1984). The court has also held that a proposed constitutional amendment failed to meet the summary and ballot title criteria of s. 101.161, F.S.. See Evans, supra; Askew v. Firestone, 421 So.2d 151 (Fla. 1982). In each case, the court's ruling resulted in the proposed constitutional amendment being removed from the ballot. Such a determination often involves a significant expenditure of time.

This proposed amendment, together with the enacting language of PCS/HB 72, are designed to provide a method by which an initiative proposal's compliance with constitutional and statutory requirements could be ascertained expeditiously.

It should be noted, however, that an advisory opinion would not be binding on a challenge brought subsequent to the adoption of the proposed amendment. Nonetheless, to the extent the challenge raises issues addresed in the advisory opinion, the opinion would, as a practical matter, prove to be extremely persuasive.

The Proposed Committee Substitute for HJR 71 includes additional language in the proposed ballot summary to clarify the intent that the Supreme Court render an advisory opinion within 30 days as required by the language of the amendment. This change is designed to

conform the proposal with the requirements of Askew v. Firestone, supra, which held that the ballot summary must address every change effected by the proposed constitutional amendment.

V. AMENDMENTS:

VI. PREPARED BY Paul Anderson (PA)

VII. STAFF DIRECTOR Richard Hixson

Date: March 6, 1986
Revised:
Final:

HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY
STAFF ANALYSIS

BILL# CS/HJR 71

SPONSOR Judiciary, Robinson & others

EFFECTIVE DATE

IDENTICAL/SIMILAR BILLS CS/HB 72

RELATING TO Initiative petitions

OTHER COMMITTEES OF REFERENCE

I. SUMMARY:

A. Present Situation:

Article XI, Section 3 of the Florida Constitution, reserves to the people of Florida the power to propose revisions or amendments to the Constitution, provided that such revisions or amendments embrace but one subject and matter directly connected therewith. Section 100.371, F.S., sets out the procedure for placing constitutional amendments proposed by initiative on the ballot. Section 101.161, F.S., requires that a summary of a proposed amendment be printed in clear and unambiguous language on the ballot and that the ballot title appear as a caption consisting of the name by which the measure is commonly referred.

B. Effect of Proposed Changes:

CS/HJR 71 proposes the addition of Section 10 to Article IV and an amendment to Section 3 of Article V of the Florida Constitution, providing that the Attorney General shall request the state Supreme Court to render a written opinion as to the validity of an initiative petition and requiring the supreme court to issue such advisory opinion in an expedited manner. The amendment also directs the court to provide by rule for the participation of interested persons in the opinion process.

II. ECONOMIC IMPACT:

A. Public:

None

B. Government:

None

III. STATE COMPREHENSIVE PLAN IMPACT:

None

IV. COMMENTS:

The Florida Supreme Court has previously found constitutional amendments proposed by initiative to have violated the single subject requirement of Section 3 of Article XI of the Florida Constitution. See Evans v. Firestone, 457 So.2d 1351 (Fla. 1984); Fine v. Firestone, 448 So.2d 984 (Fla. 1984). The court has also held that a proposed constitutional amendment failed to meet the summary and ballot title criteria of s. 101.161, F.S.. See Evans, supra; Askew v. Firestone, 421 So.2d 151 (Fla. 1982). In each case, the court's ruling resulted in the proposed constitutional amendment being removed from the ballot. Such a determination often involves a significant expenditure of time.

This proposed amendment, together with the enacting language of CS/HB 72, are designed to provide a method by which an initiative proposal's compliance with constitutional and statutory requirements could be ascertained expeditiously.

It should be noted, however, that an advisory opinion would not be binding on a challenge brought subsequent to the adoption of the proposed amendment. Nonetheless, to the extent the challenge raises issues addresed in the advisory opinion, the opinion would, as a practical matter, prove to be extremely persuasive.

The proposed amendment has been narrowly drafted to ensure that it addresses but one subject and matters directly related thereto. For the purpose of the record, it should be noted that the subject being addressed by this amendment is the process by which the Supreme Court will determine, prior to its being placed before the electorate, the compliance of a constitutional amendment

proposed by initiative with certain requirements of the Constitution and laws of the State of Florida.

V. AMENDMENTS:

VI. PREPARED BY Paul Anderson PA

VII. STAFF DIRECTOR Richard Hixson

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

Case No.: 2010 CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v.

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and FAIRDISTRICTSFLORIDA.ORG, a political committee,

Defendants, and

BOB GRAHAM,

Intervening Defendant.
_____/

ORDER ON MOTIONS TO DISMISS

THIS CAUSE came on to be heard on July 8, 2010, on the Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction filed by Defendant, Dawn K. Roberts, on June 22, 2010, and the Motions to Dismiss for Lack of Subject Matter Jurisdiction filed by Defendants, Bob Graham and FairDistrictsFlorida.Org, Inc., on June 24, 2010, and June 29, 2010, respectively. The Court, having reviewed the motions and responsive pleadings filed by the parties, and being otherwise fully advised in the premises, finds as follows:

1. In this case, Plaintiffs' and Intervening Plaintiffs' complaints allege that the ballot summaries for Amendment 5 and Amendment 6 (the "Amendments") are misleading. The Senate additionally claims the Amendments violate federal and Florida law. The Plaintiff(s)

and Intervening Plaintiff's seek declaratory and injunctive relief. The Circuit Court has authority to grant declaratory and injunctive relief pursuant to sections 26.012 (3) and 86.011, Florida Statutes.

2. With the exception of the limited circumstances where jurisdiction is expressly denied by the Constitution or Florida Statutes, Circuit Courts have plenary jurisdiction over all matters. *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 895 (Fla. 2003); *Dep't of Revenue v. Kuhnlein*, 646 So.2d 717, 720 (Fla. 1994). One such exception was created in 1986, in the adoption of Article IV, Section 10 and Article V, Subsection (3)(b)(10) of the constitution (the "Advisory Opinion Process").

Specifically, Article IV, Section 10 provides:

> The Attorney general shall as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously.

Article V, Subsection 3(b)(10) provides that the supreme court:

> Shall, when requested by the attorney general pursuant to the provisions of Section 10, Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

These provisions established the Supreme Court's present mandatory and exclusive jurisdiction to issue an "advisory opinion" upon the request of the attorney general, on voter initiative petitions to amend the Constitution.

3. Here, the Florida Attorney General requested an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes. The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued an advisory opinion

holding that "the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to the Attorney General Re Standards for Establishing Legislative District Boundaries*, 3 So.3d 175 (Fla. 2009).[1]

4. The defendants and intervening defendant argue that adoption of the Advisory Opinion Process established the Supreme Court's present mandatory and exclusive jurisdiction over *all* pre-election challenges to voter initiative petitions to amend the Florida Constitution. Based on the clear and unambiguous language in the constitution, as well as the opinions of the Florida Supreme Court following adoption of the Advisory Opinion Process, this court cannot so conclude. The Supreme Court has held that creation of the advisory opinion process did not restrict the right to challenge petitions according to precedent:

> When [the] provisions [creating the advisory process] were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised. This necessarily implies that other legal challenges would continue to be permissible under existing precedent; and our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution.

Fla. League of Cities v. Smith, 607 So.2d 397, 398-99 (Fla. 1992) (emphasis added); *Smith v. American Airlines, Inc.*, 606 So.2d 618 (Fla. 1992). Therefore, any challenges permissible under existing precedents survived the creation of the Advisory Opinion Process in 1986. Those

---

[1] The complaints now pending in circuit court contain eight counts alleging the ballot titles and summaries are misleading. At least two of these were arguably addressed in the advisory opinion by the Supreme Court. The allegation by the Florida Senate that the proposed amendments violate federal and Florida law, was not previously considered by the Florida Supreme Court.

precedents recognized not only mandamus actions, but also challenges to initiative petitions in Circuit Court. *See Carroll v. Firestone*, 497 So.2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So.2d 1351 (Fla. 1984).

Further, after the Advisory Opinion Process was established, the Supreme Court was presented with the opportunity to rule on the issue of whether a circuit court has jurisdiction to address a challenge to a ballot summary in an initiative petition case. In *Lane v. Chiles*, 698 So.2d 260, the Supreme Court affirmed a final summary judgment of the Circuit Court in Leon County upholding the constitutionality of Article X, Section 16, of the Florida Constitution, limiting marine net fishing. Among other things, the court agreed with the circuit court that the ballot summary claim was untimely filed in circuit court, as it was brought "eight months after it was adopted by a vote of the people and less than two weeks before the amendment was to be effective.." *Id* at 265. Although it did note that it had specifically approved the ballot summary by advisory opinion, the Supreme Court did not hold that a challenge in circuit court thereafter would have been improper. To the contrary, it agreed that the challenge in circuit court was untimely.

Thus, the Supreme Court's exclusive jurisdiction to render advisory opinions under Article V, Section 3(b)(10), Florida Constitution does not deprive Circuit Courts of jurisdiction of all challenges to ballot summaries in initiative petition challenges under Section 101.161(1), Florida Statutes. This Court, however, will certainly consider the advisory opinion previously issued by the Supreme Court with respect to the Amendments at issue here as persuasive authority.

5. If a proposed amendment specifically violates some provision of the Federal Constitution or some paramount federal law, such that it is wholly void and inoperative, it should

not be submitted to the electorate of the state for approval or rejection. *See Gray v. Moss*, 156 So. 262 (Fla. 1934); *Gray v. Winthrop*, 156 So. 270 (Fla. 1934).

6. The Court previously granted an *ore tenus* motion to add FairDistrictsFlorida.Org as a defendant. Thereafter the Plaintiff filed an Amended Complaint, and the House of Representatives filed an Amended Motion to Intervene. In the Court's review of all of the amended pleadings, however, there appears to be no relief sought against them by any of the Plaintiffs. Where no relief is sought against a party in an action for declaratory judgment, dismissal is appropriate. *McLaughlin v. Metropolitan Dade County*, 191 So.2d 615, 616 (Fla. 3d DCA 1966).

Accordingly, it is

ORDERED and ADJUDGED as follows:

1. The Defendants' motions to dismiss for lack of subject-matter jurisdiction are DENIED. This Court has jurisdiction to determine whether the ballot titles and summaries for the Amendments meet the requirements of Section 101.161, Florida Statutes, and whether the Amendments on their face, but not as applied, violate the Constitution, federal law or Florida law.

2. The Defendant's motion to dismiss FairDistrictsFlorida.Org, as a party to this case is GRANTED.

DONE and ORDERED this 12th day of July, 2010, at Tallahassee, Leon County, Florida.

JACKIE L. FULFORD
Circuit Judge

Copies to All Counsel of Record

ADVISORY OPINIONS UNDER ARTICLE V, SECTION 3(B)(10)

Case	Opposed?	Approved?
Advisory Opinion to the Attorney Gen. re Standards For Establishing Legislative Dist. Boundaries (FIS), 24 So. 3d 1198 (Fla. 2009)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Referenda Required For Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 14 So. 3d 224 (Fla. 2009)	No	Yes
Advisory Opinion to the Attorney Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved, 2 So. 3d 968 (Fla. 2009)	Yes	No
Advisory Opinion to the Attorney Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 175 (Fla. 2009)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 161 (Fla. 2009)	Yes	Yes
Advisory Opinion to the Attorney. Gen. re Florida Growth Mgmt. Initiative Giving Citizens the Right to Decide Local Growth Mgmt. Plan Changes, 2 So. 3d 118 (Fla. 2008), *reh'g denied* (Jan. 29, 2009)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 992 So. 2d 190 (Fla. 2008)	No	No

Advisory Opinion to the Attorney. Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 963 So. 2d 210 (Fla. 2007)	No	No
Advisory Opinion to the Attorney Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So. 2d 210 (Fla. 2007)	No	Yes
Advisory Opinion to the Attorney Gen. re Funding of Embryonic Stem Cell Research, 959 So. 2d 195 (Fla. 2007)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Extending Existing Sales Tax To Non-Taxed Services Where Exclusion Fails To Serve Pub. Purpose, 953 So. 2d 471 (Fla. 2007)	Yes	No
Advisory Opinion to the Attorney Gen. re Referenda Required For Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 938 So. 2d 501 (Fla. 2006)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Florida Marriage Prot. Amendment, 926 So. 2d 1229 (Fla. 2006)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature, 926 So. 2d 1218 (Fla. 2006)	Yes	No
Advisory Opinion to the Attorney Gen. re: Protect People, Especially Youth, from Addiction, Disease,	No	Yes

& Other Health Hazards of Using Tobacco, 926 So. 2d 1186 (Fla. 2006)		
Advisory Opinion to the Attorney Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 902 So. 2d 763 (Fla. 2005)	Yes	No
Advisory Opinion to the Attorney Gen. re Authorizes Miami-Dade & Broward County Voters To Approve Slot Machines In Parimutuel Facilities, 882 So. 2d 966 (Fla. 2004)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Authorizes Miami-Dade & Broward County Voters To Approve Slot Machines In Parimutuel Facilities, 880 So. 2d 689 (Fla. 2004)	No	No
Advisory Opinion to the Attorney Gen. re Pub. Prot. from Repeated Med. Malpractice, 880 So. 2d 686 (Fla. 2004)	No	No
Advisory Opinion to the Attorney Gen. re the Med. Liab. Claimant's Comp. Amendment, 880 So. 2d 675 (Fla. 2004)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Pub. Prot. from Repeated Med. Malpractice, 880 So. 2d 667 (Fla. 2004)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient, 880 So. 2d 659 (Fla. 2004)	No	Yes

Advisory Opinion to the Attorney Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646 (Fla. 2004)	Yes	No
Advisory Opinion to the Attorney Gen. re Florida Minimum Wage Amendment, 880 So. 2d 636 (Fla. 2004)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions & Exclusions Serve a Pub. Purpose, 880 So. 2d 630 (Fla. 2004)	Yes	No
Advisory Opinion to the Attorney Gen. re Repeal of High Speed Rail Amendment, 880 So. 2d 628 (Fla. 2004)	Yes	No
Advisory Opinion to the Attorney Gen. re Repeal of High Speed Rail Amendment, 880 So. 2d 624 (Fla. 2004)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Patients' Right To Know About Adverse Med. Incidents, 880 So. 2d 617 (Fla. 2004)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Authorizes Miami-Dade & Broward County Voters To Approve Slot Machines In Parimutuel Facilities, 880 So. 2d 522 (Fla. 2004)	Yes	Yes
Advisory Opinion to the Attorney Gen. re: Voluntary Universal Pre-Kindergarten Educ., 824 So. 2d 161 (Fla. 2002)	No	Yes

Advisory Opinion to the Attorney Gen. re Local Trustees & Statewide Governing Board to Mange Florida's University System, 819 So. 2d 725 (Fla. 2002)	Yes	Yes
Advisory Opinion to Attorney Gen. re Right To Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491 (Fla. 2002)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Florida's Amendment to Reduce Class Size, 816 So. 2d 580 (Fla. 2002)	Yes	Yes
Advisory Opinion to Attorney Gen. re Protect People from the Health Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking, 814 So. 2d 415 (Fla. 2002)	Yes	Yes
In re Advisory Opinion to the Attorney Gen. re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy, 815 So. 2d 597 (Fla. 2002)	No	Yes
Advisory Opinion to the Attorney Gen. re Authorization for County Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities, 813 So. 2d 98 (Fla. 2002)	Yes	No
Advisory Opinion to the Attorney Gen. re Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys., 769 So. 2d 367 (Fla. 2000)	No	Yes
Advisory Opinion to the Attorney Gen. re Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ., 778 So. 2d	Yes	No

888 (Fla. 2000))		
Advisory Opinion to the Attorney Gen. re Term Limits Pledge, 718 So. 2d 798 (Fla. 1998)	No	No
Advisory Opinion to the Attorney Gen. re Fish & Wildlife Conservation Comm'n: Unifies Marine Fisheries & Game and Fresh Water Fish Commissions, 705 So. 2d 1351 (Fla. 1998)	Yes	No
Advisory Opinion to the Attorney Gen. re Right of Citizens to Choose Health Care Providers, 705 So. 2d 563 (Fla. 1998)	Yes	No
Advisory Opinion to the Attorney Gen. re Requirement for Adequate Pub. Educ. Funding, 703 So. 2d 446 (Fla. 1997)	Yes	No
Advisory Opinion to the Attorney Gen. re People's Prop. Rights Amendments Providing Comp. for Restricting Real Prop. Use may Cover Multiple Subjects, 699 So. 2d 1304 (Fla. 1997)	Yes	No
Advisory Opinion to the Attorney Gen. re: Prohibiting Pub. Funding of Political Candidates' Campaigns, 693 So. 2d 972 (Fla. 1997)	Yes	Yes

Advisory Opinion to the Attorney Gen. - Fee on the Everglades Sugar Prod., 681 So. 2d 1124 (Fla. 1996)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Tax Limitation, 673 So. 2d 864 (Fla. 1996)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Stop Early Release of Prisoners, 661 So. 2d 1204 (Fla. 1995)	No	Yes
Advisory Opinion to the Attorney Gen. re Florida Locally Approved Gaming, 656 So. 2d 1259 (Fla. 1995)	Yes	Yes
Advisory Opinion to the Attorney Gen.re Casino Authorization, Taxation & Regulation, 656 So. 2d 466 (Fla. 1995)	Yes	No
Advisory Opinion to the Attorney Gen. re Tax Limitation, 644 So. 2d 486 (Fla. 1994)	Yes	No
Advisory Opinion to the Attorney Gen. re Ltd. Casinos, 644 So. 2d 71 (Fla. 1994)	Yes	Yes
Advisory Opinion to the Attorney Gen. re Stop Early Release of Prisoners, 642 So. 2d 724 (Fla. 1994)	No	No
Advisory Opinion to the Attorney Gen. re Funding for Criminal Justice, 639 So. 2d 972 (Fla. 1994)	No	Yes
In re Advisory Opinion to the Attorney Gen.-Save Our Everglades, 636 So. 2d 1336 (Fla. 1994)	Yes	No

In re Advisory Opinion to the Attorney Gen.- Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994)	Yes	No
Advisory Opinion to the Attorney Gen.--Ltd. Marine Net Fishing, 620 So. 2d 997 (Fla. 1993)	No	Yes
Advisory Opinion to the Attorney Gen.--Ltd. Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991)	Yes	Yes
In re Advisory Opinion to the Attorney Gen.- Homestead Valuation Limitation, 581 So. 2d 586 (Fla. 1991)	No	Yes
In re Advisory Opinion to the Attorney Gen., Limitation of Non-Econ. Damages in Civil Actions, 520 So. 2d 284 (Fla. 1988)	Yes	Yes
In re Advisory Opinion to the Attorney Gen. English--The Official Language of Florida, 520 So. 2d 11 (Fla. 1988)	Yes	Yes

IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

Case No. _____
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

PETITIONER'S REQUEST FOR ORAL ARGUMENT

Pursuant to Florida Rule of Appellate Procedure 9.320, the Petitioner requests oral argument in this proceeding. Oral argument would be appropriate and helpful to the Court in this case because this petition raises an important and urgent issue of first impression – whether a circuit court may consider a lawsuit seeking to prevent a citizen initiated proposed amendment to the Constitution of the State of Florida from being placed on the ballot based on claims that the ballot summary is misleading and that the proposed amendment would violate federal law or be unworkable.

The Petitioner notes that oral argument would need to be set on an expedited basis because the millions of ballots at issue in this case must go to the printer by

September 2, 2010, in order for election officials to meet their statutory obligations. *See* § 101.62(4)(a), Fla. Stat. (2009) (requiring absentee ballot to be mailed no later than 45 days before each election).

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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

Case No. _____
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

PETITIONER'S NOTICE OF PRIORITY STATUS

Pursuant to Florida Rule of Judicial Administration 2.545(c)(1), the Petitioner Dawn K. Roberts, in her capacity as Florida Interim Secretary of State (the "Secretary"), requests that the Court give this case priority status and expedite its disposition of the case.

The Secretary seeks to stop further proceedings in the Circuit Court, Second Judicial Circuit, in and for Leon County, Florida, on a lawsuit filed by U.S. Representatives Corrine Brown and Mario Diaz-Balart, the Florida House of Representatives, and the Florida Senate. That lawsuit seeks to enjoin the Secretary from putting two proposed constitutional amendments on the November 2010 general election ballot.

Florida Rule of Judicial Administration 2.215(g), titled "Duty to Expedite Priority Cases," directs Florida courts to give "[p]articular attention" to "challenges involving elections and proposed constitutional amendments." *See also Crawford v. Gilchrist*, 59 So. 963, 966 (Fla. 1912) (emphasizing that challenges to the validity of proposed constitutional amendments "should be determined as speedily as the law will permit so as to avoid unnecessary expense, confusion, and litigation in governmental matters that vitally affect all the people of the state").

The millions of ballots at issue in this case must go to the printer by September 2, 2010, in order for election officials to meet their statutory obligations. *See* § 101.62(4)(a), Fla. Stat. (2009) (requiring absentee ballot to be mailed no later than 45 days before each election).

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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

Case No. _____
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

PETITIONER'S MOTION FOR REVIEW OF ORAL ORDER DENYING STAY PENDING REVIEW

Pursuant to Florida Rule of Appellate Procedure 9.310(f), the Petitioner, Dawn K. Roberts, in her capacity as Florida Interim Secretary of State (the "Secretary"), respectfully requests the Court to stay the proceedings in Case No. 37-2010-CA-001824 in the Circuit Court in and for Leon County, Florida, Hon. Jackie Lee Fulford, presiding.

The Secretary files herewith her Petition for Constitutional Writ or, Alternatively, for Writ of Prohibition. That petition sets forth why the proceedings before Judge Fulford interfere with this Court's jurisdiction under article V, section 3(b)(10), Florida Constitution. It alternatively sets forth why the circuit court lacks subject matter jurisdiction.

On July 8, 2010, the circuit court heard the parties' arguments on jurisdiction. The transcript of that proceeding has been ordered on an expedited basis, but is not yet ready at this time. A copy will be filed in a supplemental appendix as soon as possible. On July 12, 2010, Judge Fulford entered a written order denying the Secretary's motion to dismiss. (1 Appendix at 323-27.)

On the record at a hearing early in the morning on July 12, 2010, the Secretary's counsel advised Judge Fulford that the Secretary was filing its petition today and made an ore tenus motion for a stay pending review under Florida Rule of Appellate Procedure 9.310(a). Judge Fulford denied that motion and indicated that she will proceed to the merits of the lawsuit. The transcript of that proceeding has been ordered on an expedited basis, but is not yet ready at this time. A copy will be filed in a supplemental appendix as soon as possible.

For the reasons expressed in the accompanying petition, this Court should enjoin further proceedings in the circuit court and either direct that the case be dismissed or transfer it to this Court. The continuing proceedings in the circuit court not only interfere with this Court's jurisdiction, but are consuming the limited resources of the Secretary and potentially interfere with her ability to have the ballots prepared for the 2010 general election. If this were a direct appeal, the Secretary would be entitled to an automatic stay as of right pursuant to Florida Rule of Appellate Procedure 9.310(b)(2) because she is a public officer. *But see*

State, Dept. of Health & Rehabilitative Services v. E.D.S. Fed. Corp., 622 So. 2d 90, 91 (Fla.1st DCA 1993) (holding that this provision does not apply to review by original petition).

The principles underlying Rule 9.310(b)(2) should apply equally here to warrant a stay. *See St. Lucie County v. N. Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984) (noting that purpose behind automatic stay for appeals by public officials is because "planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally"). *See also order Reform Party of Florida v. Black*, 885 So. 2d 303, 307 (Fla. 2004) (granting Secretary's motion to reinstate stay pending appeal involving ballot challenges "[i]n order to preserve the rights of the parties and the voters").

Similarly, if the Court directs the Respondents to show cause why a writ of prohibition should not be granted, the proceedings below will be automatically stayed pursuant to Florida Rule of Appellate Procedure 9.100(h). Because there is a serious question as to the circuit court's continued exercise of jurisdiction, the same principles underlying a stay in a prohibition proceeding apply here, even if the Court were to only order the Respondents to show cause as to the request for a constitutional writ.

WHEREFORE, this Court should stay further proceedings in the circuit court pending disposition of the accompanying petition.

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Attorney

Supreme Court of Florida

TUESDAY, JULY 13, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

Because of significant public and media interest in this matter, counsel for the parties are directed to hereafter file an original and eight copies of all pleadings filed with this Court. Per this Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, AOSC04-84, dated September 13, 2004, counsel are directed to transmit a copy of all documents, including any attachments and appendices, in an electronic format as required by the provisions of that order. All electronic documents filed shall be accessible to persons with disabilities in the manner required by Section 508 of the Federal Rehabilitation Act, the Americans with Disabilities Act, sections 282.601 through 282.606, Florida Statutes, and any related regulations or guidelines. FOR GENERAL FILING INFORMATION AND ADMINISTRATIVE ORDER NO. AOSC04-84, PLEASE VISIT THE CLERK'S OFFICE WEBSITE AT http://www.floridasupremecourt.org/clerk/index.shtml.

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Clerk, Supreme Court

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HON. BOB INZER, CLERK

Supreme Court of Florida

TUESDAY, JULY 13, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

Petitioner has filed a petition for writ of all writs. Respondent is hereby requested to **file** a response to the above-referenced petition on or before July 19, 2010, by 5:00 P.M. The petitioner may **file** a reply on or before July 22, 2010, by 5:00 P.M.

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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and BOB GRAHAM,
Petitioners,

v.

Case No. SC10-1362
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.
_____/

NOTICE OF JOINDER AS PETITIONER AND ADOPTION OF THE SECRETARY'S PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

Bob Graham, through undersigned counsel, hereby notifies the Court, pursuant to Florida Rule of Appellate Procedure 9.360(a), that he joins Interim Secretary of State Dawn K. Roberts as a Petitioner in this matter and adopts in its entirety and incorporates herein the Secretary's Petition for Constitutional Writ or, Alternatively, for Writ of Prohibition filed on July 12, 2010 (see Exhibit A).

Respectfully submitted,

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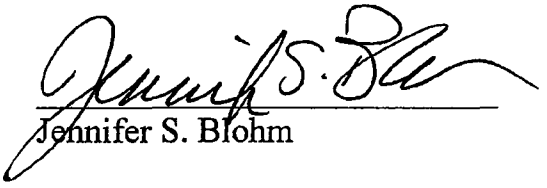

Jennifer S. Blohm

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Exhibit
A

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INTRODUCTION

This petition presents the question of whether a circuit court may consider a lawsuit seeking to prevent a citizen initiated proposed amendment to the Constitution of the State of Florida from being placed on the ballot based on claims that the ballot summary is misleading and that the proposed amendment would violate federal law or be unworkable. The Petitioner, Dawn K. Roberts, in her capacity as Interim Secretary of State of Florida (the "Secretary"), contends that a pre-ballot challenge on the first ground can only be made in this Court and that a pre-ballot challenge on the second ground cannot be made in any state court. She therefore seeks a writ in aid of this Court's jurisdiction or, alternatively, for prohibition directed to the Honorable Jackie Lee Fulford, Circuit Judge, Second Judicial Circuit in and for Leon County, Florida.

The Secretary is supported in making this argument by Florida Governor Charlie Crist, retired United States Senator and former Florida Governor Bob Graham, and FAIRDISTRICTSFLORIDA.ORG, Inc. ("Fair Districts"). Collectively, they challenge the propriety of a declaratory action brought by United States Representatives Corrine Brown and Mario Diaz-Balart (collectively, the "Plaintiffs"), the Florida House of Representatives (the "House"), and the Florida Senate (the "Senate," and collectively with the House, the "Legislature").

BASIS FOR INVOKING JURISDICTION

The Secretary invokes this Court's jurisdiction to "issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction" pursuant to Article V, section 3(b)(7) of the Florida Constitution. *See also* Florida Rule of Appellate Procedure 9.030(a)(3) ("The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.").

Often referred to as a "constitutional writ," a writ necessary to the complete exercise of a court's jurisdiction is "a form of ancillary power that is used to protect the court's ultimate jurisdiction conferred elsewhere in the constitution." Philip J. Padovano, *Florida Appellate Practice* § 29:7 at 740 (2010 ed.) (citing *Bedford v. State*, 633 So. 2d 13 (Fla. 1994)). A constitutional writ is used "to preserve the power of the court to fully and effectively decide cases that have been, or will be, presented on independent jurisdictional grounds." *Id.* at 740-41. A constitutional writ is appropriate in this case to preserve this Court's power to fully and effectively decide both a case that has been presented in this Court before and a case that may be presented here in the future.

First, as argued in Part I(A) below, the proceedings below directly conflict and interfere with this Court's prior decision that the specific ballot summaries at issue here are not misleading. *Advisory Opinion to Attorney Gen. re Standards*

For Establishing Legislative Dist. Boundaries, 2 So. 3d 175, 181 (Fla. 2009) (hereinafter, the "*Redistricting Advisory Opinion*").

Second, as argued in Part I(B), the only way that this Court has indicated that an advisory opinion on a voter initiative's ballot summary may be revisited before an election is through a mandamus proceeding filed in this Court. *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992). Thus, the attacks on the ballot summaries by the Plaintiffs and the Legislature might be brought in this Court in the future. *See* Padovano, *supra*, at 541 ("A constitutional writ may be issued in connection with a case that will become the subject of the jurisdiction of the appellate court in the future.").

Alternatively, if a constitutional writ is somehow not an appropriate remedy, the Secretary seeks a writ of prohibition. A writ of prohibition is appropriate "when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction." *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). Although a writ of prohibition directed to a circuit court may often be more appropriately filed in the relevant district court of appeal, this Court has recognized its jurisdiction to issue a writ of prohibition directly to a circuit court in any case where "it is most likely that some provision of the state or federal constitution would be construed." *Moffitt v. Willis*, 459 So. 2d 1018, 1020 (Fla. 1984); *see also Florida Senate v. Fla. Public Employees Council 79, AFSCME*, 784 So. 2d 404,

406 (Fla. 2001) (holding that article V, section 3(b)(7) grants this Court jurisdiction to enter a writ of prohibition against a circuit court entering a temporary restraining order in violation of the separation of powers). The Secretary's motion to dismiss in the lower tribunal and this petition depend on a proper interpretation of article IV, section 10 and article V, section 3(b)(10), Florida Constitution, so the *Moffitt* test is clearly satisfied.

Finally, this is a case of exceptional public importance and urgency that warrants immediate attention from this Court. Requiring this issue to be first decided by the district court of appeal would create undue delay that could interfere with the State's general election in 2010.[1] Accordingly, this petition is properly filed directly in this Court and should not be transferred to the district court of appeal.

STATEMENT OF THE FACTS

In 2007, the Florida Department of State, Division of Elections (the "Department"), approved the form of two citizen initiative petitions to amend the Florida Constitution to establish criteria for state legislative reapportionment and

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[1] The ballots for the 2010 general election must go to the printer by September 2, 2010, for elections officials to meet their statutory obligations. *See* § 101.62(4)(a), Fla. Stat. (2009) (requiring absentee ballot to be mailed no later than 45 days before each election). The Secretary files herewith a notice of priority status pursuant to Fla. R. Jud. Admin. 2.545(c)(1).

criteria for United States congressional redistricting. (1 Petitioner's Appendix ("App.") at 1; 26.) The petitions were sponsored by Fair Districts. (1 App. at 1; 26.) "The overall goal of the proposed amendments is to require the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations." *Redistricting Advisory Opinion*, 2 So. 3d at 181.

After Fair Districts obtained ten percent of the required voter signatures for the petitions, the Attorney General of Florida requested an advisory opinion as to the validity of the petitions from this Court, as he was required to do pursuant to article IV, section 10 of the Florida Constitution. *Id.* at 178 (Fla. 2009).

As they were permitted to do by article IV, section 10, Fair Districts was heard by the Court in support of the petitions, and the House and Senate were heard in opposition. *Id.* The Legislature argued "multiple claims" that the ballot titles and summaries of the proposals violated section 101.161(1), Florida Statutes (2008).[2] *Id.* at 185.

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[2] Specifically, the Legislature argued that (1) the titles are misleading because they did not indicate that the courts, in addition to the legislature, would have to comply with the redistricting standards; (2) the summary does not distinguish between the intent to favor an incumbent or party, which the amendments prohibit, and the effect of favoring an incumbent or party, which they do not prohibit; (3) the summaries do not advise that the amendments would, in the view of the Legislature, transfer authority for redistricting from the Legislature to the courts; (4) the summaries refer to existing "city, county and geographical boundaries," while the amendments refer to "existing political and geographic

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As it was required to do pursuant to article V, section 3(b)(1) of the Florida Constitution, this Court considered the arguments of all interested persons and rendered an advisory opinion on the issue on January 29, 2009. *Id.* at 178-79. The Court held "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Id.* at 191. Accordingly, this Court "approve[d] the amendments for placement on the ballot."[3] *Id.*

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boundaries"; (5) the summaries indicate that districts cannot be drawn to deny minorities an equal opportunity to participate in the political process "and" to elect representatives of their choosing, while the amendments prohibit districts from being drawn to limit minorities ability to participate in the political process "or" to elect representatives; (6) the summaries' use of the term "language minorities" would confuse voters; and (7) the summaries fail to inform voters that, in the view of the Legislature, the amendments would prohibit multi-member legislative districts *Id.* at 185-90.

It also made several arguments that that the proposals violated the single-subject requirement of article XI, section 3 of the Florida Constitution. *Id.* at 181, 183-84.

[3] Justice Lewis authored the opinion quoted above and was joined by Chief Justice Quince and Justice Anstead. *Id.* at 191. Justices Wells, Canady, and Polston concurred in the result only. *Id.* Justice Pariente recused. *Id.* Thus, the Court unanimously rejected the Legislature's arguments that the ballot summaries were misleading, but only a plurality agreed with the specific reasoning articulated by Justice Lewis.

On May 24, 2010, the Plaintiffs, who apparently had decided not to avail themselves of their opportunity to be heard in the *Redistricting Advisory Opinion* proceeding, as they were entitled to do by article IV, section 10, filed a complaint in circuit court in Leon County, which was assigned case number 37-2010-CA-1824, demanding relief that was directly contrary to this Court's ruling. (1 App. at 1-22.) Specifically, they are asking the circuit court to declare that the ballot summary for the amendment regarding congressional redistricting violates section 101.161(1), Florida Statutes, and to enjoin the Secretary from placing the amendment on the 2010 general election ballot. (1 App. at 1-22.)

They have since amended the complaint to add Fair Districts as an additional defendant, but still seek the same relief. (1 App. at 120-141.) The only new facts that they allege have occurred since this Court's *Redistricting Advisory Opinion* is that the citizen initiative petition sponsored by Fair Districts has obtained the necessary number of signatures and has been certified for placement on the November 2010 ballot. (1 App. at 120-121.) The Plaintiffs make eight arguments as to why the ballot summary is, in their view, misleading and therefore in violation of section 101.161(1).[4]

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[4] Specifically, they argue that the summary (1) advises that districts will not be drawn to "deny" minorities the equal opportunity to elect representatives, while the amendment would only prohibit districts from being drawn to "diminish"

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The trial court granted motions to intervene as plaintiffs by the House and Senate. (1 App. at 53; 54.) The House did not file a separate complaint and instead set forth its claims in its motion to intervene. (1 App. at 25-40 n.4.) It noted that the Secretary has not only approved the congressional redistricting amendment challenged by the Plaintiffs, which is now known as "Amendment 6," for the November 2010 ballot, but also approved the state legislative redistricting amendment, now known as "Amendment 5." (1 App. at 25-26.) The House levels eight claims that the ballot summaries are misleading.[5] It amended its claims to add Fair Districts as a defendant. (1 App. at 150-166.)

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minorities' ability to do so; (2) fails to advise that the effect of the amendment would be to restrain the ability of the Legislature to give minorities the ability to elect representatives; (3) falsely suggests that current law does not require districts to be as equal in population as feasible; (4) confusingly uses the phrase "drawn to" in three different ways; (5) suggests that the Legislature must ignore incumbency even though federal law, according to the Plaintiffs, requires incumbency to be considered and favored to protect minority rights; (6) repeats a problem the Plaintiffs have with the underlying amendment – that the criteria are too vague and open to conjecture; (7) repeats another problem the Plaintiffs have with the underlying amendment – that it refers to "language minorities" in the plural even though its intent is only to refer to Spanish speaking minorities; and (8) falsely suggests that the Legislature will be able to determine where language minorities reside to take into consideration in crafting districts. (1 App. at 120-141.)

[5] Specifically, the House adopts the first six claims of the Plaintiffs, contending that they apply equally to both amendments. (1 App. at 31.) It additionally asserts that the summaries are misleading "because the true purpose of

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The Senate filed its own complaint that begins by adopting and incorporating the claims raised by the Plaintiffs and the House regarding the ballot summaries. (1 App. at 57.) In addition, the Senate levels two new claims directed at the amendments themselves: (1) that the amendments would violate the federal Voting Rights Act, 42 U.S.C. § 1971 and (2) that the amendments are "vague, conflicting, and unworkable." (1 App. at 57-70.)

The Secretary and Fair Districts filed motions to dismiss all of the claims for the reasons stated in this petition. (1 App. at 71-87; 2 App. at 195-198.) The circuit court also granted Senator Graham's motion to intervene as a defendant and Governor Crist's motion for leave to appear as an amicus curiae. (1 App. at 119; 2 App. at 204-205.) Senator Graham filed his own motion to dismiss on largely the same grounds (1 App. at 142-145), and Governor Crist filed a memorandum in support of the Secretary's motion to dismiss (1 App. at 106-118).

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the amendments is to remove the redistricting process from the Legislature and deliver it to the Florida Supreme Court." (1 App. at 31-32.) It asserts as a final claim as to Amendment 5 only that the summary fails to disclose the "inevitable and dramatic effect" the House believes the amendment will have on this Court's review of legislative redistricting plans under article III, section 16(c), of the Florida Constitution. (1 App. at 32.)

The House and the Plaintiffs have sought discovery, including issuing subpoenas and notices of depositions of Senator Graham and representatives of Fair Districts and written discovery requests to Fair Districts. (1 App. at 172-174; 175-178; 187-194; 2 App. at 206-222.) The Secretary, Fair Districts, and Senator Graham moved for stays of discovery and asked the circuit court to expedite its consideration of the motions to dismiss. (1 App. at 88-94; 95-101; 142-145; 146-149; 2 App. at 195-198; 199-203.)

After conducting an expedited hearing,[6] the circuit court denied the Secretary's motion to dismiss by order issued the morning of July 12, 2010. (2 App. at 323.) The court concluded that it had jurisdiction pursuant to sections 26.012(3) and 86.011, Florida Statutes (2009). (2 App. at 323-327.) The court also noted that none of the claims in this case sought relief against Fair Districts, and it therefore granted Fair District's motion to dismiss. (2 App. at 327.)

When the court announced its ruling at an early morning hearing on July 12, 2010, the Secretary announced her intention to file this petition today and made an ore tenus motion under Florida Rule of Appellate Procedure 9.310(a) for the court to stay further proceedings pending this Court's review of this petition. The court

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[6] The transcript of the July 8 hearing on the motion to dismiss has been ordered and will be filed in a supplemental appendix as soon as possible.

orally denied that motion.[7] The Secretary files herewith a motion to review that order and stay the circuit court's proceedings pending disposition of this petition.

NATURE OF RELIEF SOUGHT

The Secretary asks this Court to issue a writ that either (1) directs the Honorable Jackie Lee Fulford, Circuit Judge, Second Judicial Circuit in and for Leon County, Florida, to dismiss Case No. 37-2010-CA-1824 or (2) transfers that proceeding to this Court.

ARGUMENT

The challenges made in this case against Amendments 5 and 6 fall into two categories, neither of which may be entertained on a pre-election basis by a Florida circuit court.[8] First, all of the claims by the Plaintiffs and the House and all but two of the claims by the Senate attack the validity of the ballot summaries, but that is a matter that the Florida Constitution and sound judicial policy place before this Court. Second, the Senate challenges both the constitutionality and advisability of

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[7] A transcript of that hearing has also been ordered and will be included in a supplemental appendix.

[8] Whether these challenges could be lodged in circuit court if and when the amendments are passed is an issue that is not before the Court. Because the Secretary's interest in this case is solely about what goes on the ballots the Department must distribute for the 2010 general election, the Secretary takes no position on this matter.

the proposed amendments themselves, but those are non-justiciable claims beyond the authority of any Florida court at this pre-election stage.

I. Further Proceedings on the Challenges to the Ballot Summaries Should Either Be Prohibited or Transferred to This Court.

The pre-election challenges to the ballot summaries in the circuit court directly conflict and interfere with this Court's exclusive jurisdiction under article IV, section 10 and article V, section 3(b)(10) of the Florida Constitution. While the Court has the discretion to transfer the challenges to this Court to decide them on the merits, the better course would be to terminate the challenges as they were either determined or waived in the *Redistricting Advisory Opinion* proceedings.

A. The Plaintiffs and Legislature's Claims Below Directly Interfere With This Court's Jurisdiction to Determine Pre-Election Challenges to the Validity of an Initiative Petition and Arguably Exceed the Circuit Court's Subject-Matter Jurisdiction.

While no constitutional or statutory provision expressly forbids a circuit court from entertaining a pre-election challenge to an initiative petition's ballot summary, a brief review of the historical context of two 1986 amendments to the Florida Constitution demonstrates why this appears to be the case. And even if those amendments did not technically eliminate the circuit court's subject matter jurisdiction over such claims, their underlying history and policies conclusively demonstrate that a circuit court proceeding on this issue directly interferes with this Court's mandatory original jurisdiction to consider these challenges.

In 1984, this Court decided *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), in which it affirmed the trial court's grant of an injunction striking a voter initiative amendment from the ballot on grounds that the amendment violated the single subject requirement of article XI, section 3 of the Florida Constitution and that the ballot summary did not comply with section 101.161, Florida Statutes. *Evans*, 457 So. 2d at 1353-55. This was the second time the Court struck a voter initiative proposed amendment from the ballot. *See Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984) (striking a proposed amendment on single-subject grounds).

The unavoidably anti-democratic implications of a court striking a citizen-initiated effort to amend the Constitution shortly before the election caused at least one member of this Court serious concern. In an opinion fully agreeing with the majority's conclusion that the proposed amendment in *Evans* violated the single-subject requirement and had a misleading ballot summary, Justice Overton reiterated the point he had made two years earlier that "the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." 457 So. 2d at 1356 (Overton, J., concurring) (quoting *Askew v. Firestone*, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J., concurring)); *see also id.* at 1357 (arguing that a legislative fix "should be accomplished at the next legislative session"). After reviewing several

guidelines for drafting ballot summaries gleamed from prior case law, Justice Overton concluded:

> Hopefully, with these guidelines, and legislation that would allow the correction of misleading ballot language, this Court will not again be faced with the problem of having to remove a constitutional amendment from the ballot because of inartful drafting.

Id. at 1358.

Justice Overton was not alone in this view; Justices Ehrlich and McDonald joined his concurring opinion in *Askew*, which first recommended legislative action. In *Evans*, Justice Ehrlich bemoaned the fact that the Legislature had not followed this "strong recommendation." 457 So. 2d at 1359 (Ehrlich, J., concurring).

The recommendations from this Court that the Legislature do something to prevent initiative petitions from being stricken from the ballot based on defective summaries did not go unheeded much longer after *Evans*. The Legislature put forward just such a process when it proposed for adoption article IV, section 10 and article V, section 3(b)(10) of the Florida Constitution, which were approved in the 1986 general election (collectively, the "1986 Amendments"). These amendments work in tandem to place the question of the validity of the form of an initiative petition under general law squarely before this Court on a specific timeline.

First, the attorney general is required to seek an advisory opinion from this Court as to the validity of the petition and all "interested persons" are entitled to be heard on the issue:

> The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.

Art. IV, § 10, Fla. Const. Pursuant to general law, an initiative petition is submitted to the Attorney General once certain requirements are met, including the sponsor of the amendment having obtained at least ten percent of the signatures required to place it on the ballot. § 15.21, Fla. Stat. (2009). The Attorney General must then petition this Court for an advisory opinion within thirty days. § 16.061(1), Fla. Stat. (2009).

Second, this Court's constitutional grant of jurisdiction was expanded to not just authorize, but require the Court to render an advisory opinion on the issue.

> The supreme court ... [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

Art. V, § 3(b)(10). The issues "provided by general law" are the single-subject requirement from article XI, section 3, Florida Constitution, the requirements for the ballot title and summary found in section 101.161(1), Florida Statutes (2009),

and the requirements for a financial impact statement found in article XI, section 5(c), Florida Constitution, and section 100.371(5)(c), Florida Statutes (2009). *E.g., Advisory Opinion to Attorney Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 971 (Fla. 2009).

Together, the 1986 Amendments established the Court's present mandatory jurisdiction over pre-election challenges to voter initiative petitions to amend the Florida Constitution. The accompanying legislative staff summaries explained the purpose of these provisions is "to provide a method by which an initiative's proposal's compliance with constitutional and statutory requirements could be ascertained expeditiously." Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla. H.R. Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986). (2 App. at 320-322; 317-319.) This Court has further explained:

> The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot.

Armstrong v. Harris, 773 So. 2d 7, 14 n.18 (Fla. 2000) (citing William A. Buzzett & Deborah K. Kearney, *Commentary (1986 House Joint Resolution 71)*, 26 Fla. Stat. Ann., Art. IV, § 10, Fla. Const. (West Supp. 2000)).

Just a few months ago, this Court used very absolute terms to explain how its review process is an important "mechanism[] that directly promote[s] ballot integrity and the reduction of fraud":

> [W]ell before any referendum, this Court reviews ballot titles and summaries to *ensure* compliance with the single-subject limitation and to *guarantee* that Florida's electors are not misled "with regard to the true effect of a [proposed] amendment" or revision.

Browning v. Florida Hometown Democracy, Inc., PAC, 29 So. 3d 1053, 1072 (Fla. 2010) (quoting *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008)) (emphasis added).

Although the Court has not articulated much analysis in a published opinion as to whether the 1986 Amendments deprived circuit courts of jurisdiction to entertain pre-election challenges to the form of initiative ballot language, it has strongly signaled that this is the case.

First and most directly, in *Advisory Opinion to Attorney General Fee on Everglades Sugar Products*, 681 So. 2d 1124 (Fla. 1996) (hereinafter, the "*Sugar Products Advisory Opinion*"), the Court noted that after the Attorney General filed a petition for an advisory opinion, four entities filed an action for declaratory judgment against the initiative's sponsor. *Id.* at 1126-1127. The Court did not analyze the jurisdictional issue, but it noted that it had "ordered [the declaratory action] transferred to this Court." *Id.* This begs the question of what authority this

Court would have had to do that if the circuit court had jurisdiction over the declaratory action.

Second, on at least two occasions, this Court has noted that its jurisdiction to review the form of initiative amendment ballot language before an election is exclusive. *See Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) ("The Attorney General of Florida has requested this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. In response, we issued an order permitting interested parties to file briefs, and we heard oral arguments on the validity of the proposed amendment. **We have original and exclusive jurisdiction..**" (emphasis added and citations omitted)); *Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994) ("The Attorney General of Florida has petitioned this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. **We have original and exclusive jurisdiction.**" (emphasis added and citations omitted)). *See also Fla. Senate v. Fla. Ass'n of Realtors, Inc.*, 829 So. 2d 854, 855 (Fla. 2002) (Pariente, J., concurring) (noting that "this Court has mandatory jurisdiction over citizens' initiative petitions to amend the Constitution").

A review of the history of initiative petitions since the 1986 Amendments casts even further doubt on the propriety, if not the authority, of circuit courts to

consider these kinds of cases. In the more than two decades following the voters' adoption of the 1986 Amendments, there has not been a published opinion in which a Florida court, other than this Court, has attempted to exercise jurisdiction over a pre-election declaratory action seeking to invalidate a voter initiative to amend the Constitution on the basis that the form of the proposed amendment or ballot summary did not conform with general law. As discussed above, the only published opinion mentioning such a declaratory action was transferred to this Court. *Sugar Products Advisory Opinion*, 681 So. 2d at 1126-1127.

The dearth of circuit court challenges does not mean that initiative petitions have not gone unchallenged in the past twenty years. To the contrary, this Court has devoted substantial resources to conducting pre-election review of voter initiatives. The Court has rendered at least sixty advisory opinions in these cases, including thirty-eight in the past ten years alone.[9] In 43 (71.7%) of those cases, at least one party chose to appear and oppose the proposed amendment. Reflecting the amount of time and effort invested by the Court, its opinions demonstrate that it is no rubber stamp. Dissenting opinions and sharp divisions on the Court are common in these cases, and the Court invalidated initiative proposals, at least in

[9] A table listing the opinions found by the Secretary is included in the appendix. (2 App. at 328.)

part, no fewer than 18 times (one-third of the time), including at least 3 in cases where no party chose to appear in opposition.[10]

Perhaps more importantly, to allow a circuit court to entertain a declaratory action to strike an initiative amendment from the ballot would defeat the entire purpose of the 1986 Amendments and would exacerbate the problems those amendments were designed to remedy. Before the amendments, the sponsors of a grass-roots effort to amend the Constitution faced the daunting prospect of going to the great expense and trouble of gathering the thousands of necessary signatures only to have their efforts defeated right before the amendment would be put on the ballot.

As discussed above, the purpose of the amendments was to allow sponsors to get the form of the amendment, title, and ballot summary in order and have it either approved by this Court or rejected with clarification to allow the form to be fixed before proceeding further. But if a declaratory action in circuit court is allowed to proceed after the 1986 Amendments, the sponsors of initiative petitions will have to undertake the expensive burden of first litigating the matter in this

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[10] Even where no party appears in opposition, the Court is required by the Constitution to "sua sponte examine the issues pursuant to [its] own independent research." *Advisory Opinion to the Atty. Gen.*, 642 So. 2d 724, 725 (Fla. 1994).

Court in an advisory opinion proceeding and still face the same risks and uncertainty they confronted before 1986.

In a slightly different context, this Court has explained why allowing multiple attacks on the same ballot language violates the intent and policy behind the 1986 Amendments. In *Advisory Opinion to Attorney Gen. re Referenda Required For Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006) (hereinafter, the "*Land Use Plans Advisory Opinion*"), the Court considered a claim that language in a ballot summary it had previously rejected in an earlier version of the summary was misleading due to an editorial comment in the first sentence. *Id.* at 505 (citing *Advisory Op. to the Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 902 So. 2d 763 (Fla. 2005)).

After the sponsor removed that sentence but otherwise left the ballot summary unchanged, the Attorney General submitted it for a new advisory opinion, and opponents of the initiative argued that another part of the summary was misleading. *Id.* Because the Court's advisory opinions are "intended to enable proponents to remedy any flaws in the ballot language," the Court held that it had implicitly rejected this argument in its first opinion, even though the opinion did not expressly address it. *Id.* More importantly for present purposes, the Court went on to explain:

> To hold otherwise would allow serial attacks on a proposed amendment, thwarting a proponent's efforts indefinitely.
>
> .... Allowing piecemeal attacks on a proposed amendment would not only be fundamentally unfair to the proponent of an amendment, it would be a misuse of the process for approval of citizen initiatives.

Id. at 505.

The *Land Use Plans Advisory Opinion* did not involve the jurisdictional issue in this case because the challenge to the ballot language was being made in this Court, not a circuit court. But allowing circuit court declaratory actions seeking to prevent the citizenry from considering ballot initiatives that this Court previously approved in an advisory opinion would be a far more serious misuse of the constitutional review process. It would directly interfere with this Court's mandatory jurisdiction under the 1986 Amendments.

Ensuring a fair process for the citizenry to amend the constitution is more than just a policy underlying the 1986 Amendments because "the initiative petition method to amend the constitution is a fundamental right" and the government "must not unduly burden the petitioners' initiative access." *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566 (Fla. 1980), *quoted with approval in Browning*, 29 So. 3d at 1063.

Because of the chilling impact that would be caused by allowing this case to proceed in the circuit court, a constitutional writ is appropriate in this case

regardless of whether the circuit court has subject matter jurisdiction in the technical sense. Thus, the Court need not definitively determine whether the circuit court has jurisdiction. Nonetheless, the Secretary maintains her position advanced below that the circuit court lacks jurisdiction.

The circuit court rejected this argument and concluded that it has jurisdiction under sections 26.012(2) and (3) and 86.011, Florida Statutes. (2 App. at 323-327.) While either statute might have originally provided circuit courts with jurisdiction over these kinds of declaratory actions, the 1986 Amendments preempted them.

Section 26.012(2) defines the "exclusive original jurisdiction" of the circuit courts.[11] Because the 1986 Amendments, specifically article V, section 3(b)(10), grants this Court original jurisdiction over pre-election challenges to the form of

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[11] The Plaintiffs also contended that the court had jurisdiction under § 26.012(3). That section provides, "The circuit court may issue injunctions."

But that cannot mean that a circuit court has jurisdiction to issue an injunction in a case over which it otherwise lacks jurisdiction. *See, e.g., Florida Pub. Serv. Comm'n v. Bryson*, 569 So. 2d 1253 (Fla. 1990) (holding that circuit courts lack jurisdiction to enjoin the Public Service Commission from reviewing complaints about rates because art. V, § 3(b)(2), Fla. Const. grants this Court jurisdiction to review actions of statewide agencies governing utility rates and services).

initiative ballots, such challenges can no longer fall under the exclusive jurisdiction of the trial courts.

Section 86.011 merely grants circuit courts the general authority to render declaratory judgments. The 1986 Amendments, however, provide the specific means for a judicial declaration regarding whether the form of an initiative ballot complies with general law. *See, e.g., McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) ("[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.") *See also Blue Shield of Fla., Inc. v. Woodlief*, 359 So. 2d 883, 885 (Fla. 1st DCA 1978) (holding that it is a misuse of section 86.011 to seek a declaratory judgment to bring a claim in circuit court that would otherwise falls outside of its jurisdiction).

The court also cited *Allstate Insurance Co. v. Kaklamanos*, 843 So. 2d 885, 895 (Fla. 2003), and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994), for the following proposition: "With the exception of the limited circumstances where jurisdiction is expressly denied by the Constitution or Florida Statutes, Circuit Courts have plenary jurisdiction over all matters." (2 App. at 324.) Neither of those cases, however, purport to create a new basis for jurisdiction. Nor do they suggest that constitutional provisions, such as the 1986

Amendments, cannot implicitly remove jurisdiction granted elsewhere. Instead, both cases deal with the entirely separate issue of whether the concepts of limited standing found in federal law and the law of other states apply in Florida.

Finally, the circuit court concluded that in *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992), this Court concluded that the 1986 Amendments did not foreclose challenges to initiative petitions in circuit court. (2 App. at 325-326.) But that decision did not address the issue of the continuing authority of a circuit court to entertain a pre-election challenge to the form of an initiative ballot.

The relevant issue in *Florida League of Cities* was whether an advisory opinion is a bar to reconsidering whether an initiative should be removed from the ballot because of a misleading summary. *Id.* at 398-99. The Court noted that article IV, section 3(b)(10) was "silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction." *Id.* at 398.

The Court then looked at the legislative history behind the 1986 Amendments, which indicated a belief that an advisory opinion would not be binding precedent "as to any other adversarial legal challenge that might later be raised." *Id.* at 399. The Court concluded, "This necessarily implies that other legal challenges would continue to be permissible under existing precedent." *Id.*

But the other legal challenges referred to by the legislative history and the Court were not declaratory actions in circuit court challenging initiative petitions. The legislative history only opines "that an advisory opinion would not be binding on a challenge brought subsequent to the adoption of the proposed amendment." Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla. H.R. Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986). (2 App. at 320-322; 317-319.) It made no mention of such a challenge being brought before an election, as happened here.

And the precedent cited by this in *Florida League of Cities* Court involved challenges to ballot summaries that were not proposed by initiative.[12] *See Smith v. American Airlines, Inc.*, 606 So.2d 618, 619 (Fla. 1992) (challenge to amendment proposed by taxation and budget reform commission); *Askew v. Firestone*, 421 So.2d 151, 153 (Fla. 1982) (challenge to amendment proposed by joint legislative resolution). The 1986 Amendments, on the other hand, apply only to amendments proposed by initiative, so this Court does not have jurisdiction to render advisory

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[12] Amendments to the Constitution may be proposed by initiative petition, constitutional convention, constitutional revision commission, the taxation and budget reform commission, and legislative joint resolution. Art. XI, §§ 1, 2, 3, 4, 6, Fla. Const.

opinions on other proposed amendments.[13] *Fla. Senate v. Fla. Ass'n of Realtors, Inc.*, 829 So. 2d 854, 855 (Fla. 2002) (Pariente, J., concurring). The only pre-election means of challenging the form of an amendment proposed by initiative that the Court has recognized is a mandamus petition filed directly in this Court. *Florida League of Cities*, 697 So. 2d at 399. In short, nothing in *Florida League of Cities* indicates that a circuit court could or should entertain a pre-election challenge to an initiative ballot summary.

The circuit court also cited two precedents where this Court did review pre-election challenges to initiative ballot summaries – *Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986), and *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984). (2 App. at 325-326.) But both of those cases were decided before the 1986 Amendments, so they are not at all relevant to the question of whether those amendments preempted the circuit court's jurisdiction in these circumstances.

Finally, the circuit court cited *Lane v. Chiles*, 698 So. 2d 260 (Fla. 1997), in which this Court affirmed a circuit court's order denying a challenge to an initiative petition that had already been adopted. (2 App. at 326.) But the

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[13] This is the reason the Secretary has not sought to terminate circuit court litigation involving other proposed amendments that have been certified for the 2010 general election ballot. *See, e.g., Fla. State Conf. of NAACP Branches v. Dep't of State*, Case No. 37-2010-CA-001803 (Fla. 2d Cir.) (challenging Amendment 7, an amendment proposed by joint resolution).

Secretary does not contend that the 1986 Amendments affected the circuit court's jurisdiction to entertain **post-election** challenges to initiative amendments. The Court made clear in *Lane* that the challenge to the ballot summary in that case was made after the amendment was effective. *Id.* at 265.

The court put particular emphasis on this Court's holding that a challenge in *Lane* to the ballot summary was untimely because it was made after the amendment was enacted. (2 App. at 326.) This Court noted that "the general rule is that a challenge to the form of a proposed amendment must be made before the amendment is adopted." *Id.* at 265. But the Court gave no indication whatsoever that the required pre-election challenge could be made in circuit court. It was clearly referring to the advisory opinion process the 1986 Amendments create in this Court.

Thus, the circuit court lacks subject matter jurisdiction over the claims regarding the ballot summaries. If the Court does not issue a constitutional writ, it should therefore issue a writ of prohibition.

B. While the Court Has the Authority and Discretion to Transfer the Proceedings and Consider the Merits of the Challenges to the Ballot Summaries, the Better Course Would Be to Terminate These Proceedings Because the Challenges Were Waived in the *Redistricting Advisory Opinion* Proceeding.

As noted above, the only time since the 1986 Amendments that this Court appears to have confronted a circuit court declaratory action making a pre-election

challenge to the form of an initiative ballot, it transferred the action to consider it along with the Attorney General's petition for an advisory opinion. *Sugar Products Advisory Opinion*, 681 So. 2d at 1126-1127. Although that case is distinguishable because the declaratory action was filed while the Attorney General's petition was still pending in this Court, there is precedent for this Court reconsidering an advisory opinion before the general election.

As noted above, in *Florida League of Cities*, the Court held that in a pre-election mandamus proceeding it could reconsider a determination from a prior advisory opinion that an initiative ballot summary was not misleading. 607 So. 2d at 399. But it made it clear that it would very rarely do this:

> We emphasize, however, that relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction. Renewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion.

Id.

Thus, the Court does have discretionary jurisdiction to entertain a mandamus petition containing a pre-election challenge to an initiative ballot despite a prior advisory opinion approving the ballot language. Subsequent decisions, however, indicate that the Court really meant it when it said such attempts "almost always will result in this Court refusing to exercise discretionary jurisdiction."

For example, in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), the Court reviewed a post-election challenge to an initiative amendment imposing term limits. The opponents of the amendment argued that it violated the single-subject requirement of section 16.061, even though the Court had found to the contrary in its pre-election advisory opinion. *Id.* at 1284. The Court declined to entertain this argument and made two key observations that bear on the issue now before the Court. First, it explained that unlike other advisory opinions, which have less precedential value, an advisory opinion as to whether a ballot complies with section 16.061 has direct consequences that are more akin to a traditional judgment:

> [W]e point out that when our "advisory" opinions conclude that there is a defect in the ballot title and summary or a violation of the single-subject requirement, the effect of our "advice" is the removal of the amendment from the ballot.

Id. Second, the Court reiterated that "only under *extraordinary* circumstances will we revisit an issue decided in our earlier advisory opinions." *Id.* at 1285.

Respectfully, this case does not involve the kind of extraordinary circumstances that would warrant the Court to re-open the issue of whether Amendments 5 and 6 have misleading ballot summaries. As an initial matter, both the House and the Senate appeared in the *Redistricting Advisory Opinion* proceedings and argued that the summaries were misleading. In contrast, the opponents of the amendment in *Florida League of Cities* had not been heard from

in the prior advisory opinion proceeding. *See In re Advisory Opinion to Attorney Gen.--Homestead Valuation Limitation*, 581 So. 2d 586, 586 (Fla. 1991) (indicating that the only appearances were by the Attorney General and the amendment's proponent). While the "advisory" nature of an opinion under article V, section 3(b)(10) might preclude traditional estoppel principles from applying, the Court surely has the discretion to decline to give litigants a second bite at the apple.

And it should do so here to avoid creating a temptation for the Legislature, which regularly appears to challenge proposed initiative amendments, to prejudice the rights of initiative sponsors by holding back challenges to their ballot initiatives until after they have gone to the expense and trouble of getting the necessary signatures to have the initiative placed on the ballot. After all, that is exactly the evil that the 1986 Amendments were enacted to prevent.

Moreover, it is relevant that the Legislature is one of the parties seeking to have an initiative amendment pulled from the ballot. As this Court has often noted, the very purpose of Article XI, section 3 of the Florida Constitution, which authorizes initiative petitions, is "to bypass legislative and executive control and to provide the people of Florida a narrow but direct voice in amending their

fundamental organic law."[14] *Browning*, 29 So. 2d at 1963 (citing *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 962 (Fla. 2002), and *State ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566 (Fla. 1980)). The Constitution strikes a "delicate symmetric balance" between the right of citizens to petition for amendments and the Legislature to restrict that right. *Id.* (quoting *Citizens Proposition for Tax Relief*, 386 So. 2d at 566). Thus, a second challenge by the Legislature to get around this Court's advisory opinion in another forum should be particularly disfavored. For these reasons, the Court should exercise its discretion to not reconsider its advisory opinion based on the claims by the Legislature.

The Court should reach the same conclusion as to the claims by the Plaintiffs, who did not bother to raise their objections in the advisory proceeding. Although the Court did entertain a pre-election ballot challenge in *Florida League of Cities* by opponents who had not objected in the advisory proceeding, it should not do so here. First, the Plaintiffs are members of the United States Congress,

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[14] Not only are the amendments in this case an attempt by the citizenry to "bypass legislative control" of a constitutional function, they conflict with the natural temptation of incumbent legislators to draw districts that protect their self-interest because the amendments' purpose is to ensure that the Legislature "redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations." *Redistricting Advisory Opinion*, 2 So. 3d at 181.

who presumably are well versed in their legal rights and responsibilities and fully able to protect their interests. As incumbents representing districts that could be directly affected by Amendment 6, they had every reason to stand up and be heard in the advisory proceeding and not prejudice the process by waiting until the last minute to bring this challenge in the wrong court.

Shortly after *Florida League of Cities* clarified that the Court had discretion to entertain a mandamus petition seeking reconsideration of an advisory opinion, the Court warned that failing to make an objection during the advisory proceeding can have consequences. In *Advisory Opinion to the Atty. Gen.*, 642 So. 2d 724 (Fla. 1994), the Court noted that it had published an order authorizing all interested parties to file briefs and then advised:

> Despite this notice, no interested party ... has filed a brief of any kind, requested oral argument, or appeared before this Court on the date set. As a result, all parties who may have had an interest in this proceeding have waived any rights they may have had to advise this Court of their viewpoints and legal analyses of the issues.

Id. at 725.

Finally, the Court should decline to exercise its discretion to entertain the claims by the Plaintiffs and the Legislature because they waited until the last minute to raise them. Although they have known of Fair District's petitions since 2007, they waited until the summer of 2010 to bring this lawsuit. But the millions of ballots at issue in this case must go to the printer before September 2, 2010, in

order for elections officials to meet their statutory obligations. *See* § 101.62(4)(a), Fla. Stat. (2009) (requiring absentee ballot to be mailed no later than 45 days before each election).

Members of this Court have repeatedly warned of the obvious institutional problems caused by such last-minute litigation. *See Fla. Senate v. Fla. Ass'n of Realtors, Inc.*, 829 So. 2d 854, 855-56 (Fla. 2002) (Pariente, J., concurring) (addressing the problem presented to the Court by "artificial emergencies when objectors wait until shortly before the scheduled elections to file lawsuit challenging the proposed ballot language); *Florida League of Cities*, 607 So. 2d at 401 (Overton, J., dissenting) ("I am continually troubled that this Court is placed in the position of determining at the last minute the validity of proposed constitutional amendments and, as a result, is requested to remove proposals from the ballot.") Respectfully, it is time for those warnings to result in consequences, lest these tactics continue to be attempted.

For the foregoing reasons, although the Court has the discretion to transfer this proceeding from the circuit court, the more appropriate remedy is to direct that the challenges to the ballot language in the circuit court be dismissed.

II. The Senate's Pre-Election Challenges to the Enforceability or Advisability of the Proposed Amendments Should Be Prohibited as Non-Justiciable Issues Beyond the Jurisdiction of Florida Courts.

Once the ballot challenges are removed for this case, all that is left are two claims by the Senate: (1) that the proposed amendments violate the federal Voting Rights Act and therefore will not be enforceable if enacted and (2) that the proposed amendments would be unworkable if enacted. But the amendments have not been enacted, and at this pre-election stage, these claims are not justiciable by Florida courts.

The Senate contends that the circuit court has jurisdiction to determine that the amendments purported "contradictions with federal law will render them futile and incapable of being made operative under any circumstances." (1 App. at 59.) It relies on *Gray v. Winthrop*, 156 So. 270 (Fla. 1934). (*Id.*) Remarkably, this is the very argument Justice Overton made in his dissent – rejected by the majority – in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229-30 (Fla. 1991) (Overton, J., concurring in part and dissenting in part) (hereinafter, the "*Limited Terms Advisory Opinion*").

In that case, Justice Overton argued that pursuant to *Gray v. Winthrop*, *Gray v. Moss*, 156 So. 262 (Fla. 1934), and *Weber v. Smathers*, 338 So. 2d 819 (Fla. 1976), a proposed amendment must be stricken from the ballot if:

> by its terms [it] specifically and necessarily violates a command or limitation of the Federal Constitution ... in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances.

The *Limited Terms Advisory Opinion*, 592 So. 2d at 229 (J. Overton, dissenting) (quoting *Winthrop*, 156 So. at 272).

But that argument was rejected by the majority, which held that "we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989)." 592 So. 2d at 227 & n.2 (citing *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla. 1982) (holding that the question of whether an amendment proposed by the Legislature violated due process is not justiciable in a challenge to a ballot summary)).

Likewise, in *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002), this Court reaffirmed its holding in the *Limited Terms Advisory Opinion*, and once again rejected the argument made by Justice Overton in his dissent – and by the Senate here:

> In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment. Moreover, **other constitutional challenges are not justiciable in this type of proceeding.**

816 So. 2d 580, 582 (emphasis added and citation omitted) (citing the *Limited Terms Advisory Opinion*], 592 So. 2d at 227). By "this type of proceeding," the

Court meant a **pre-election proceeding,** over which, for the reasons previously discussed, the Florida Supreme Court has original and exclusive jurisdiction.

In *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 804-05 (Fla. 1998) (hereinafter, the "*Term Limits Advisory Opinions*"), Justice Overton once again argued, this time in a concurrence joined by no other Justice, that

> it is a fraud on the public to indicate that this initiative provision could be properly placed on the ballot if the ballot summary was not misleading. I find this entire provision to be unconstitutional on its face under *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). I still adhere to the view that I expressed in [the *Limited Terms Advisory Opinion*] that ... in considering whether or not the proposed amendment to [the Florida] constitution meets constitutional requirements of validity under the Constitution of the United States.

718 So. 2d at 804 (Overton, J., concurring in the result only). Once again, the majority of the Court rejected the argument. 718 So. 2d at 801 & n.1.

The Secretary does not dispute that if the voters approve the Amendments, the Senate may assert – post-election – the arguments it attempts to make in the circuit court.[15] But the pre-election scope of review of initiative proposed

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[15] *Ray* is an example of this procedure. There, the amendment opponents filed a post-election circuit court case to prevent enforcement of a voter-approved amendment to the Florida Constitution on the ground that the amendment was invalid under federal law. *Ray*, 742 So. 2d at 1277, 1278, 1280. This is precisely the claim the Senate makes in this case.

amendments is "limited to two legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary of the proposed amendment are misleading, in violation of section 101.161(1), Florida Statutes." The *Term Limits Advisory Opinions*, 718 So. 2d at 801.

The rationale for this limitation is simple and compelling; as stated in *Advisory Opinion to the Attorney General Re: Tax Limitation*, 644 So. 2d 486 (Fla. 1994):

> This Court's role in these matters is strictly limited to the legal issues presented by the constitution and relevant statutes. **This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments, and we have not done so. Infringing on the people's right to vote** on an amendment is a power this Court should use only where the record shows the constitutional single-subject requirement has been violated or the record establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment and its effect on the present constitution.

Id. at 489 (emphasis added).

Even as to the narrow issues which the Court does consider in pre-election advisory cases, "'[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.'" *Advisory Opinion to Attorney General Re: 1.35% Property Tax Cap*, 2 So. 3d 968, 971 (Fla. 2009) (quoting *Askew*, 421 So. 2d at 156). "[W]here voter initiatives are concerned, the Court has no authority to inject itself in the process, unless the laws

governing the process have been clearly and conclusively violated." *Id.* (internal quotation and citation omitted).

As aptly put by the Third District Court of Appeal:

> The law is well-settled that a court of equity as a general rule will not restrain the holding of an election because a free election in a democracy is a political matter to be determined by the electorate and not the courts. Limited exceptions to this rule have been recognized but only on the narrowest of grounds. One such exception is where the election is being held in violation of an applicable legislative enactment. Another is where the ballot question on a referendum is misleading and deprives the voter of an opportunity to know and to be on notice as to the proposition on which he is to cast his vote.

Metropolitan Dade County v. Shiver, 365 So. 2d 210, 212 (Fla. 3d DCA 1978), *affirmed*, 394 So. 2d 981 (Fla. 1981) (internal citation omitted).

In sum, this Court has consistently applied its limited authority to review initiative amendments to infringe as little as possible on the people's right to vote. Allowing an amendment opponent to simply sidestep this Court and seek broader review in a pre-election challenge in a Florida circuit court would render that limited scope of review meaningless.

CONCLUSION

For the foregoing reasons, this Court should issue a writ that either (1) directs the Honorable Jackie Lee Fulford, Circuit Judge, Second Judicial Circuit in and for Leon County, Florida, to dismiss Case No. 37-2010-CA-1824 for lack of subject-matter jurisdiction or (2) transfers that proceeding to this Court.

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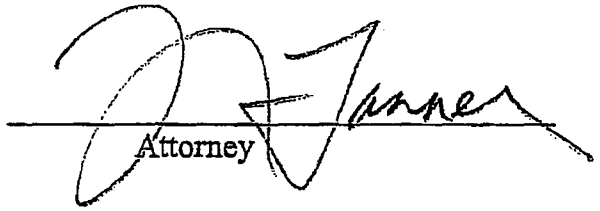

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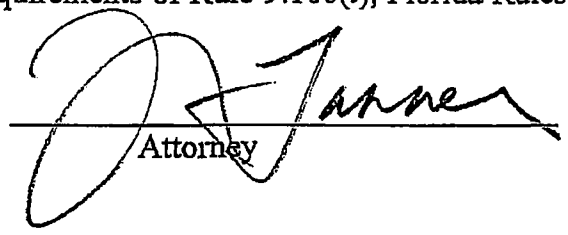
I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.100(*l*), Florida Rules of Appellate Procedure.



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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

Case No. SC10-1362
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

EMERGENCY SUPPLEMENT TO PETITIONER'S MOTION FOR REVIEW OF ORAL ORDER DENYING STAY PENDING REVIEW

The Petitioner, Dawn K. Roberts, Interim Secretary of State of Florida, (the "Secretary") hereby supplements her Motion for Review of Oral Order Denying Stay Pending Review and states:

1. In retrospect, the motion should properly have been styled as an emergency to more fully alert the Court that it involves an urgent matter. Things are proceeding rapidly in the trial court, requiring the parties and the trial court and its support personnel to expend substantial financial and time resources.

2. During an unrecorded telephonic hearing on Tuesday, July 13, 2010, the trial court adjusted the previous scheduling order. The court ordered that the

11-15-10

parties must file dispositive motions by Tuesday, July 20, and responses to dispositive motions by Friday, July 23.

3. The trial court also ruled that it would decide the claims based on a facial challenge to the ballot summaries and amendments and would not take evidence. The Court therefore permanently stayed discovery. The Judge did indicate that the complaining parties could proffer affidavits or testimony at the time previously reserved for the trial in this matter, July 26-28. Otherwise, that time will be used for argument on the dispositive motions.

4. While the stay of discovery and ruling that there will be no evidentiary hearing help to ameliorate some of the harm caused by the trial court's denial of the motion for stay, the Secretary still faces substantial harm and prejudice. Moreover, these developments remove any prejudice to the complaining parties of a stay pending disposition of the Secretary's petition. Regardless of whether a stay is ordered, the trial court will not be accepting any evidence on their claims.

WHEREFORE, the Secretary respectfully submits that an emergency ruling is appropriate on her motion to review denial of stay based on the facts and arguments in her original motion as supplemented herein.

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IN THE SUPREME COURT OF FLORIDA
Case No. 10-1362

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

RESPONDENT CORRINE BROWN AND MARIO DIAZ-BALART'S RESPONSE TO MOTION FOR REVIEW OF ORAL ORDER DENYING STAY PENDING REVIEW

Respondents Corrine Brown and Mario Diaz-Balart respond to the motion for review of an oral order denying stay pending review.

Petitioner Dawn K. Roberts, the Interim Secretary of State, has moved this Court for review of the Order denying her *ore tenus* motion for stay. These Respondents brought an action in circuit court seeking declaratory and injunctive relief with regard to proposed Amendment 6, which is scheduled to go on the statewide ballot on the November 2010 election, claiming that the ballot summary

7-14-10

for Amendment 6 was misleading. [1] *Brown and Diaz-Balart v. Roberts*, Case No. 2010-CA-001824 in the Circuit Court in and for Leon County, Florida, Hon. Jackie Lee Fulford, presiding.

Petitioner moved to dismiss, claiming that the lower tribunal lacked subject matter jurisdiction. On the morning of July 12, 2010, Judge Fulford announced her decision, denying the motion to dismiss, and issuing a written order.[2] The Petitioner made an *ore tenus* motion for stay, saying she was going to seek review in this Court. Judge Fulford entered an *ore tenus* response, denying the motion, citing, among other reasons, the looming election deadlines, including the need for the various supervisors of elections throughout the State to mail off absentee ballots.

Petitioner's motion for stay pursuant to Florida Rule of Appellate Procedure 9.130(f) should be should be denied as being outside the scope of the Rule 9.310(a). Rule 9.130(f) provides:

> (f) Stay of Proceedings. In the absence of a stay, during the pendency of a review of a non-final order, the lower

---

[1] Respondents The Florida House of Representatives and The Florida Senate intervened in the case as party plaintiffs. Respondent Bob Graham intervened in the case as a party defendant.

[2] FairDistrictsFlorida.org, Inc. was named as a party defendant below, but was dismissed as a party by order of the lower tribunal. That portion of the order that the Petitioner seeks review herein is not at issue. (FairDistricts should be removed from the style of this matter and deleted as a party in that its interest in these proceedings ended upon its dismissal at its request.)

> tribunal may proceed with all matters, including trial or final hearing; provided that the lower tribunal may not render a final order disposing of the cause pending such review.

Judge Fulford denied the Petitioner's *ore tenus* motion for stay. However, in order to seek a stay under Rule 9.103(f), the Petitioner must first show that she is seeking review of an appealable non-final order. Rule 9.130(a) sets the parameters for which orders may be appealed interlocutorily and specifically provides, in *toto*:

> Rule 9.130. Proceedings to Review Non-Final Orders and Specified Final Orders
>
> (a) Applicability.
>
> (1) This rule applies to appeals to the district courts of appeal of the non-final orders authorized herein and to appeals to the circuit court of non-final orders when provided by general law. Review of other non-final orders in such courts and non-final administrative action shall be by the method prescribed by rule 9.100.
>
> (2) Appeals of non-final orders in criminal cases shall be as prescribed by rule 9.140.
>
> (3) Appeals to the district courts of appeal of non-final orders are limited to those that
>
> (A) concern venue;
>
> (B) grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
>
> (C) determine
>
> (i) the jurisdiction of the person;

(ii) the right to immediate possession of property, including but not limited to orders that grant, modify, dissolve or refuse to grant, modify, or dissolve writs of replevin, garnishment, or attachment;

(iii) the right to immediate monetary relief or child custody in family law matters;

(iv) the entitlement of a party to arbitration, or to an appraisal under an insurance policy;

(v) that, as a matter of law, a party is not entitled to workers' compensation immunity;

(vi) that a class should be certified;

(vii) that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law; or

(viii) that a governmental entity has taken action that has inordinately burdened real property within the meaning of section 70.001(6)(a), Florida Statutes.

(D) grant or deny the appointment of a receiver, and terminate or refuse to terminate a receivership.

(4) Non-final orders entered after final order on motions that suspend rendition are not reviewable; provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in rule 9.110. Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule.

(5) Orders entered on an authorized and timely motion for relief from judgment are reviewable by the method prescribed by this rule. Motions for rehearing directed to these orders will not toll the time for filing a notice of appeal.

> (6) Orders that deny motions to certify a class may be reviewed by the method prescribed by this rule.

Rule 9.130 only grants a court of appeal the jurisdiction to hear an interlocutory appeal from an order determining personal jurisdiction. *See* Fla. R. App. P. 9.130 (a)(3)(c)(i). The Rules do not grant this Court the jurisdiction to hear an interlocutory appeal of an order denying a motion to dismiss for lack of subject matter jurisdiction.

The Secretary's policy argument should be rejected. She cites to Rule 9.130(b)(2) that would grant her an automatic stay of a final order. However, she is correct in citing *State, Dept. of Health & Rehabilitative Services v. E.D.S. Fed. Corp.*, 622 So. 2d 90, 91 (Fla. 1st DCA 1993), which held that Rule 1.310(b)(1) does not apply to review by original petition, such as the instant case. None of the other cases cited by Petitioner support her position. The government in *St. Lucie County v. N Palm Dev. Corp.*, 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984) was seeking review of a final judgment, while the Secretary of State in *Reform Party of Florida v. Black*, 885 So. 2d 303 (Fla. 2004) was taking an appeal of an injunction.

Because there is no basis under the Rules of Appellate Procedure for an appeal of an order denying a motion to dismiss for lack of jurisdiction under Rule 9.310(a), there is no basis to seek stay under Rule 1.310(f). Accordingly, the Court should deny the motion for stay.

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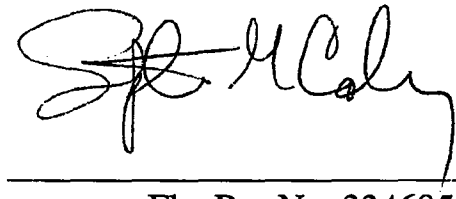

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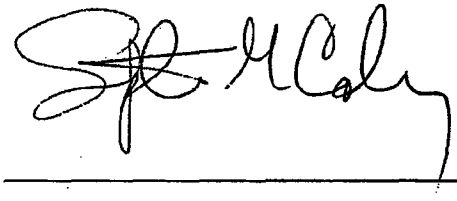
I HEREBY CERTIFY that the foregoing is in Times New Roman 14-point font and complies with the font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure.



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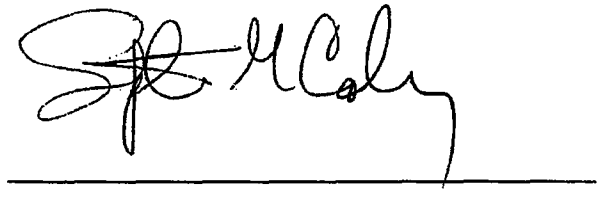

Supreme Court of Florida

MONDAY, JULY 19, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

Petitioner's "Motion for Review of Oral Order Denying Stay Pending Review" filed in the above cause is granted and proceedings in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, are hereby stayed pending disposition of the petition for review filed herein.

LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 10-1362

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,

Petitioner,

vs.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

RESPONDENT CORRINE BROWN AND MARIO DIAZ-BALART'S RESPONSE TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

Original Proceeding Referencing

CORRINE BROWN and MARIO DIAZ-BALART, Plaintiffs, and FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE, Intervening Plaintiffs v. DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, Defendant, and BOB GRAHAM, Intervening Defendant, Second Judicial Circuit, Case No. 2010-CA-1824

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NOTICE OF RECORD CITATIONS

Documents in the first volume of Appendix of Petitioner will be referred to with the designation "1 A-___", while reference to the second volume of Appendix of Petitioner will be referred to with the designation "2 A-___".

STATEMENT OF FACTS AND OF THE CASE[1]

On September 28, 2007, the Florida Department of State, Division of Elections, approved an initiative petition prepared by Defendant FairDistrictsFlorida.org for circulation that establishes new criteria for Congressional redistricting. The proposed amendment to the Florida Constitution dealing with Congressional reapportionment ("Congressional Amendment") is as follows:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact;

[1] Respondents Brown and Diaz-Balart submit their own statement of the facts and of the case because the Petitioner's statement is improperly tinged with both arguments and self-serving statements. *See Sabawi v. Carpenter*, 767 So.2d 585, 586 (Fla. 5th DCA 2000)("The purpose of providing a statement of the case and the facts is not to color the facts in one's favor or to malign the opposing party or its counsel but to inform the appellate court of the case's procedural history and the pertinent record facts underlying the parties' dispute.")

> and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries, 2 So. 3d 175, 179-80 (Fla. 2009) (hereinafter "*Redistricting Boundaries*"). The ballot title and summary for the proposed Congressional Amendment is:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING.
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

Id. at 180.

The Attorney General of Florida requested an opinion from this Court with regard to the validity of the Congressional Amendment petition, as well as a companion petition directed to legislative districting standards, pursuant to Article IV, section 10 of the Florida Constitution. This Court reviewed both amendment petitions pursuant to Article V, section 3(b)(10) of the Florida Constitution.

On January 29, 2009, Justice Lewis, joined by Chief Justice Quince and Justice Anstead, wrote an opinion "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)". *Id.* at 191. Justices Wells, Canady, and Polston did not join in the opinion, but only concurred in the result. *Id.* Justice Pariente recused herself. *Id.*

On March 9, 2009, after the petition for proposed Amendment 6 was approved for circulation, the United States Supreme Court revisited its interpretation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. In *Bartlett v. Strickland*, ___ U.S. ___, 129 S. Ct. 1231 (2009), the North Carolina Supreme Court considered a challenge to the state's redistricting plan which split a county, in violation of the North Carolina Constitution's "Whole County Provision", in order to create a minority-access seat, one in which Black voters, although not constituting a majority of the voting age population, could elect candidates of their choice with the aid of White cross-over voters. State-official defendants answered that dividing Pender County was required by Section 2. The North Carolina Supreme Court held that a minority group must constitute a numerical majority of the voting-age population in an area before Section 2 requires the creation of a legislative district to prevent dilution of that group's votes. Because African-Americans did not have such a numerical majority in District 18, the North

Carolina Supreme Court ordered the legislature to redraw the district. The United States Supreme Court affirmed the judgment of the North Carolina Supreme Court on a petition for writ of certiorari.

The Congressional Petition thereafter obtained the necessary number of signatures and was certified for placement on the November 2010 general election ballot.

On May 24, 2010, Respondents Corrine Brown and Mario Diaz-Balart filed an action in the Circuit Court in and for the Second Judicial Circuit naming Petitioner as a party plaintiff and asking for injunctive and declaratory relief. Respondents Brown and Diaz-Balart brought the action below setting forth eight independent grounds to challenge the placement of proposed Congressional Amendment on the November 2010 ballot.[2] All counts prayed for injunctive and declaratory relief. In summary, Count I claims that the proposed amendment's prohibition against diminishment of the ability of language and racial minorities to elect representatives of their choice differs from the ballot summary's description, that Congressional districts will not be drawn to deny those minorities and "equal opportunity" to elect representatives of their choice, is misleading. In Count II, the Complaint alleges that the ballot summary fails to inform the voters that the new

[2] Respondents Brown and Diaz-Balart made no claim with regard to the proposed amendment directed towards legislative redistricting. Their response to the Petition For Constitutional Writ Or, Alternatively, For Writ Of Prohibition herein is directed solely to the proposed Congressional Amendment.

overriding criteria of compactness and the use of existing political and geographic boundaries will actually decrease, rather than increase or even preserve the Florida Legislature's ability to draw districts to protect minority voting interests. Count III alleges that the ballot summary misleads the voters by inference, setting forth a requirement that Congressional districts will be "as equal in population as feasible", neglecting to inform the voters that exact equality of population is already a requirement of federal law and is a feature of the present Congressional redistricting plan. Count IV alleges that the ballot summary is misleading because of the inconsistent and confusing manner in which it utilizes the phrase "drawn to". Count V asserts that the ballot summary's promise to the voters that the Legislature will ignore incumbency in drawing Congressional districts when Section 5 of the Voting Rights Act not only requires the Legislature to take it into consideration, but explain during the pre-clearance process how its failure to do so should not be considered as a sign of intentionally retrogressing the voting rights of protected minorities. Count VI asks for a declaration that the use of undefined terms in the ballot summary, like "compact", "political or geographic boundaries", "feasible", and "intent", renders the proposal misleading. Count VII asks for a declaration that the use of the undefined phrase "language minorities" in the ballot summary is misleading, implying that speakers of many languages in Florida will be protected, when in fact only Spanish speakers in a handful of Florida's 67 counties could

conceivably benefit. Finally, Count VIII asks the Court to declare, because the 2010 Census will not be collecting data language usage and it will be impossible to accurately determine where members of language minorities reside, that the ballot summary falsely promises that the Legislature will be able to draw districts that do not have the "intent or result" of "denying or abridging the equal opportunity" of "language minorities." 1 A-1.

Both Respondents Florida House of Representatives and The Florida Senate moved to intervene in the case as party plaintiffs. 1 A-25; 1 A-41. The trial court granted motions to intervene as plaintiffs by the Senate and House. 1 A-53; 1 A-54. Both the House and Senate filed claims in addition to adopting the claims in the original Complaint.

Bob Graham moved for leave to intervene as a party defendant, which was granted by the trial court. 1 A-41; 1A-119.

The trial court granted an *ore tenus* motion to add FairDistrictsFlorida.org as a party defendant and the original complaint was amended to bring it into the case. 1 A-120

Petitioner and Respondents Graham and FairDistricts moved to dismiss the original Complaint and the Amended Complaint and the complaints in internvention of Respondents House and Senate for lack of subject matter jurisdiction. 1 A-71; 1 A-142; 2 A-195. Respondents Brown and Diaz-Balart, the

House, and the Senate responded to the various motions to dismiss. 2 A-235, 2 A-260, 2 A-274, 2 A-277, 2 A-293, 2 A-297.

On July 12, 2010, the Honorable Jackie Fulford entered an Order denying the various motions to dismiss for lack of subject matter jurisdiction. 2 A-328. However, Judge Fulford granted the motion to dismiss FairDistricts as a party defendant.

On July 12, 2010, Petitioner filed the instant petition with this Court.

On July 16, 2010 both Respondents Brown and Diaz-Balart and the House filed motions to amend in the court below. Brown and Diaz-Balart asked to amend to remove FairDistricts, to include a claim that the ballot summary is misleading for failing to disclose that the redistricting "standards" contained in the proposed Congressional Amendment will require an enactment by Congress under the time, place, and manner clause found in Article I, Section 4 of the United States Constitution in order to be effective, and to ask for relief in form of mandamus, as well as declaratory and injunctive relief. The Florida House seeks leave to amend on the basis that the legislative redistricting summary states that contiguity is a mandatory requirement, while the legislative amendment expressly states there is no priority with respect to conflicting standards, including contiguity. The House, therefore, alleges that there will no longer be a mandatory contiguity requirement, which conflicts with the summary.

SUMMARY OF ARGUMENT

Contrary to the assertions of the Petitioner, the circuit court below has jurisdiction to hear the claims brought by Respondents Corrine Brown and Mario Diaz-Balart. Under this Court's own holdings, the opinion issued in *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 179-80 (Fla. 2009) is, by its very nature, advisory, and to be accorded no binding precedential value, although it should be deemed persuasive on matters that this Court actually considered. The history of the enactment of Article V, section 3(b)(10) and Article IV, section 10 shows that these amendments were not intended to rob the circuit court of jurisdiction to hear other legal challenges, such as the ones brought by these Respondents. Moreover, writs of prohibition and other constitutional writs are to be used sparingly, only in emergencies, and never as a preemptive attack in lieu of an appeal on the merits. Finally, given the advisory nature of this Court's prior review of the proposed Congressional Amendment, the fact that Respondents Brown and Diaz-Balart did not participate does not preclude them from bringing the action below.

ARGUMENT

I. The Trial Court Below Has Jurisdiction to Hear the Claim Brought By Respondents Brown and Diaz-Balart

This Court has stated that "jurisdiction" is the power to act, the authority to adjudicate the subject matter. *Bush v. State*, 945 So. 2d 1207, 1211 (Fla.

2006)(citing *Williams v. Ferrentino*, 199 So.2d 504, 510 (Fla. 2d DCA 1967). It is widely accepted that "subject matter jurisdiction", the power of the trial court to deal with a class of cases to which a particular case belongs, is conferred upon a trial court by constitution or by statute. *Ben-David v. Education Resources Institute, Inc.*, 974 So. 2d 1138 (Fla. 3d DCA 2008); *M.A. v. State*, 959 So. 2d 380 (Fla. 4th DCA 2007); *In re D.N.H.W.*, 955 So. 2d 1236 (Fla. 2d DCA 2007); *Wardell v. State*, 944 So. 2d 1089 (Fla. 5th DCA 2006).

Petitioner argues that this Court has the *sole and exclusive* jurisdiction to adjudicate any claim that touches upon a proposed constitutional amendment ballot initiative. To support its argument, the Petitioner ignores the clear language of the Constitution, asking this Court to not only "read between the lines", but to graft on language it only wishes were part of the Constitution — language that is not there. Rather than indulge the Petitioner in her wishful thinking, this Court must limit itself to the jurisdictional grant given to it by the people of the State of Florida. This Court's jurisdiction is proscribed. Article V, section 3, of the Florida Constitution provides, in relevant part:

> SECTION 3. Supreme court.-- ...
>
> (b) JURISDICTION.--The supreme court: ...
>
> (8) May issue writs of mandamus and *quo warranto* to state officers and state agencies. ...
>
> (10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV,

render an advisory opinion of the justices, addressing issues as provided by general law.

Article IV, section 10, referenced in Article V, section 3(b)(10) provides:

> SECTION 10. Attorney General.--The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.[3]

---

[3] The Attorney General's authority under Article IV, Section 10 is limited by section 16.061 which provides:

> 16.061 Initiative petitions.--
>
> (1) The Attorney General shall, within 30 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161. *The petition may enumerate any specific factual issues that the Attorney General believes would require a judicial determination.*
>
> (2) A copy of the petition shall be provided to the Secretary of State and the principal officer of the sponsor.
>
> (3) Any fiscal impact statement that the court finds not to be in accordance with s. 100.371 shall be remanded

The Petitioner's focus is entirely upon Article V, section 3(b)(10) and from its language asserts that the Supreme Court has the exclusive jurisdiction to issue relief regarding a misleading ballot summary. However, the Petitioner misinterprets the duty and obligations of the Attorney General and this Court, as well as the advisory opinion process itself.

The language of Article V, section 3(b)(10) and Article IV, section 10, does not say that this Court has exclusive jurisdiction to consider any claim that touches upon an initiative based constitutional amendment. To the contrary, this Court held in *Florida League of Cities v. Smith*, 607 So.2d 397, 398-99 (Fla. 1992) that the effect of an advisory opinion is limited. Specifically, this Court found:

> It is true that article IV, section 10 and article V, subsection 3(b)(10) are silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction.
>
> When those provisions were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent[3] and *would only constitute persuasive authority as to any other adversarial legal challenge that*

> solely to the Financial Impact Estimating Conference for redrafting.

(Emphasis added.) There is no provision in the Florida Statutes that imposes an obligation upon this Court to resolve the factual issues enumerated by the Attorney General or any factual issues raised by a member of the public who files a comment with the Court on the proposed amendment.

> *might later be raised.* Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986) (available from Fla. Div. of Archives); Staff of Fla.H.R.Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986) (available from Fla. Div. of Archives).[4] *This necessarily implies that other legal challenges would continue to be permissible under existing precedent; and our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution. E.g., Askew* [*v. Firestone*, 421 So.2d 151, 155 (Fla.1982)]; *Smith v. American Airlines, Inc.*, 606 So.2d 618 (Fla.1992).
>
> [3]This is entirely consistent with settled law holding that *advisory opinions "are not binding judicial precedents, [although] they are frequently very persuasive and usually adhered to." Lee v. Dowda*, 155 Fla. 68, 73, 19 So.2d 570, 572 (1944). As a corollary, we note that *advisory opinions are only persuasive as to issues they actually address, not as to issues such as the one before us today that were not addressed at all in a prior advisory opinion.*
>
> [4]Although the committee substitutes discussed in these summaries were not themselves adopted, they differ in no relevant way from House Joint Resolution 71, which ultimately was adopted, placed before the voters, and approved. *See* Fla. HJR 71, 1986 Fla. Laws 2281, 2281-83.

Emphasis supplied. This Court's use of the terms "existing precedent" and "other legal challenges" in *Florida League of Cities* implies that legal actions, such as the one brought by Respondents Brown and Diaz-Balart below, are permitted. *See Carroll v. Firestone*, 497 So.2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So.2d 1351 (Fla. 1984).

Moreover, the persuasive effect of the advisory opinion in *Redistricting Boundaries* is limited for two reasons. First, it only extends to the issues raised before the Court at that time. When this Court examined the ballot title and summary in question, the House and Senate raised the issues of whether the proposed amendments concerned single subjects [*id.* at 181-83], whether either of them affected multiple governmental functions [*id.* at 183-84], whether the ballot summaries were misleading for not informing voters that the judiciary will apply the redistricting standards if the Legislature fails to draw a plan [*id.* at 185], whether the ballot summaries mislead by allowing a plan to be drawn which favors an incumbent or a party, so long as there is no "intent" to favor an incumbent or a party [*id.* at 185-86], whether the ballot summaries mislead by failing to inform voters that the authority to reapportion will be shifted to the judiciary [*id.* at 187], whether the ballot summaries' use of the phrase "city, county and geographical boundaries" was misleading [*id.* at 187-88], whether the use of the word "or" multiple times is misleading [*id.* at 188-89], and whether the term "language minorities" is misleading [*id.* at 189].[4] There is no overlap between the issues considered by this Court in the advisory opinion and the claims raised by Respondents Brown and Diaz-Balart below. Further, neither Brown nor Diaz-

[4] The House and Senate's argument that the proposed amendment will impliedly repeal the Legislature's authority to draw multimember districts has no application to Congressional districts. *See* 2 U.S.C. § 2c.

Balart participated in the Court's initial facial review of the ballot summary of the Congressional Amendment.

Second, this Court is limited in its ability to examine facts in determining whether the ballot summary is misleading. Quite simply, this Court is not a trial court and the advisory opinion process does not lend itself to more than a facial examination, comparing whether the language used in the ballot summary matches the verbiage in the proposed amendment. There is no procedure by which this Court can hear witnesses or weigh evidence. That function is clearly the province of a trial court. However, the Florida Constitution does not recognize this Court as one of its "trial courts."

The determinative issue, then, is whether the circuit court below is a trial court that has jurisdiction to hear a claim seeking both injunctive and declaratory relief. Article V, section 5 specifically provides:

> SECTION 5. Circuit courts.--
>
> (a) ORGANIZATION.--There shall be a circuit court serving each judicial circuit.
>
> (b) JURISDICTION.--The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and *all writs necessary or proper to the complete exercise of their jurisdiction.* Jurisdiction of the circuit court shall be uniform throughout the state. They shall

have the power of direct review of administrative action prescribed by general law.

~~5.~~Emphasis added. The Legislature has further delineated the jurisdiction of the circuit courts, in relevant part, as follows:

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> 26.012 Jurisdiction of circuit court.--
>
> (2) They [circuit courts] shall have exclusive original jurisdiction: ...
>
> (c) *In all cases in equity* including all cases relating to juveniles except traffic offenses as provided in chapters 316 and 985; ...
>
> (3) The circuit court may issue injunctions. ...
>
> (5) A circuit court is a trial court.

Further, section 86.011 sets the jurisdiction of the court below as follows:

> 86.011 Jurisdiction of trial court.--The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:
>
> (1) Of any immunity, power, privilege, or right; or
>
> (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also

> demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

Because Respondents Brown and Diaz-Balart seek both declaratory and injunctive relief, jurisdiction is properly vested in the court below.[5] In her order denying the motions to dismiss, the circuit judge below correctly wrote:

> With the exception of the limited circumstances where jurisdiction is expressly denied by the Constitution or Florida Statutes, Circuit Courts have plenary jurisdiction over all matters. *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 895 (Fla. 2003); *Dep't of Revenue v. Kuhnlein*, 646 So.2d 717, 720 (Fla. 1994).

2A-324. Unlike this Court, the Florida Constitution vests the court below with the authority to conduct trials, and by implication, to hear testimony, accept evidence into the record, and make findings of fact and conclusions of law. Clearly, if the Attorney General had commenced an action seeking an advisory opinion in the circuit court below, that court would have been barred from issuing such an advisory opinion. However, the scheme contained in Article IV, section 10 and Article V, subsection 3(b)(10) is not a bar to the case Respondents Brown and Diaz-Balart filed below. In *Lane v. Chiles*, 698 So.2d 260 (Fla. 1997), this Court affirmed a final summary judgment of the Circuit Court in Leon County upholding the constitutionality of Article X, section 16 of the Florida Constitution limiting net

[5] As noted above, Respondents Brown and Diaz-Balart have a pending motion to file a Second Amended Complaint that also seeks relief via mandamus. Article V, section 5(b) of the Florida Constitution grants a circuit court the authority to issue writs of mandamus.

fishing. This Court noted that the ballot summary claim was brought "eight months *after* it was adopted by a vote of the people and less than two weeks before the amendment was to be effective." *Id.* at 265 (emphsais added). This Court held that, while it had specifically approved the ballot summary by advisory opinion, it agreed that the challenge in circuit courtm which was filed after the referendum election, was brought too late. This Court's holding in *Lane* recognized that its exclusive jurisdiction to render advisory opinions under Article V, Section 3(b)(10), Florida Constitution does not deprive circuit courts of jurisdiction over ballot summaries in initiative petition challenges under Section 101.161(1), Florida Statutes.

In the instant case, the Respondents Brown and Diaz-Balart intend to introduce testimony and other evidence that bears on the claims contained in the Amended Complaint. For instance, the Plaintiffs intend to introduce evidence in support of Counts VII and VIII which deal with the scope of the 2010 Census and the American Community Surveys conducted by the United States Bureau of the Census and demonstrate that the ballot summary is misleading in telling the voters that the Legislature will be able to discern with any degree of accuracy where "language minorities" reside. Since the Census no longer collects language usage data, the ballot summary "flies under false colors", promising what the Legislature cannot possibly deliver. The advisory opinion process is ill-suited to consider

claims that are fact intense, such as Counts VII and VIII. The Florida Constitution clearly vests the circuit court below with jurisdiction to hear the claims brought by Respondents Brown and Diaz-Balart, to weigh the evidence, and render a judgment.

II. A Writ Of Prohibition Or Other Constitutional Writ Is Not Permitted In This Matter

The attempt by the Petitioner to seek a writ of prohibition or other constitutional writ here is analogous to the attempt to obtain the same relief in *English v. McCrary*, 348 So.2d 293 (Fla. 1977). In *English*, a Tallahassee reporter who was excluded from a divorce hearing by a circuit court judge, sought a writ of prohibition in the First District Court of Appeal which would have forced the trial judge to allow him into the hearing. The First District denied his petition. This Court affirmed the denial of English's petition and, in doing so, clearly laid out the parameters under which prohibition can be used, first deciding:

> Prohibition is an extraordinary writ, a prerogative writ, extremely narrow in scope and operation, by which a superior court, having appellate and supervisory jurisdiction over an inferior court or tribunal possessing judicial or quasi-judicial power, may prevent such inferior court or tribunal from exceeding jurisdiction or usurping jurisdiction over matters not within its jurisdiction.

Id. at 296. This Court then described the nature of the relief accorded under prohibition as:

In Florida, the courts have consistently determined, in accord with the historical understanding and background of the writ of prohibition, that it is meant to be very narrow in scope, to be employed with great caution and utilized only in emergencies. Prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction. It is preventive and not corrective in that it commands the one to whom it is directed not to do the thing which the supervisory court is informed the lower tribunal is about to do. ...

Prohibition will be invoked only in emergency cases to forestall an impending present injury where person seeking writ has no other appropriate and adequate legal remedy. *Joughin v. Parks*, 107 Fla. 833, 147 So. 273 (1933). *However, absence of an adequate remedy by an appeal or writ of error is not, in and of itself, sufficient to authorize the writ. Crill et al. v. State Road Dept. et al.*, 96 Fla. 110, 117 So. 795 (1928). Furthermore, only when damage is likely to follow the inferior court's acting without authority of law or in excess of jurisdiction will the writ issue. *Curtis et al. v. Albritton*, 101 Fla. 853, 132 So. 677 (1931).

Prohibition lies to prevent an inferior tribunal from acting in excess of jurisdiction but not to prevent an erroneous exercise of jurisdiction. *Burkhart v. Circuit Court of the Eleventh Judicial Circuit*,146 Fla. 457, 1 So.2d 872 (1941). *In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be. Curtis et al. v. Albritton*, supra. Discussing the remedy of prohibition in relation to the broad powers vested in the circuit courts, this Court, in *State ex rel. B. F. Goodrich Co. et al. v. Trammell et al.*, 140 Fla. 500, 192 So. 175 (1939), opined:

> "The circuit courts of the State of Florida are courts of general jurisdiction similar to the Court of King's Bench in England clothed with most generous powers

> under the Constitution, which are beyond the competency of the legislature to curtail. *Ex Parte Henderson*, 6 Fla. 279; *Lamb v. State*, 91 Fla. 396, 107 So. 535. They are superior courts of general jurisdiction, subject of course to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and as a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly out side of and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto. *Chapman v. Reddick*, 41 Fla. 120, 25 So. 673; *Curtis v. Albritton*, 101 Fla. 853, 132 So. 677.
>
> "Circuit courts of the State of Florida have exclusive jurisdiction of all cases in equity, all cases at law, and all criminal cases not cognizable by inferior courts. Section 11, Article V, of the Constitution; *State v. Sullivan*, 95 Fla. 191, 116 So. 255.

English, 348 So.2d at 296-98. This Court in *English* distinguished between "assumption of jurisdiction to which the court has no legal claim and erroneous exercise of jurisdiction with which it is invested." *Id.* at 298. Only in the case of the former will prohibition lie. Prohibition, this Court has ruled, is not meant to act as a pre-emptive substitute for appeal.

> In *State ex rel. Rheinauer v. Malone*, 40 Fla. 129, 23 So. 575, 576 (1898), this Court explicated:
>
> "But it does not lie for errors or grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal or writ of error. *It is a fundamental principle, and one which will be strictly enforced, that this writ is never allowed to usurp the functions of a writ or error or certiorari, and can never be employed as a process for*

> *the correction of errors of inferior tribunals*. The courts will not permit a writ which proceeds upon the ground of an excess or usurpation of jurisdiction to become an instrument itself of usurpation, or be confounded with a writ of error, which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded. *It does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment, in a case in which it has a right to adjudicate. In the application of the principle, it matters not whether the court below has decided correctly or erroneously; its jurisdiction of the matter in controversy being conceded, prohibition will not lie to prevent an erroneous exercise of that jurisdiction.*" (Emphasis supplied.)
>
> Abuse of discretion by the inferior tribunal acting within its jurisdiction is not a matter to be determined by prohibition. *State v. Hunt*, 70 So.2d 301 (Fla. 1954), *State ex rel. Jacksonville Ice & Cold Storage Co. v. Gray et al.*, 130 Fla. 359, 177 So. 849 (1937).

English, 348 So.2d at 298 (emphasis added).

At best, the Petitioner has made a claim that the trial court below has made an erroneous exercise of jurisdiction with which it is invested. Because of that shortcoming, her petition for a writ of prohibition or other constitutional writ must be denied.

III. Respondents Brown And Diaz-Balart Did Not Waive Their Right To Bring The Action Below By Failing To Participate In The Initial Review Of The Congressional Amendment

Petitioner's final argument is that, because Respondents Brown and Diaz-Balart did not participate in this Court's initial facial review of the ballot summary of the proposed Congressional Amendment, they are forever barred from litigating

their claims. This argument must be rejected because it attempts to raise the status and authority of an advisory opinion to that of a final judgment, something that neither the history of the amendments authorizing the initiative amendment process envisioned or that this Court's prior decisions support.

As discussed above, Respondents Brown and Diaz-Balart have brought numerous claims that were not considered by this Court. As this Court held in *Florida League of Cities*, 607 So.2d at 99 n.3, "advisory opinions are only persuasive as to issues they actually address, not as to issues such as the one before us today that were not addressed at all in a prior advisory opinion." Moreover, the advisory opinion was not designed to have a preclusive effect. In *Denson v. State*, 775 So. 2d 288, 290 n.3 (Fla. 2000), this Court defined "*res judicata*" as:

> *Res judicata*, translated from the Latin, means "matter adjudged." *See* Black's Law Dictionary 1305 (6th ed.1990). The doctrine of *res judicata* provides that a final judgment on the merits is conclusive of the rights of the parties and constitutes a bar to a subsequent action or suit involving the same cause of action or subject matter. *See ICC Chemical Corp. v. Freeman*, 640 So.2d 92, 93 (Fla. 3d DCA 1994). The idea underlying *res judicata* is that if something has already been decided, the petitioner has had his day in court, and, for purposes of judicial economy, it generally will not be reexamined in any court (except for appeals by right). *See Rooney v. State*, 699 So.2d 1027 (Fla. 5th DCA 1997).

The advisory opinion lacks preclusive effect because it was not a "final judgment on the merits" between the same parties "involving the same case of action or subject matter."

To accept the Petitioner's reasoning would turn every proceeding brought by the Attorney General under Article IV, section 10 into a class action, binding 18 million residents of the State, but without due process safeguards such as notice or an opportunity to opt out of the class.

The Court should deny the petition for writ of prohibition or other constitutional writ.

CONCLUSION

The history of both Article IV, section 10 and Article V, section 3(b)(10) demonstrates that they were intended to provide advisory guidance to the sponsors of a proposed constitutional initiative, but not a guarantee that if the proposal's ballot summary was defective or its effect was to violate the United States Constitution it would be assured its spot on the ballot. The Petitioner confuses this Court's jurisdiction to issue advisory opinions with the plenary jurisdiction of the circuit court. Petitioner's claim that that only this Court can adjudicate the claims that Respondents Brown and Diaz-Balart raised below should be rejected. The Petitioner's attempt to use prohibition as a way to preemptively appeal the decision of the circuit court below that it has jurisdiction to adjudicate the claims brought

before it should be rejected. Petitioner, like the petitioner in English v. McCrary, has failed to make out a prima facie case for a writ of prohibition or other administrative writ.

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CERTIFICATE OF COMPLIANCE

Respondents Brown and Diaz-Balart hereby certify that they have utilized the Times New Roman typeface at a size of 14 points throughout this Response Brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on July 17, 2010 to:

Trial Court Judge

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IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1362

DAWN K. ROBERTS,

Petitioner,

vs.

CORRINE BROWN, MARIO DIAZ-BALART,

Respondents

On Appeal From The Denial Of Motions To Dismiss For Lack of Jurisdiction

THE FLORIDA SENATE'S RESPONSE IN OPPOSITION TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

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BACKGROUND AND INTRODUCTION

On August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act into law calling it "a triumph for freedom as huge as any victory that has ever been won on any battlefield." *See* Johnson, Remarks in the Capitol Rotunda (Aug. 6, 1965). Since that day, the Voting Rights Act has evolved into a great success in protecting and advancing the voting rights of minorities. This is especially true in Florida which now has the best record of minority representation of any state in the South, and it is against this backdrop that this case has arisen.

This is a suit brought by various parties challenging the legality of two reapportionment initiatives (Amendments 5 and 6) currently set to be on the upcoming general election ballot in November, 2010. The Florida Senate intervened in the case because it believes that these ballot proposals patently violate paramount federal law and are, thus, illegal and should be removed from the ballot.

Claims of The Florida Senate

In its Complaint, the Florida Senate asserted two separate claims:[1] both for a declaratory judgment and an injunction against the Secretary of State, asking that

[1] In addition to asserting its own claims, the Florida Senate adopted the claims asserted in the Florida House's Amended Complaint. However, the claims asserted directly by the Florida Senate in its Complaint have not been raised by any other Respondent in the case and were not reviewed by the Florida Supreme Court previously.

the ballot proposals at issue in this litigation be barred from the upcoming ballot because they plainly violate paramount federal law and also because they violate the separation of powers scheme set up in the Florida Constitution and are flatly unworkable.

Proceedings Below

In response, the Florida Secretary of State (along with Intervenor-Defendant Senator Bob Graham)("Senator Graham") filed a Motions to Dismiss For Lack of Subject Matter Jurisdiction (the "Motion to Dismiss") contending that the lower court lacked jurisdiction to review the reapportionment proposals because the Florida Supreme Court had exclusive jurisdiction over the issue. The Motion to Dismiss was fully briefed and a hearing was held in the Circuit Court on July 8, 2010.

The Measured Denial Of The Motion To Dismiss

On July 12, 2010, the lower court issued an order denying the Motion to Dismiss on the grounds that it had jurisdiction to facially review the ballot proposals against the Plaintiffs' challenges. The Order on Motions to Dismiss is very measured and holds only and reasonably that, as a court of plenary jurisdiction, the Circuit Court has jurisdiction to decide the Plaintiffs' claims but that its jurisdiction is limited to a facial review of the proposed constitutional

amendments.[2] For the Court's convenience, the complete text of that Order on Motions to Dismiss is set forth below in its entirety:

ORDER ON MOTIONS TO DISMISS

THIS CAUSE came on to be heard on July 8, 2010, on the Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction filed by Defendant, Dawn K. Roberts, on June 22, 2010, and the Motions to Dismiss for Lack of Subject Matter Jurisdiction filed by Defendants, Bob Graham and FairDistrictsFlorida.Org, Inc., on June 24, 2010, and June 29, 2010, respectively. The Court, having reviewed the motions and responsive pleadings filed by the parties, and being otherwise fully advised in the premises, finds as follows:

1. In this case, Plaintiffs' and Intervening Plaintiffs' complaints allege that the ballot summaries for Amendment 5 and Amendment 6 (the "Amendments") are misleading. The Senate additionally claims the Amendments violate federal and Florida law. The Plaintiff(s) and Intervening Plaintiff's seek declaratory and injunctive relief. The Circuit Court has authority to grant declaratory and injunctive relief pursuant to sections 26.012 (3) and 86.011, Florida Statutes.

2. With the exception of the limited circumstances where jurisdiction is expressly denied by the Constitution or Florida Statutes, Circuit Courts have plenary jurisdiction over all matters. *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 895 (Fla. 2003); *Dep't of Revenue v. Kuhnlein*, 646 So.2d 717, 720 (Fla. 1994). One such exception was created in 1986, in the adoption of Article IV, Section 10 and Article V, Subsection (3)(b)(10) of the constitution (the "Advisory Opinion Process").

Specifically, Article IV, Section 10 provides:

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[2] The Florida Senate believes that the lower court's jurisdiction is actually more expansive and that the lower court actually has jurisdiction to hear a full trial in the case. However, it will preserve this objection for another appeal, should one be necessary.

The Attorney general shall as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion expeditiously.

Article V, Subsection 3(b)(10) provides that the supreme court:

Shall, when requested by the attorney general pursuant to the provisions of Section 10, Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

These provisions establish the Supreme Court's present mandatory and exclusive jurisdiction to issue an "advisory opinion" upon the request of the attorney general, on voter initiative petitions to amend the Constitution.

3. Here, the Florida Attorney General requested an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes. The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued an advisory opinion holding that "the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to the Attorney General Re Standards for Establishing Legislative District Boundaries*, 3 So.3d 175 (Fla.2009).[3]

4. The defendants and intervening defendant argue that adoption of the Advisory Opinion Process established the Supreme Court's present mandatory and exclusive jurisdiction over all pre-

[3] The complaints now pending in circuit court contain eight counts alleging the ballot titles and summaries are misleading. At least two of these were arguably addressed in the advisory opinion by the Supreme Court. The allegation by the Florida Senate that the proposed amendments violate federal and Florida law, was not previously considered by the Florida Supreme Court. [Please note that this footnote is actually footnote 1 of the Order on Motions to Dismiss.]

election challenges to voter initiative petitions to amend the Florida Constitution. Based on the clear and unambiguous language in the constitution, as well as the opinions of the Florida Supreme Court following adoption of the Advisory Opinion Process, this court cannot so conclude. The Supreme Court has held that creation of the advisory opinion process did not restrict the right to challenge petitions according to precedent:

> When [the] provisions [creating the advisory process] were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised. This necessarily implies that other legal challenges would continue to be permissible under existing precedent; and our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution.

Florida League of Cities v. Smith, 607 So.2d 397, 398-99 (Fla. 1992) (emphasis added); *Smith v. American Airlines, Inc.*, 606 So.2d 618 (Fla. 1992). Therefore, any challenges permissible under existing precedents survived the creation of the Advisory Opinion Process in 1986. Those precedents recognized not only mandamus actions, but also challenges to initiative petitions in Circuit Court. *See Carroll v. Firestone*, 497 So.2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So.2d 1351 (Fla. 1984).

Further, after the Advisory Opinion Process was established, the Supreme Court was presented with the opportunity to rule on the issue of whether a circuit court has jurisdiction to address a challenge to a ballot summary in an initiative petition case. In *Lane v. Chiles*, 698 So.2d 260, the Supreme Court affirmed a final summary judgment of the Circuit Court in Leon County upholding the constitutionality of Article X, Section 16, of the Florida Constitution, limiting marine net fishing. Among other things, the court agreed with the circuit court that the ballot summary claim was untimely filed in circuit court, as it was brought "eight months after it was adopted

by a vote of the people and less than two weeks before the amendment was to be effective.." *Id.* at 265. Although it did note that it had specifically approved the ballot summary by advisory opinion, the Supreme Court did not hold that a challenge in circuit court thereafter would have been improper. To the contrary, it agreed that the challenge in circuit court was untimely.

Thus, the Supreme Court's exclusive jurisdiction to render advisory opinions under Article V, Section 3 (b)(10), Florida Constitution does not deprive Circuit Courts of jurisdiction of all challenges to ballot summaries in initiative petition challenges under Section 101.161(1), Florida Statutes. This Court, however, will certainly consider the advisory opinion previously issued by the Supreme Court with respect to the Amendments at issue here as persuasive authority.

5. ***If a proposed amendment specifically violates some provision of the Federal Constitution or some paramount federal law, such that it is wholly void and inoperative, it should not be submitted to the electorate of the state for approval or rejection***. *See Gray v. Moss*, 156 So.2d 262 (Fla. 1934); *Gray v. Winthrop*, 156 So. 270 (Fla. 1934).[4]

6. The Court previously granted an ore tenus motion to add FairDistrictsFlorida.Org as a defendant. Thereafter the Plaintiff filed an Amended Complaint, and the House of Representatives filed an Amended Motion to Intervene. In the Court's review of all of the amended pleadings, however, there appears to be no relief sought against them by any of the Plaintiffs. Where no relief is sought against a party in an action for declaratory judgment, dismissal is appropriate. *McLaughlin v. Metropolitan Dade County,* 191 So.2d 615, 616 (Fla. 3d DCA 1966).

Accordingly it is

ORDERED and ADJUDGED as follows:

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[4] The emphasis in this paragraph of the Order on Motions to Dismiss is supplied here by the pleader.

1. The Defendants' motions to dismiss for lack of subject-matter jurisdiction are DENIED. This Court has jurisdiction to determine whether the ballot titles and summaries for the Amendments meet the requirements of Section 101.161, Florida Statutes, and whether the Amendments on their face, but not as applied, violate the Constitution, federal law or Florida law.

2. The Defendant's motion to dismiss FairDistrictsFlorida.Org, as a party to this case is GRANTED.

DONE and ORDERED this 12th day of July, 2010 at Tallahassee, Leon County, Florida.

Subsequent Proceedings

After losing the Motion to Dismiss, the Secretary of State immediately filed the instant Petition for Constitutional Writ or, Alternatively, For Writ of Prohibition with this Court. Senator Graham, an Intervenor-Defendant, subsequently joined in the Petition.

SUMMARY

The requested writs should be denied, and the Petition dismissed. The lower court's decision denying the Motion to Dismiss is quite limited and holds only that, as a court of plenary jurisdiction, it has jurisdiction to at least conduct a facial review of two proposed ballot initiatives that would wholly rewrite the Legislature's constitutional reapportionment duties and that would allegedly eviscerate minority voting rights in this State. Surely, such wholesale changes to voting rights and legislative districts warrant at least this limited-type of facial

review. More specifically, the Petition should be dismissed because: 1) the Secretary of State (along with Senator Graham) lack standing to petition for a constitutional writ since neither has been injured in any way by the lower court's ruling; 2) the lower court's order dismissing the Secretary of State's Motion to Dismiss fully comports with established Florida law as decided by this Court; 3) the claims raised by the Florida Senate in its Complaint are fully justiciable (and the justiciability issue was not raised in the proceedings below and has, therefore, been waived regardless); and 4) the Secretary of State's alternative request for a writ of prohibition must also fail since she clearly has a remedy by way of plenary appeal (even if she had standing to seek such a writ, which she does not). For all these reasons, the Secretary of State's Petition for Constitutional Writ fails to prove the necessity of the issuance of such an extraordinary writ in this limited case, and the Petition should, accordingly, be roundly and completely denied.

ARGUMENT

I. The Secretary of State, As A Ministerial Officer, Lacks Standing To Seek An Extraordinary Writ.

As described above, this case deals with two ballot proposals that would vastly restructure the Legislature's duties to reapportion all of the voting districts in Florida and would also preclude the Legislature from reapportioning such districts in compliance with federal voting rights law. With respect to Proposed Amendments 5 and 6, the Secretary of State concedes in her own pleadings that her

duties are purely "nominal." *See* Defendant's Response to Motion of Bob Graham to Intervene, Senate App. p. 1.[5] By Constitution and by statute, the Secretary of State is empowered only with determining whether the requisite number of petitions have been submitted by the appropriate date, assigning ballot position, submitting the amendments for publication, and submitting them to the counties for ballot printing. *See* Art. XI, § 3, Fla. Const.; §§ 100.371, 101.161(2), Fla. Stat.; Rule 1S-2.0011, F.A.C. *See also* Graham's Reply to Plaintiffs' Responses to Graham's Motion to Intervene, Senate App., p. 8 (referring to the Secretary of State's role as "purely ministerial"). This means that the Secretary of State simply has no interest sufficient to provide her with standing to seek a writ in this case. She has not been—and will not be—injured if the case remains in the lower court where it rightly belongs at this stage.

The law is clear that a party lacks standing to seek a writ regarding an order that was not adverse to that party, and the lower court's order denying the Secretary of State's Motion to Dismiss was not actually adverse to her. Indeed, it was actually neutral with respect to the Secretary of State's duties over the ballot proposals in question. The Secretary of State simply did not suffer any detriment or

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[5] The Secretary of State's Response to Motion of Bob Graham to Intervene along with Senator Graham's Reply to Plaintiffs' Responses to Graham's Motion to Intervene were apparently not included in the Petitioner's Appendix. Hence, they have been supplied by the Florida Senate in its Appendix. Petitioner has no objection.

harm by this ruling. *See State v. Myrick*, 636 So.2d 785 (Fla. 1st DCA 1994). She will either put the proposals on the ballot or she will not, as directed by appropriate court order. The fact that the Secretary of State appears to have some partisan interest in seeing these initiatives on the ballot is of no moment to whether or not she has actually been injured by the ruling or has some other interest therein.[6] In this case, the Secretary of State's only duty is to obey the courts with respect to whether or not these ballots should lawfully be placed on the upcoming general election ballot, and she herself has conceded that she is merely a "nominal" party in this case. Therefore, she has no standing to seek any writ to this Court.

Indeed, for example, government officials such as the Secretary of State here generally lack standing to bring claims regarding laws they are bound to obey. As a general rule, a public official may only seek a declaratory judgment when he is "willing to perform his duties, but ... prevented from doing so by others." *Reid v. Kirk*, 257 So.2d 3, 4 (Fla.1972). Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion. *See Askew*

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[6] The Secretary of State was named a defendant in this case only because she has a ministerial duty regarding the upcoming general election ballot. Thus, she should rightly be neutral with respect to whether or not these two redistricting initiatives get put on the ballot and her decision to actually take sides in the matter is plainly improper. The importance of neutral election officials, such as the Secretary of State, over constitutional ballot initiatives cannot be overstated, and the Secretary of State has violated her duty of neutrality here.

v. City of Ocala, 348 So.2d 308 (Fla.1977). The same analysis applies with respect to the Secretary of State's lack of standing to seek a writ in this case. Since the Secretary of State only has a ministerial duty to comply with the ballot statutes and to obey any controlling court orders, she has suffered no injury sufficient to provide her with standing to bring a writ before this Court. Accordingly, her request for a constitutional writ must be dismissed for lack of standing.

Senator Graham, an Intervenor-Defendant, has also joined in the Secretary of State's Petition for Constitutional Writ. Unfortunately, his standing to bring a writ before this Court in this matter is even weaker than the non-existent standing of the Secretary of State. In his Reply to Plaintiffs' Responses to Graham's Motion to Intervene, Senator Graham asserts that his only "interest" in the ballot initiatives "is indeed the same as other voters" and citizens of Florida. *See* Graham's Reply to Plaintiffs' Responses to Graham's Motion to Intervene, Senate App., p.6. Hence, by his own pleadings, Senator Graham confirms that he has no special interest or injury in this case, that he stands no different than any other citizen or voter of Florida before this Court relative to the ballot proposals. This means that, under well-established law, he too lacks standing to bring a writ before this Court in this case. *See, e.g., Centrust Savings Bank v. City of Miami*, 491 So.2d 576, 577 (Fla. 3d DCA 1986)(holding that property owner lacked standing to seek writ of mandamus absent claim that he had suffered special injury apart from the general

public); *Boucher v. Novotny*, 102 So.2d 132, 135-136 (Fla. 1958); 35 Fla. Jur2d *Mandamus & Prohibition* § 96.

In conclusion, it is clear that none of the Petitioners has standing to seek any writ before this Court. The Secretary of State's interest in the case is purely ministerial (and she confirms in her own pleadings that she is only a "nominal" party) and Senator Graham has specifically denied having any special interest herein in the very text of his own pleadings. Thus, neither Petitioner simply has any standing to support the requested writs and, therefore, the Florida Senate reiterates that the Petition should be dismissed outright for lack of standing.

II. The Lower Court's Decision Is Unquestionably Correct And Does Not Interfere With This Court's Jurisdiction In Any Way.

This suit involves legal challenges to the validity of two proposed ballot initiatives dealing with legislative redistricting. The claims brought by the Florida Senate in its Complaint assert legitimately that these two ballot initiatives would violate controlling federal law on minority voting rights. The lower court held only that it had jurisdiction to hear facial challenges to the ballot proposals and motions for summary judgment are expected to be filed shortly in the case. No trial will take place.

Issuance of a writ pursuant to the Court's "all writs" power is an extreme remedy that can only be exercised where it is necessary to the exercise of this Court's jurisdiction. *See* Article V, § 3(b)(7), Fla. Con.; Rule 9.030(a)(3) of the

Florida Rules of Appellate Procedure. Because the lower court clearly has jurisdiction to review the Florida Senate's claims, use of the Court's "all writs" power would be both unnecessary and improper in this case.

A. This Court Does Not Have Exclusive Jurisdiction Over The Florida Senate's Claims.

In her Petition, the Secretary of State asks this Court for the remarkable relief of directing the Circuit Court to dismiss the underlying case in its entirety or transferring the whole case to this Court lock, stock, and barrel. Neither relief is justified, and the Secretary of State's unfounded request should be denied for being without foundation. Indeed, in her own Petition, the Secretary of State concedes that "no constitutional or statutory provision expressly forbids a circuit court from entertaining a pre-election challenge" to a ballot initiative. Petition, p. 12. This should be the end of the matter. The Secretary of State goes on to claim, however, that the underlying "policies" behind the Supreme Court's preliminary advisory review of ballot initiatives show that the Circuit Courts should be deprived of jurisdiction to hear broader pre-election claims. *Id.* at. 12-17. The Secretary of State is wrong.

As this Court surely knows, the Circuit Courts are courts of plenary jurisdiction. This means that unless there is a specific statutory or constitutional provision depriving them of jurisdiction, the circuit courts retain jurisdiction to hear all claims related to pre-election challenges over ballot proposals. And, the

Secretary of State defeats her own case by admitting, as she does, that there is no law or authority depriving the Circuit Courts of jurisdiction here.

Truly, the Florida Constitution and § 101.161, Fla. Stat., provide this Court with advisory authority to review proposed voter initiatives for their compliance with ballot summary and single-subject requirements prior to their placement upon any ballot. However, as this Court has acknowledged, this review is purely "advisory" in nature. Indeed, this Court reviewed proposed Amendments 5 and 6 earlier pursuant to the statutory procedure set out in § 101.161, Fla. Stat. *Advisory Opinion to the Attorney General Re: Standards for Establishing Legislative District Boundaries*, 2 So.3d 175 (Fla. 2009). With respect to the ballot proposals at issue, this Court's earlier review held only that "the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and [their] ballot title summaries comply with section 101.161(1), Florida Statutes." *Id.* at 191.

But, as this Court has acknowledged, its early review of such voter initiatives is quite limited in nature[7] and it has described the elements of this

[7] Even re-review of the ballot summary and single-subject issues are not strictly foreclosed by previous Florida Supreme Court review under § 101.161, as this Court stated in *Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992), only that re-litigation of the ballot summary and single-subject issues was "strongly disfavored" and should be "entertained only in truly extraordinary cases." It bears repeating that the claims raised by the Florida Senate in its Complaint do not attempt to re-litigate, in any way, the ballot summary or single-issue limitations

limited review in *Advisory Opinion to Atty. Gen. ex rel. Amendment*, 778 So.2d 888 (Fla. 2000), as follows:

> The court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999). *See Advisory Opinion to* the *Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563, 565 (Fla. 1998); *Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns*, 693 So.2d 972, 974 (Fla. 1997). In order for the Court to invalidate a proposed amendment, the record must show that the proposal is clearly and conclusively defective on either ground. *See Askew v. Firestone*, 421 So.2d 151, 154 (Fla. 1982). In determining the propriety of the initiative petitions, the Court does not review the merits of the proposed amendments. *See Right of Citizens to Choose Health Care Providers*, 705 So.2d at 565; *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So.2d 1304, 1306 (Fla. 1997). As the Court noted in *Advisory Opinion to the Attorney General re Tax Limitation*, 644 So.2d 486, 489 (Fla. 1994) (Tax Limitation I), ". This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments...."

In that same case, moreover, this Court held that other constitutional challenges are not justiciable in this type of § 101.161 advisory proceeding. 778 So.2d at 891. *See also Advisory Opinion to the Attorney General-Limited Political Terms in Certain Elective Offices*, 592 So.2d 225, 227 (Fla. 1991).

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previously reviewed by this Court. *See also* 12A Fla. Jur. 2d *Courts and Judges* § 98 ("Advisory opinions")(confirming that the Florida Supreme Court has jurisdiction to reconsider its own advisory opinions as they would not be binding precedent and noting that other challenges were permissible by implication).

Since this Court's decision in *Grose v. Firestone*, 422 So.2d 303 (Fla. 1982), this Court has consistently adhered to the holding that "other constitutional challenges are not justiciable in this type of [advisory] proceeding" but that other substantive claims may be raised about the amendments in other proceedings. More specifically, the *Grose* Court ruled:

> Appellants' argument that the substance of the amendment is unconstitutional is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented. *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270 (1934); *Gray v. Moss* 115 Fla. 701, 156 So. 262 (1934).

422 So.2d at 306.

Hence, it is clear from this Court's own decisions that its constitutional and § 101.161 early (and advisory) review of proposed ballot initiatives is strictly limited to two narrow issues, and that other substantive claims can be raised in appropriate proceedings, such as proceedings in the circuit courts. *See Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982); *In re Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226-27 (Fla. 1991); *In re Prohibiting Public Funding of Political Candidates' Campaign*, 693 So. 2d 972, 976 (Fla. 1997).

Thus, while it is clear that this Court has exclusive authority to review the ballot summaries under a § 101.161 advisory review early on, it is simply inaccurate for the Secretary of State to assert, as she does repeatedly in her

Petition, that this Court has exclusive jurisdiction to review ballot initiatives for substantive defects and illegalities or that such substantive pre-election review is wholly precluded by a lack of subject matter jurisdiction by the Circuit Courts.

This Court has further acknowledged that its advisory opinions are "not strictly binding precedent." *Fla. League of Cities v. Smith*, 607 So.2d 397, 399 (Fla. 1992). Hence, the mere fact this Court has undergone a cursory advisory review of these proposed initiatives for two minimal requirements does not, in any way, preclude more substantive judicial review, especially where, as here, the Florida Senate has alleged that they patently violate paramount federal law, namely the Voting Rights Act and the "one person, one vote" requirement, and improperly impinge on minority voting rights in ways that are so fundamental as to be both incurable and plainly illegal.

As noted above, this Court has already held that it lacks the authority to review other substantive issues in a § 101.161 advisory opinion proceeding. *See Advisory Opinion to Attorney General – Limited Political Terms*, 592 So.2d 225, 227 (Fla. 1991); *Advisory Opinion to Attorney General – Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1019, n.1 (Fla. 1994). This means that, by its own decisions, this Court does not have "exclusive" jurisdiction to review the Florida Senate's claims in the first instance and that the Secretary of State's

arguments to the contrary must be wrong. Thus, her Petition seeking an extraordinary writ should be dismissed accordingly.

In her Petition, the Secretary of State also argues that only constitutional amendments proposed by joint resolution of the Florida Legislature can be reviewed in the lower courts by declaratory judgment action. Petition, pp. 26-27. This argument is also unsupported by case law. In *Dade County v. Dade County League of Municipalities*, 104 So.2d 512, 514 (Fla. 1958), this very Court confirmed that pre-election review of constitutional questions was appropriate for ballot initiatives being challenged on a substantive basis:

> At the outset we dispose of the matter of the propriety of considering the constitutionality of the proposal in advance of an election called to enable the electorate to express its approval or disapproval of the subject proposal. There is adequate precedent for doing so. We are not here confronted with an election in which the people are to have the privilege of expressing their choice as between candidates for public office. If the latter were the situation, the matter for determination would be purely political rather than judicial and the courts would not interfere. *State ex rel. Landis v. Tedder*, 106 Fla. 140, 143 So. 148. ***We are here dealing with an election involving a matter with reference to which the public interest and public rights may be determined in advance of the ballot, in order to preclude or forestall possible expenditure of substantial sums of public monies in the doing of what could be a vain and useless thing.*** *Duval County v. Jennings*, 121 Fla. 584, 164 So. 356; *Dubose v. Kelly*, 132 Fla. 548, 181 So. 11; *Gray v. Moss*, 115 Fla. 701, 156 So. 262; *Gray v. Winthrop*, 115 Fla. 721, 156 So. 270, 94 A.L.R. 804. (emphasis supplied).

See also West Palm Beach Ass'n of Firefighters v. Bd of City Commissioners, 448 So.2d 1212, 1213-1214 (Fla. 4th DCA 1984)(questioning why City had not sought

declaratory relief as to validity of proposed ballot initiative and noting that would have been the preferred procedure).

Indeed, the Florida Circuit Courts are the ***only*** place where substantive pre-election challenges to voter initiatives can be heard in the first instance. As the Fourth District Court of Appeal held in a redistricting case brought by Respondent Brown, *Brown v. Butterworth*, 831 So.2d 683, 686 (Fla. 4th DCA 2002):

> We begin with the proposition that, as the Circuit Judge himself noted, the circuit courts in Florida are the primary trial courts of general jurisdiction. As our supreme court has explained,
>
> > ***"In this state, circuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which clearly and specially appears so to be....*** 'The circuit courts of the State of Florida are courts of general jurisdiction similar to the Court of King's Bench in England clothed with most generous powers under the Constitution, which are beyond the competency of the legislature to curtail. They are superior courts of general jurisdiction, subject of course to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and as a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly out side of and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto.' " [c.o.]
>
> *English v. McCrary*, 348 So.2d 293, 297 (Fla.1977) (quoting *State ex rel. B.F. Goodrich Co. v. Trammell*, 140 Fla. 500, 192 So. 175 (1939)). We find nothing in the Florida Constitution that expressly and clearly vests all apportionment claims in some court other than the circuit court. (emphasis supplied).

The same result should apply here. There is simply nothing in any court case or other authority that somehow divests the jurisdiction of the circuit court to hear the Florida Senate's claims, and the Secretary of State concedes that there are none.

Similarly, in *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So.2d 1144, 1147 (Fla. 2d DCA 2006), the Florida appellate court confirmed the circuit court's jurisdiction to hear pre-election claims. It held that, if the opponent of a proposed amendment "in good faith questions the constitutionality of the ordinance in its entirety and on its face[,] the court may properly consider that question in advance of an election concerning its approval. "*W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs of the City of W. Palm Beach*, 448 So.2d 1212, 1214 (Fla. 4th DCA 1984." *See also Gaines v. City of Orlando*, 450 So.2d 1174, 1178 (Fla. 5th DCA 1984) "In their discretion, however, the courts may make an initial determination as to whether or not the substantive provisions of the proposed amendments, are facially constitutional and are within the powers of the enacting body. *Fine v. Firestone*, 448 So.2d 984 (Fla.1984); *City of Miami Beach v. Smith*, 165 So.2d 748 (Fla. 1964); *Dade County v. Dade County League of Municipalities*, 104 So.2d 512 (Fla. 1958); 42 Am.Jur.2d *Initiative And Referendum* § 48 (1969).").

Thus, contrary to the arguments made by the Secretary of State, the lower court absolutely has jurisdiction to hear the Florida Senate's claims here. Indeed, it

is the only court where a trial, or dispositive review, can actually be held on the matter in the first instance. It is similarly not true that only amendments proposed by joint resolution can be reviewed in advance of an election as the many cases cited above confirm that even voter-proposed initiatives can be substantively reviewed by the circuit courts prior to their submission to the ballot in order to keep the voters from voting on "a vain and useless thing."

B. The Florida Senate's Substantive Claims As To The Illegality Of The Proposed Amendments Were Not Waived In The Prior Supreme Court Advisory Proceeding.

In this case, the Florida Senate claims that the proposed redistricting amendments plainly violate paramount federal law, the separation of powers structure set out in Florida's Constitution, and are flatly unworkable. It is undisputed that none of the Florida Senate's claims were reviewed by this Court previously. However, here in this writ proceeding, the Secretary of State is suddenly contending that these claims were waived because they were not raised in the Florida Supreme Court's previous advisory review of the ballot summaries and single subject test. The Secretary of State did not raise this issue in her Motion to Dismiss. Moreover, because the Secretary of State did not raise this argument in her Motion to Dismiss, she cannot raise it in this Court now as to do so would be patently unfair to the opposing parties and the lower court, none of which had a

chance to address the issue below either at the hearing or in their pleadings related to the Motion to Dismiss.

According to this Court's own opinion in the *Limited Political Terms case*, 592 So.2d at 227, other constitutional/illegal challenges (such as the kind raised by the Florida Senate in its Complaint here) are plainly not reviewable in the first instance by this Court in a § 101.161 ballot review advisory proceeding. This means that the Florida Senate ***was actually barred*** from raising its constitutional and federal claims in the earlier proceeding. The Court's own opinions do not stand for the proposition, and this Court has never held, that substantive challenges to voter initiatives are not reviewable by the circuit courts before an election, and the Secretary of State's twisted interpretations to the contrary are simply incorrect. The fact that Justice Overton wanted to expand the scope of the Florida Supreme Court's § 101.161 review to include other constitutional issues but could not carry the majority in earlier cases has no bearing on the fact that the Florida courts, including this Court, have repeatedly held that other, substantive challenges to proposed constitutional amendments can be raised in the circuit courts prior to an election and that they are actually barred from being raised during earlier Florida Supreme Court advisory review.

That pre-elections suits for injunction are available where a proposed citizen initiative will clearly violate state or federal law is also confirmed by Florida Jurisprudence 2d:

> There are some exceptions to the general rule against the availability of an injunctive remedy. Thus, where an election is to be held in violation of the law or contrary to some well-established legal requirements, or when it will result in some substantial injury to any suitor or to the public generally, the election may be enjoined in the absence of other legal remedy. Moreover, in elections not involving the right to public office, where asserted vested contract or property rights can be more effectually protected by restraining in advance a threatened unlawful election tending toward their encroachment, a court of equity is not bound to speculate upon the likely or probable result of the election if held, but may enjoin the holding of such election in a clear case.

21 Fla. Jur. 2d *Elections* § 178 ("When injunction may be available") (citations omitted). Thus, the Secretary of State's Petition must fail for being flatly contrary to both established case law and recognized Florida authority confirming the Florida Senate's positions before this Court.

III. The Florida Senate's Claims Are Justiciable And The Justiciability Issue Was Not Raised Below Regardless.

The Secretary of State's Petition also claims that the Florida Senate's claims are not justiciable by the Florida courts. Petition, pp. 34-39. In support, the Secretary of State cites this Court's cases holding that other substantive claims cannot be raised in the Supreme Court's § 101.161 advisory proceeding. However, this misses the point. This Court has never held that substantive challenges to

ballot initiatives are wholly injusticiable. Rather, it has held only that such claims cannot be raised in an early § 101.161 advisory proceeding. The two points are very different. Indeed, as cited repeatedly above, this Court has confirmed in numerous cases that other challenges remain justiciable in appropriate proceedings in other courts. *See, e.g., Gray v. Winthrop*, 115 Fla. 721 (Fla. 1934)(allowing substantive pre-election review of proposed constitutional initiatives). Thus, the Secretary of State's Petition must fail, again, as being contrary to both established case law and recognized Florida authority confirming the Florida Senate's positions that its claims are justiciable in the circuit court.

In fact, the consequences of the Secretary of State's arguments here could be both enormous and hugely deleterious to this State of Florida and its citizens. Say, for example, that a ballot initiative wholly depriving minorities of the right to suffrage was proposed and suppose that initiative passed this Court's single subject and ballot summary review. Is the Secretary of State credibly trying to argue to this Court that such a pernicious—and wholly illegal—ballot proposal would have to be put onto the ballot even though it would plainly be wrong and violative of both state and federal law? Surely, the courts have jurisdiction to review such a ballot proposal prior to an election. Yet, this is exactly what the Secretary of State is urging this Court to find, to hold that pre-election substantive challenges to ballot

initiatives be fully insulated from judicial review prior to their being passed. Simply put, this is nonsense.

IV. The Request For Writ of Prohibition Must Also Be Denied.

It is well-established that a writ of prohibition must be denied where a petitioner has an adequate remedy via plenary appeal. *See Southern Records and Tape Service v. Goldman*, 502 So.2d 413, 415 (Fla.1987)("a challenge to [the lower court's] jurisdiction could be addressed by plenary appeal, and the writ of prohibition, therefore, should be denied."). *See also Sutton v. State*, 975 So.2d 1073, 1076 (Fla. 2008)(confirming that writ of prohibition is available only where there is no other adequate or appropriate legal remedy). In this case, it is undisputed that the Secretary of State has a remedy by way of plenary appeal since the lower court's judgments on the parties' dispositive motions will surely be appealed. Therefore, the Secretary of State's request for a writ of prohibition should also be denied and/or dismissed.

CONCLUSION

The Florida Senate fully supports the right of Floridians to appropriately amend the Florida Constitution. However, it is clear from the very text of the proposed constitutional amendments at issue that they are violative of paramount federal law (namely, the "one person, one vote" principle, the Voting Rights Act, and the 14th Amendment to the United States Constitution) and are wholly

unworkable. The wholesale restructuring of Florida voting rights and reapportionment contemplated by proposed Amendments 5 and 6 are suspicious and demand careful judicial scrutiny. Too often such "redistricting reforms" have been shills for disfranchising minorities and the Florida Senate believes that these amendments are so plainly violative of the Voting Rights Act that there would be no way to implement them without Florida minorities losing at least half their state and federal congressional and legislative seats in Florida, thereby setting the rights of minority voters to participate and to elect candidates of their choice in Florida back a generation or more. This would be both illegal and unconscionable. Thus, the Florida Senate is rightfully concerned and has legitimately asked the lower to exercise its lawful jurisdiction and review these proposed changes for the protection of all Floridians and the Florida Constitution. The lower court's decision is very limited in scope, and holds only that the lower courts have limited jurisdiction to hear facial challenges to proposed constitutional amendments before they are put on the ballot. This is both minimally correct and eminently reasonable in context. Thus, the exercise of this Court's jurisdiction to issue such an extraordinary is neither necessary nor proper here as the lower court's proceedings are no threat or interference to this Court's jurisdiction in any way, and the Petition must be dismissed.

WHEREFORE, for all the foregoing reasons, the Florida Senate respectfully requests that the Petition for Constitutional Writ be dismissed for lack of standing or that it be denied outright for failing to assert any of the appropriate jurisdictional bases necessary for exercise of the Court's power to issue an ancillary—but extraordinary-- writ that would not aid the Court's jurisdiction in any way. The Florida Senate also requests any further relief deemed just and proper by this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing pleading is in Time New Roman 14-point font and complies with the requirements of Rule 9.100 of the Florida Rules of Appellate Procedure.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1362

DAWN K. ROBERTS,

Petitioner,

vs.

CORRINE BROWN, MARIO DIAZ-BALART,
Respondents.

On Appeal From The Denial Of A Motion To Dismiss For Lack of Jurisdiction

---

APPENDIX TO THE FLORIDA SENATE'S RESPONSE IN OPPOSITION TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

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Supreme Court Case No.: SC10-1362
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

DEFENDANT'S RESPONSE TO MOTION OF BOB GRAHAM TO INTERVENE

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant") submits this response to the Motion of Bob Graham to Intervene as a Defendant filed on June 11, 2010 ("Motion"). For the following reasons, the Defendant supports the Motion.

The Defendant, as the State of Florida's chief elections officer, has an interest in insuring that the elections process in 2010 is orderly and is not disrupted by last-minute, piece-meal litigation such as this case. The Defendant's role in this case is appropriately to defend the lawful elections procedures that have been applied to Amendments 5 and 6 and, most particularly as a threshold matter, to object to this Court's exercise of jurisdiction in this case.

The Plaintiffs elected to join only the Defendant—an essentially nominal party—and not to join the sponsor or other proponents of the Amendments. By that choice, the Plaintiffs have

necessitated the intervention of a party such as Mr. Graham to defend the merits of the Amendments.

For the foregoing reasons, the Defendant asks the Court to grant the Motion and allow Mr. Graham to participate in this case to the full extent that the Court has already ordered that the Intervening Plaintiffs can participate.

Dated this 22nd day of June, 2010.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE

Intervening Plaintiffs,

vs. Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Defendant.
_____/

REPLY BY BOB GRAHAM TO PLAINTIFFS' RESPONSES TO GRAHAM'S MOTION TO INTERVENE

BOB GRAHAM files this reply to the responses by Plaintiffs Brown and Diaz-Balart, Intervening Plaintiff the Florida House of Representatives and Intervening Plaintiff the Florida Senate (collectively, "Plaintiffs") to the Motion of Bob Graham to Intervene as a Defendant.

As demonstrated below, Bob Graham is entitled to intervention. Graham has a legally cognizable interest in this proceeding, and this Court should permit him to intervene.

I. GRAHAM HAS A LEGALLY COGNIZABLE INTEREST IN THIS ACTION

Bob Graham is a Florida citizen and registered voter who supports Amendments 5 and 6 and wishes to be able to vote in favor of these citizens' initiatives in the upcoming general election.[1] Were Plaintiffs to obtain the relief they seek in this action, Amendments 5 and 6 will be removed from the ballot and Graham will be unable to vote for their adoption. Conversely, if judgment is entered in favor of the defendant, Amendments 5 and 6 will remain on the ballot and Graham will be able to vote in favor of them. This is an interest "of such a direct and immediate character that [he] will either gain or lose by the direct legal operation and effect of the judgment." *Miracle House Corp. v. Haige*, 96 So. 2d 417, 418 (Fla. 1957).

It is well-settled in Florida that a voter has standing to participate in litigation regarding whether a proposed constitutional amendment satisfies constitutional and statutory requirements for placement on the ballot. In *Crawford v. Gilchrist*, 59 So. 963 (Fla. 1912), the Governor sued to prohibit the Secretary of State from placing constitutional amendments proposed by the legislature on the ballot because the legislature had not met certain procedural requirements in passing the joint resolutions. The Court held the Governor, who sued as "Governor and also a citizen, taxpayer and elector, [was clearly] a proper party to these injunction proceedings." *Id.* at 967. Likewise, in *City of Hialeah v. Delgado*, 963 So. 2d 754 (Fla. 3d DCA 2007), *rev. dismissed*, 970 So. 2d 824 (Fla. 2007), the appellate court found the trial court was "entirely correct"

[1] The initial complaint in this action challenged only Amendment 6. Subsequent to the filing of Bob Graham's motion to intervene, the Senate filed a complaint challenging Amendment 5. Bob Graham has actively supported both amendments and wishes to vote in favor of them in the general election.

in ruling that the plaintiff had standing as a citizen and voter to challenge whether ballot language complied with subsection 101.161(1), Florida Statutes. *Id.* at 756.

Having standing to sue means having a "legitimate or sufficient interest at stake in the controversy that will be affected by the outcome of the litigation." *Equity Resources, Inc. v. County of Leon*, 643 So. 2d 1112, 1117 (Fla. 1st DCA 1994), *rev. denied*, 651 So. 2d 1194 (Fla. 1995). This interest is virtually identical to the interest necessary for intervention, i.e., an "interest . . . of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Morgareidge v. Howey*, 78 So. 14, 15 (Fla. 1918). Thus if a citizen and voter has sufficient interest to *sue* regarding the placement of a proposed constitutional amendment on the ballot, he necessarily must also have sufficient interest to intervene to *defend* a citizens' initiative against removal from the ballot. Graham has just such an interest.

Contrary to Plaintiffs' assertion, Graham need not assert an interest above and beyond the interests of other Florida voters to be eligible for intervention; this argument "misapprehends the difference between taxpayer standing and standing in election law cases." *City of Hialeah*, 963 So. 2d at 756. Graham's interest is indeed the same as other voters who wish to amend their constitution by voting in favor of Amendment 6; all such voters have a direct and immediate interest in this litigation in that they will gain

or lose—i.e., be able to vote for constitutional amendments they support, or not—by direct legal operation and effect of the judgment in this case.[2]

But this hardly means, as Plaintiffs assert, that the Court must permit intervention by "all supporters and opponents, and there will be no logical end to interventions," causing the litigation to become "inefficient, cumbersome, or impracticable." (House Response at 2-3). This fantastical parade of horribles ignores the Court's obligation to exercise "sound discretion to determine whether to permit intervention," by considering "a number of factors, including the derivation of the interest, . . . the size of the interest, the potential for conflicts or new issues, and any other relevant circumstance." *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992). If an unwieldy number of voters were to seek to intervene in this action, it certainly would be appropriate for the Court to exercise its discretion to deny intervention to prevent the litigation from becoming unmanageable. But Graham is the only voter who has sought intervention and Plaintiffs have not asserted his intervention will delay or disrupt the proceedings or prejudice Plaintiffs in any way; nor will it. Under such circumstances, intervention should be granted. *Bay Park Towers Condo. Ass'n v. H.J. Ross & Assocs.*, 503 So. 2d 1333, 1335 (Fla. 3d DCA 1987).

[2] To the extent Plaintiffs contend that Graham must identify an interest beyond that of other Florida voters who support Amendments 5 and 6, Plaintiffs themselves have identified such an interest by noting that Graham is an Honorary Co-Chairman of Fair Districts. (House Response at 3; Senate Response at 4).

II. GRAHAM'S INTERESTS IN THIS ACTION EXTEND BEYOND THE INTERESTS OF THE DEFENDANT SECRETARY OF STATE.

The Secretary of State's role with regard to placing on the ballot constitutional amendments proposed by initiative petition is purely ministerial; the Secretary determines whether the requisite number of petitions have been submitted by the appropriate date, assigns ballot position, submits the amendments for publication, and submits them to the counties for ballot printing. Art. XI, § 3, Fla. Const.; §§ 100.371, 101.161(2), Fla. Stat.; Rule 1S-2.0011, Fla. Admin. Code. The Secretary has an overriding interest in ensuring these processes occur timely, uniformly, and without disruption.

Because this action directly threatens to disrupt these processes for Amendments 5 and 6, the Secretary has a substantial interest in actively defending this action. It is clearly in the Secretary's interest to preserve the finality of the Florida Supreme Court's decision approving these proposed citizen initiatives for placement on the ballot. *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009). Indeed the absence of jurisdiction of this Court to second guess the determination by the Florida Supreme Court that Amendments 5 and 6 are entitled to ballot placement is precisely the type of issue in which the Secretary has a distinct interest. It is likewise in the Secretary's interest to block a challenge regarding the effect of a proposed amendment before the election, as such a challenge flies in the face of the constitutionally-mandated approval process and carefully constructed election deadlines and procedures.

Graham shares the Secretary's interests in preventing relitigation of issues already decided by the Florida Supreme Court and preventing disruptive, pre-election litigation of the effect of proposed amendments. However, in the event this Court rejects these threshold arguments and permits this case to venture into issues already decided by the Florida Supreme Court or entertains Plaintiffs' arguments regarding the post-election effects of these amendments, the Secretary's interests will no longer be co-extensive with Graham's. Graham, as an active supporter of Amendments 5 and 6, has an interest not only in the smooth operation of the election processes, but also in defending the ultimate merits of the amendments to accomplish true redistricting reform. It is anticipated the Secretary, a ministerial state officer, will have little interest in engaging in complicated legal arguments regarding whether, for example, these citizen-initiated amendments can be implemented consistent with the federal Voting Rights Act. Graham's interests are therefore broader than those of the Secretary. Where an intervenor's interests will not be fully protected by the existing party in litigation, it is an abuse of discretion to deny intervention. *Southland Life Ins. Co. v. Abelove*, 556 So. 2d 805, 806 (Fla. 5th DCA 1990) (insurer should have been permitted to intervene in insured's action against tortfeasor, because insurer's interests would not be fully protected by insured's suit); *Bay Park Towers*, 503 So. 2d at 1334-35 (condo association should have been permitted to intervene in action by individual owner regarding defective plumbing system, because the association's interests regarding the common elements would not be protected by the individual owner's suit).

WHEREFORE, Bob Graham respectfully requests that this Court enter an order permitting him to intervene as a defendant in this action and award such further relief as the Court deems appropriate.

Respectfully submitted,

Lynn C. Hearn

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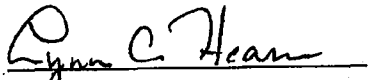

Lynn C. Hearn

IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-1362
L.T. No.: 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,
and BOB GRAHAM,

Petitioners,

vs.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE,

Respondents.

RESPONDENT FLORIDA HOUSE OF REPRESENTATIVES' RESPONSE TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

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STATEMENT OF CASE AND FACTS

Respondent Florida House of Representatives adopts the "Statement of Case and Facts" of Respondents Corrine Brown and Mario Diaz-Balart.

ARGUMENT

I. This Court Does Not Have Exclusive Jurisdiction Over Challenges To Ballot Initiatives.

The Petitioner's request that this Court invoke extraordinary remedies to take this case away from the circuit court collides with her virtual admission that the circuit court has jurisdiction. The Petitioner acknowledges that "no constitutional or statutory provision expressly forbids a circuit court from entertaining a pre-election challenge to an initiative petition's ballot summary." Pet. at 12. Later, the Petitioner urges this Court to assert jurisdiction here "regardless of whether the circuit court has subject matter jurisdiction in the technical sense." Pet. at 22-23. The Petitioner even says that this "Court need not definitively determine whether the circuit court has jurisdiction." Pet. at 23. The Petitioner's arguments are rightly tentative, because the circuit court undeniably has jurisdiction over this matter.[1]

[1] The Petitioner's arguments before this Court are considerably more nuanced than the ones she made to the trial court. The Petitioner's motion to dismiss did not suggest that the trial court had jurisdiction, even in a "technical" sense.

Florida's circuit courts have broad and far reaching jurisdiction. Article V, section 5(b), Florida Constitution states:

> The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction....

Art. V, § 5(b), Fla. Const.

The circuit courts are "tribunals of plenary jurisdiction" and "have authority over any matter not ***expressly*** denied them by the constitution or applicable statutes." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (emphasis added); *accord Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 895 (Fla. 2003); *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 854 (Fla. 1992) ("[C]ircuit courts are superior courts of general jurisdiction, and nothing is intended to be outside their jurisdiction except that which *clearly* and *specially* appears so to be." (quoting *English v. McCrary*, 348 So. 2d 293, 297 (Fla. 1977))).

Circuit courts' jurisdiction over cases like this one survived the voters' adoption in 1986 of constitutional amendments creating the advisory opinion process. This is evident, first and foremost, from the text of Article V, section 3(b)(10) and Article IV, section 10, of the Florida Constitution.

Article V, section 3(b)(10) merely provides that this Court "[s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of

Article IV, render an advisory opinion of the justices, addressing issues as provided by general law." Article IV, section 10 provides that:

> The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.

Nothing on the face of these provisions suggests that this Court's jurisdiction over challenges to initiative petitions is exclusive or that the advisory opinion process displaces other means of challenging such petitions.

This Court's decision in *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992), establishes beyond any doubt that Article V, section 3(b)(10) of the Florida Constitution does not confer on this Court exclusive jurisdiction to hear challenges to initiative petitions.[2] The petitioners in that case sought a writ of mandamus directing the Secretary of State to remove from the ballot a proposed constitutional amendment that the Court had already approved under the advisory opinion process. The Court found that it had jurisdiction to consider the petition,

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[2] This Court's decisions in *Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 661 So. 2d 1204 (Fla. 1995) and *Advisory Opinion Re: Stop Early Release of Prisoners*, 642 So. 2d 724 (Fla. 1994), cited on page 18 of the Petition, are not to the contrary. In boilerplate in those cases, the Court noted that it had "original and exclusive jurisdiction" to consider the Attorney General's request for an advisory opinion. This Court's exclusive jurisdiction to issue advisory opinions to the Attorney General is not in dispute.

but then denied it on the merits. Several aspects of the Court's opinion in *League of Cities* are important here.

First, the Court based its jurisdiction to consider the mandamus petition on Article V, Section 3(b)(8) of the Florida Constitution, which gives this Court *discretionary* jurisdiction to issue writs of mandamus to state officers and state agencies. The Court did not even consider whether to ground its jurisdiction in Article V, section 3(b)(10)—the provision that, according to the Petitioner here, gives this Court exclusive jurisdiction to consider challenges to initiative petitions. The Court implicitly rejected the notion that any pre-election challenge to an initiative petition is necessarily subsumed within, or a continuation of, the advisory opinion process.

Second, the Court explicitly considered and rejected the argument that the advisory proceeding mandated by Article IV, section 10 and Article V, section 3(b)(10) "raises a procedural bar or otherwise deprives this Court of jurisdiction" over the case. *League of Cities*, 607 So. 2d at 398. On this point the Court noted that the legislative history of those proposals indicated the Legislature's belief "that any advisory opinion regarding initiative petitions would *not* be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised." *Id.* at 398-99 (emphasis in original). The Court then held that the Legislature's understanding of the advisory

opinion process "necessarily implies that other challenges would continue to be permissible under existing precedent." *Id.* at 399. As Petitioner herself acknowledged before the trial court, existing precedent in 1986 meant that a voter initiative "could be reviewed through a declaratory action filed in the circuit courts or a mandamus petition filed in the Supreme Court." (App. 77-78).

Third, after holding that other means of challenging initiative petitions survived the creation of the advisory opinion process, the Court noted that "a petition for mandamus is *an* appropriate method for challenging an allegedly defective proposed amendment to the Constitution." *Id.* (emphasis added). Significantly, the Court did not say that a mandamus action in the Supreme Court is "the only" appropriate method or even "the" appropriate method for challenging initiative petitions. Indeed, it would have been error for the Court to say that, because there was "existing precedent" in 1986 for a circuit court's consideration of a pre-election challenge to a proposed initiative petition. *See, e.g., Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984).

Fourth, the Court compared the advisory opinions issued pursuant to Article V, section 3(b)(10) to advisory opinions that this Court issues to the Governor. *See League of Cities*, 607 So. 2d at 399 n.3. This Court has long recognized that its advisory opinions to the Governor "do not necessarily control in litigated cases,"

State ex rel. Williams v. Lee, 164 So. 2d 536, 538 (Fla. 1935), and "are merely legal opinions of the individual justices, offered for the Governor's guidance," *In re Adv. Opinion to the Gov.*, 509 So. 2d 292, 301 (Fla. 1987). In *In re Advisory Opinion to the Governor*, 509 So. 2d 292 (Fla. 1987), the Court even emphasized that its opinion did not bar actual litigation on the very same questions decided in the advisory process, and that all interested parties would remain "free to initiate lawsuits...to argue that [the advisory opinion] has been wrongly decided." *Id.* at 302.

Finally, the Court in *League of Cities* noted that even the persuasive authority of advisory opinions is limited: "[W]e note that advisory opinions are only persuasive as to issues they actually address, not as to issues . . . that were not addressed at all in a prior advisory opinion." *League of Cities*, 607 So. 2d at 399 n.3. Plaintiffs and Intervenor-Plaintiffs in this case do not seek to re-litigate issues that this Court has already addressed.

The Legislature that proposed the amendments creating the advisory opinion process is presumed to have known that advisory opinions do not bar further litigation and can even be challenged as wrongly decided. *See Seagrave v. State*, 802 So. 2d 281, 290 (Fla. 2001) ("[T]he legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject

concerning which it subsequently enacts a statute.'" (quoting *Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996))).

Indeed, had the Legislature wanted to propose a process whereby this Court would be vested with exclusive jurisdiction to issue a binding judgment on the validity of initiative petitions, there was already a model in the Florida Constitution. In the constitutional revision of 1968, the Legislature proposed, and voters adopted, a 30-day process for automatic review in this Court of state legislative redistricting plans. *See* Fla. HJR 1-2X (1968) (proposed Fla. Const. art. III, § 16(c)). This process requires this Court to enter a "declaratory judgment determining the validity of the apportionment." Art. III, § 16(c), Fla. Const. The declaratory judgment entered by the Court is "binding upon all the citizens of the state," Art. III, § 16(d), Fla. Const. Because this Court renders a *judgment* that expressly binds all citizens, this Court alone can revisit its determination. *In re Apportionment Law Senate Joint Resolution No. 1305*, 263 So. 2d 797, 822 (Fla. 1972) ("By classifying the proceeding as one for 'declaratory judgment,' the Florida Constitution contemplates that we retain exclusive state jurisdiction and consider any and all future proceeding related to the validity of the apportionment plan.").

In the case of initiative petitions, however, the Constitution classifies the Court's determination as an "advisory opinion"—not a "declaratory judgment."

The Legislature chose, and the voters approved, an advisory process, with full knowledge of the distinction between judgments and advisory opinions. *Cf. Ervin v. City of N. Miami Beach*, 66 So. 2d 235, 236 (Fla. 1953) ("The difference between a declaratory judgment and a purely advisory opinion is that the former is a binding adjudication of the rights of the parties . . . ." (quoting *Ready v. Safeway Rock Co.*, 24 So. 2d 808, 811 (Fla. 1946) (Brown, J., concurring))). To treat advisory opinions as a barrier to further litigation—and as vesting exclusive jurisdiction in this Court—is to transform them into final adjudications, contrary to the deliberate choice of the voters.

Finally, the ballot summary accompanying the proposals creating the advisory opinion process in 1986 supports the proposition that this Court does not have exclusive jurisdiction over challenges to initiative petitions. *See Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 489 (Fla. 2008) (looking to text of ballot summary to determine voters' intent in adopting constitutional amendment). That summary gave no hint that the voters were being asked to do away with any existing precedents governing such challenges, including precedents granting access to a fact-finding tribunal.

The summary accompanying the proposals creating the advisory opinion process was as follows:

> Provides that the Attorney General shall, as directed by general law, request the Supreme Court to render an expeditious

> advisory opinion as to the validity of an initiative petition which proposes an amendment to the State Constitution, and requires the Supreme Court to issue an advisory opinion upon request of the Attorney General, and by rule to permit interested persons to be heard on the questions presented by the Attorney General.

See Summary, Supreme Court Opinion on Proposed Initiatives (1986), available at http://election.dos.state.fl.us/initiatives/initdetail.asp?account=10&seqnum=45.

The notion that this summary informed voters they would be taking away then-existing avenues for challenging initiative petitions flies in the face of this Court's jurisprudence requiring that ballot summaries put voters on clear notice of material changes to existing law. *See, e.g., Adv. Opinion to the Att'y Gen.– Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1019 (Fla. 1994) ("The purpose of section 101.161 is 'to assure that the electorate is advised of the true meaning, and ramifications, of an amendment.'" (internal quotation omitted)). Consistency with this Court's precedents requiring that ballot summaries inform voters of the ramifications of the proposals before them compels the conclusion that the advisory opinion process did not supplant pre-existing methods of challenging initiative petitions.

For all of these reasons, there is no merit to the Petitioner's suggestion that this Court has exclusive jurisdiction over challenges to initiative petitions.

II. Issuance of an Extraordinary Writ Is Not Appropriate In This Action.

A. "All Writs" Jurisdiction Is Warranted Only Where Necessary to Protect this Court's Jurisdiction.

Because this Court does not have exclusive jurisdiction over challenges to initiative petitions, the Petitioner has not established a basis for this Court to invoke jurisdiction pursuant to Article V, section 3(b)(7) of the Florida Constitution to enter "all writs necessary to the complete exercise of its jurisdiction." Indeed, the "all writs" provision is not an independent basis for jurisdiction, but instead "operates as an aid to the Court in exercising its 'ultimate jurisdiction,' conferred elsewhere in the constitution." *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005).

This Court's opinion in *Florida Senate v. Graham*, 412 So. 2d 360 (Fla. 1982), illustrates the proper use of this Court's "all writs" jurisdiction. In that case, the Florida Senate sought "extraordinary relief questioning the constitutional authority of [Governor Graham] to limit to less than thirty days a special apportionment session called pursuant to article III, section 16(a), Florida Constitution." *Id.* at 360. The Court noted that the "extraordinary provisions of" article III, section 16(b), (c) and (f) vested it with jurisdiction to either review or actually devise a plan of reapportionment in the second year following each decennial census. *Id.* at 361. In light of the inevitability of the apportionment

issue coming before it, it was appropriate for the Court to invoke its all writs jurisdiction to consider any alleged defects in the governor's call of the special reapportionment session: "Because jurisdiction of the issue of apportionment will vest with certainty in this year we have the jurisdiction conferred by article V, section 3(b)(7), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction imposed by article III, section 16(b), (c) and (f)." *Id.*

Here, there is no longer any need for this Court to protect its jurisdiction to issue an advisory opinion on the proposed amendments. That process is complete. And, as discussed earlier, *League of Cities* established that a completed advisory opinion process neither precludes nor subsumes subsequent challenges to an initiative petition that has been the subject of an advisory opinion.

Florida Senate v. Graham also illuminates the difference between this case and *Advisory Opinion to Attorney General—Fee on Everglades Sugar Products*, 681 So. 2d 1124 (Fla. 1996) (*"Sugar Products"*), a case heavily relied on by the Petitioner here. The Court in *Sugar Products* ordered transferred to itself, and assumed jurisdiction over, a circuit court declaratory judgment action filed after the Attorney General's request for an advisory opinion, but while the advisory opinion process was ongoing. *Id.* at 1126-27.

The Court's decision in *Sugar Products* to transfer the pending declaratory judgment action was entirely consistent with *Florida Senate v. Graham*: the

Court's advisory opinion proceeding was still underway, and that proceeding could well have been upended by a related proceeding in the circuit court. The declaratory judgment action that the Court transferred in *Sugar Products* challenged the validity of the signature-gathering process. *See Sugar Products*, 681 So. 2d at 1131. Adjudication of that issue potentially could have resulted in a decision voiding the initiative petition *ab initio* and rendering it unnecessary for this Court even to issue an advisory opinion at all. The Court assumed control over the declaratory judgment action to ensure that a predicate for its issuance of an advisory opinion—*i.e.*, a valid signature-gathering process—had been met. Here, there are no ongoing jurisdictional interests for this Court to protect—the advisory opinion process relating to the redistricting amendments is over. The *Sugar Products* case is inapposite.

B. The Trial Court Did Not Exceed Its Jurisdiction And, Therefore, Prohibition Is Not Appropriate.

A writ of prohibition is similarly unwarranted in this case. "Prohibition is an extraordinary writ by which a superior court having appellate and supervisory jurisdiction over a lower court may prevent the lower court from exceeding its jurisdiction or usurping authority over matters not within its jurisdiction." *Citizens Prop. Ins. Corp. v. Garfinkel*, 25 So. 3d 62, 63 (Fla. 5th DCA 2009) (citing *English v. McCrary*, 348 So. 2d 293 (Fla.1977)). The writ is not to be used as a substitute for an appeal, *State ex rel. B.F. Goodrich Co. v. Trammell*, 192 So.

175 (1939), and "must be employed with caution and utilized only in emergency cases to prevent an impending injury where there is no other appropriate and adequate legal remedy," *Mandico v. Taos Const., Inc.*, 605 So. 2d 850, 854 (Fla. 1992).

For the reasons already explained, the circuit court *does* have jurisdiction in this case. Accordingly, there is no basis for this Court to issue a writ of prohibition.

III. "Sound Judicial Policy" Favors Allowing the Trial Court to Retain Jurisdiction Over This Case.

The Petitioner is wrong to suggest that "sound judicial policy" requires this Court to assume jurisdiction over this case. Pet. at 11. In fact, the opposite is true. Because certain of Plaintiffs' and Plaintiff-Intervenors' claims involve factual issues, it is essential that this case be heard in the first instance by the circuit court—a trial court.

This Court is "ill-equipped to handle" cases that require factual determinations, and has historically declined to exercise its discretionary mandamus jurisdiction in cases that present "substantial issues of fact." *Harvard v. Singletary*, 733 So. 2d 1020, 1022 (Fla. 1999). A circuit court, by contrast, "is a trial court." § 26.012(5), Fla. Stat. (2009). It is the appropriate tribunal to hear and decide cases involving discovery, the examination and cross-examination of witnesses, and other factual presentations. No precedent supports the Secretary's

position that initiative petitions are uniquely exempt from the fact-finding processes of a circuit court, all of which are routinely available in challenges to other ballot measures.[3]

One example from among the claims asserted by Plaintiffs and Plaintiff-Intervenors in this case is sufficient to highlight the necessity of a factual hearing in this case. Among other things, Plaintiffs and Plaintiff-Intervenors allege that the proposed amendments mislead by failing to disclose that application of the proposals' compactness and local boundary requirements will harm minority voters—indeed, by suggesting, contrary to fact, that the proposals offer minority voters enhanced protection. Proof of this claim depends on showing where minority populations in Florida are concentrated, and how these populations would be treated under the proposed amendments' new standards. Proof of this claim also depends on showing how the Florida Legislature has exercised its discretion in the past—unconstrained by binding standards like the ones in the proposed amendments—and the extent to which existing districts that elect minority

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[3] The Florida Constitution, moreover, contains a broad and explicit guarantee of access to the courts. Art. I, § 21, Fla. Const.; *see also Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992), *receded from on other grounds by AHCA v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996) ("The history of the provision shows the courts' intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes."). It would ill comport with this provision to construe the creation of the advisory opinion process as a bar to traditional, fact-based adjudication in circuit courts.

candidates would have been precluded by compactness and local boundary requirements. A fact-intensive claim of this nature cannot be resolved in the first instance by an appellate court.

Critically, none of Plaintiffs' or Plaintiff-Intervenors' claims in this proceeding was raised in the advisory opinion proceeding, either by the participants in that proceeding or by the Court *sua sponte*. Indeed, this case is, in part, a response to the U.S. Supreme Court's decision in *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), which was issued *after* this Court issued its advisory opinion on the proposed amendments. In *Bartlett*, the Court held that Section 2 of the Voting Rights Act does not require the creation of "cross-over districts." *See id.* at 1248. In those districts, minority voters make up less than 50% of the voting age population, but they are nonetheless sufficiently numerous that they can elect candidates of their choice with help from non-minority voters who "cross over" to vote for the minority voters' preferred candidate. *See id.* at 1242. The significance of *Bartlett* is that the Voting Rights Act cannot be counted on to counteract the harm to minority voters caused by the proposed amendments' contiguity and local boundary requirements.

To suggest that Plaintiffs' and Plaintiff-Intervenors' claims were somehow waived is offensive to the overriding principle that "deception of the voting public is intolerable." *Armstrong v. Harris*, 773 So. 2d 7, 20 (Fla. 2000). The focus here

must be on the voters' right to a fair ballot—not on inconvenience to the Petitioner or to the proponents of the amendments at issue.

Indeed, even the Petitioner admits that this Court has "discretionary jurisdiction to entertain a mandamus petition containing a pre-election challenge to an initiative ballot despite a prior advisory opinion approving the ballot language." Pet. at 29. But mandamus actions in this Court are no less disruptive to an amendment sponsor's expectations than a circuit court action. Given the availability of pre-election challenges outside the advisory opinion process, there is no principled basis to deprive Plaintiffs and Plaintiff-Intervenors of the right to litigate their claims in the circuit court. That is the only forum that allows a full presentation and development of all the issues raised in this case. *Cf. Fine v. Firestone*, 448 So. 2d 984, 987 (Fla. 1984) (mandamus appropriate in disputes involving "straightforward legal questions which do not require fact-finding").

CONCLUSION

For all of the foregoing reasons, Respondent Florida House of Representatives respectfully requests that this Court deny the Petition.

Respectfully submitted,

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I certify that a true and correct copy of the foregoing has been furnished by email and United States Mail this 19th day of July 2010, to the following:

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I certify that the font used in this response is Times New Roman 14 point and in compliance with the Florida Rules of Appellate Procedure.

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July 21, 2010

To All Counsel of Record

Re: Dawn K. Roberts, etc., et al. vs. Corrine Brown, et al.
Case No. SC10-1362

This is to inform you that the law firm of GrayRobinson, P.A., who is counsel of record in this case, currently represents the Florida Supreme Court in Thompson v. The Florida Bar, et al, Case No. 6:10-cv-442-GAP-DAB, in the United States District Court for the Middle District of Florida (Orlando). This information is provided pursuant to Canon 3(E) of the Code of Judicial Conduct and its commentary, which provides:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis.

The parties are further advised that any motion to disqualify any justice shall be filed with this Court on or before August 5, 2010, and failure to timely file said motion will be considered as consent to the justice's participation in the above referenced proceeding.

Most cordially,

Thomas D. Hall

TDH/vm
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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida, and BOB GRAHAM,

Petitioners,

v.

Case No. SC10-1362
L.T. No. 37-2010-CA-001824

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Respondents.

PETITIONER DAWN K. ROBERTS' CONSOLIDATED REPLY TO RESPONDENTS' RESPONSES TO PETITION FOR WRIT OF ALL WRITS

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ARGUMENT IN REPLY[1]

Before addressing the six main areas raised by the responses, two points must be made about what the responses fail to address. First, the responses all fail to address the central argument made by the Secretary. Respondents ignore the Secretary's argument that allowing a circuit court challenge to go forward in this case would directly interfere with, and indeed eviscerate, this Court's specific holding that the summaries are not misleading. Respondents also ignore the argument that such a decision would thwart the entire purpose behind the grant to this Court of jurisdiction in the 1986 Amendments. The Secretary spent the first ten pages of her argument explaining the history behind those amendments (including the pleas from former members of this Court regarding the need for this review process), the vitally important policies underlying those amendments, and how those policies will be substantially undermined if circuit courts are allowed to entertain pre-election initiative ballot summary challenges. (Petition at 13-22.)

None of the Respondents address, much less attempt to refute, these arguments. They simply argue that they should be allowed to proceed with their

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[1] The Secretary understands that Senator Graham is preparing his own reply. Additionally, no party moved for rehearing of the order dismissing FairDistricts from the litigation. Accordingly, the case name on this reply has been revised to move Senator Graham from a respondent to a petitioner and to remove FairDistricts as a respondent altogether.

claims because, they contend, they have a technical right to bring them in circuit court. This Court should reject the Respondents' invitation to simply ignore these crucial policy considerations and the consequences of denying the petition on the administration of justice, the conduct of elections, and the ability of Floridians to petition to amend the Constitution over the objection of the Legislature. Otherwise, the circuit courts (and eventually this Court) would be flooded with declaratory actions challenging every initiative petition by opponents who either chose not to participate in the advisory opinion process or participated but lost. Opponents could make their challenges on the eve of an election after the sponsor has gone to the considerable time and expense of collecting signatures.

Second, the Respondents appear to overlook the fact that although the Secretary alternatively petitioned for a writ of prohibition, this Court advised in its Acknowledgement that it will treat the petition as "a Petition for Writ of All Writs."[2] Thus, whether the standard for a writ of prohibition has been met does

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[2] The Secretary referred to this part of her petition as seeking a "constitutional writ." She understands that the use of the term "Writ of All Writs" is an administrative tracking matter in the clerk's office and not a ruling by the Court that this verbiage should be used instead of "constitutional writ."

Because "constitutional writ" is a more commonly used term, the Secretary continues to use that language here. Philip J. Padovano, *Florida Appellate Practice* § 29:7 at 740 (2010 ed.); *Monroe Ed. Ass'n v. Clerk, Dist. Court of Appeal, Third Dist.*, 299 So. 2d 1, 2 (Fla. 1974) ("We deem [art. V, § 4(b)(3)]

(continued on next page)

not appear to be an issue. *See* Padovano, *supra*, § 29.12 at 752 (noting that a response should only be filed if ordered by the court). Consequently, the Respondents' arguments about prohibition and the standard set forth in *English v. McCrary*, 348 So. 2d 293 (Fla. 1977), should require no further reply.[3] The relevant arguments that the Respondents do make are addressed in turn.

I. The Secretary Has Standing and Has Remained Politically Neutral.

The Senate claims the Secretary lacks standing because she is not harmed by this case proceeding before the circuit court. But as the Senate notes, the Secretary is charged with the constitutional and statutory duties of submitting amendments for publication and ballot printing. In discharging her duties, the Secretary concluded that Amendments 5 and 6 must go on the ballot because that was the Court's order in *Advisory Opinion to Attorney Gen. re Standards For Establishing*

(continued)

confers discretionary jurisdiction in the District Court to issue constitutional writs, that is, under the 'all writs' authority of that court.").

[3] In the event the Secretary misapprehends the Court's order, she clarifies that she is not abandoning her request for a writ of prohibition and relies on the authorities cited in her petition, which clearly recognize this Court's authority to enter a writ of prohibition against a circuit court that lacks subject matter jurisdiction. (*See* Petition at 3-4 (citing *Moffitt v. Willis*, 459 So. 2d 1018, 1020 (Fla. 1984)).) The Respondents do not address or attempt to distinguish *Moffitt*. *See also Florida Public Service Commission v. Bryson*, 569 So. 2d 1253 (Fla. 1990) (granting petition for writ of prohibition where circuit court lacked subject matter jurisdiction).

Legislative Dist. Boundaries, 2 So. 3d 175, 181 (Fla. 2009) (the "*Redistricting Advisory Opinion*") and FairDistricts demonstrated that it obtained enough signatures by the appropriate date. She clearly has standing because the Respondents seek an injunction preventing her for performing these duties.

And the injury that she faces if unsuccessful is much broader than the impact of this one case. This petition raises the question of whether the Secretary can be forced to defend a likely flood of circuit court lawsuits seeking to block initiative petitions by opponents who either chose not to participate in the advisory proceeding or did so and lost. The Senate ignores the time and expense involved in defending such suits at a time when the Secretary must focus on preparing for the general election. She will be better able to accomplish her duties if these challenges are exclusively decided by this Court in the advisory opinion process, a proceeding that does not require the Secretary's participation.

Beyond its challenge to the Secretary's standing, the Senate argues that it is "improper" for her to "take sides" and advocate in her own interest and suggests she has "some partisan interest" in this case. This is incorrect in many respects.

As an initial matter, the Secretary has yet to take any position on whether Amendments 5 and 6 are good or bad policy; that is a matter for the voters. Indeed, she has not even taken a position on whether this Court was correct when it held that the ballot summaries were not misleading in the *Redistricting Advisory*

Opinion. She should not be forced to do that unless and until this Court, in its discretion, elects to entertain the last-minute challenges by the Respondents.

Moreover, the Senate does not appear to have considered the consequences of its argument. If the Court accepts the Senate's position, at least two current legislatively proposed constitutional amendments will go undefended, as will numerous state laws going forward. The Secretary is the only defendant in current challenges to legislatively proposed amendments 3 and 9. *Doyle v. Roberts*, Case No. 37-2010-CA-002114 (Fla. 2d Jud. Cir.); *Mangat v. Dep't of State*, Case No. 37-2010-CA002202 (Fla. 2d Jud. Cir.). She is defending those legislative proposals because, until now, that has been her unquestioned role. There would be no defense of the legislative proposals in either of those cases if the Court accepts the Senate's position here. Surely, the Senate cannot want that result.

The Secretary is also a defendant, along with the House and Senate, in a challenge to legislatively proposed amendment 7, which has just made its way to this Court. *Dep't of State v. Fla. Stat Conf. of NAACP Branches v. Dep't of State*, Case No. SC10-1375. In that case, unlike here, the Secretary actually takes a position on the merits of the amendment, which the Senate welcomed.

The Senate also overlooks that the Secretary is frequently sued in her ministerial capacity for laws the Legislature enacts. *E.g., Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213 (11th Cir. 2009)

(defending challenge to the "no approach zone" near polling places required by § 103.031(4), Fla. Stat. (2008)). In those cases, the Secretary's role is identical to what it is here, and the Senate presumably would expect that the Secretary would not leave one of the State's laws undefended.

In sum, although the Senate makes the inflammatory claim that the Secretary has "violated her duty of neutrality here," she has not. She maintains neutrality by defending all proposed constitutional amendments, whether they are citizen or legislative proposals, and regardless of the politics involved. This is the only responsible way to maintain neutrality. Otherwise, many important state matters would go undefended.

II. The Factual Disputes Raised by the Respondents Are Illusory Because the Trial Court Properly Refused to Conduct an Evidentiary Hearing.

The Respondents argue that this case is appropriately tried in the circuit court because there are factual issues that require resolution. But the circuit court has already rejected this claim and held that it does not have the authority to conduct an evidentiary hearing on their claims. (Supp. App. at 93-95, 108-10.) The court ruled that it would not take any evidence and its ultimate ruling would be based on "a review between the ballot – the ballot title and summary and the proposed amendment to see if there's anything misleading." (Supp. App. at 94; 2 Supp. App. 1-2.)

The Respondents recognize this Court has the discretion to entertain their challenges to the ballot summary if they filed a mandamus petition in this Court under the authority of *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992). They have simply chosen not to pursue that remedy. Although the House and Representatives Brown and Diaz-Balart base their entire argument that this case is more appropriately heard by the circuit court on the alleged factual disputes, they fail to even acknowledge that the circuit court has refused to resolve those disputes. Only the Senate notes this fact, but declines to offer any legal argument as to why the circuit court was wrong and instead simply noted that "it will preserve this objection for another appeal, should one be necessary."[4]

Finally, although not appropriate in this case, even if this Court were to elect to transfer the case here, exercise its discretion to allow new challenges not made in an advisory opinion, and determine over the Secretary's objection that there are factual disputes that need to be resolved, it could simply appoint a commissioner to hear evidence and make recommended findings of fact. That is how this Court would presumably address fact disputes in other cases that fall within its

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[4] Because the Respondents have declined to present any legal argument that the circuit court has erred, there is no reason for the Secretary to brief the issue. Suffice it to say that the legal authorities she presented to the circuit court carried the day.

mandatory jurisdiction, such as a capital defendant's petition for a belated appeal.[5] Indeed, this Court follows an analogous, though more formalized, process in addressing lawyer and judicial misconduct cases that fall within its mandatory jurisdiction. In short, the purported factual issues in this case should not lead the Court to allow this case to proceed further in circuit court.

III. The Failure to Raise Objections in the Advisory Proceeding May Result in a Waiver of the Right to Object.

Representatives Brown and Diaz-Balart argue that they did not waive their right to raise their objections to the ballot summary in light of this Court's holding in *Florida League of Cities*. While that case stands for the proposition that this Court has discretion to entertain their belated arguments, it does not mean that they have the **right** to demand another court to do so. Indeed, two years later, after noting that no party appeared to support or oppose an initiative ballot summary, the Court warned that "all parties who may have had an interest in this proceeding have waived any rights they may have had to advise this Court of their viewpoints and legal analyses of the issues." *Advisory Opinion to the Attorney General Re:*

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[5] *See* Fla. R. App. P. 9.140(j) Committee Notes (1996) ("In the rare case where entitlement to belated appeal depends on a determination of disputed facts, the appellate court may appoint a commissioner to make a report and recommendation."), *quoted with approval in State v. Trowell*, 739 So. 2d 77, 81 n.5 (Fla. 1999); Fla. R. App. P. 9.142(d) (providing for belated appeal procedure in this Court's capital cases).

Stop Early Release of Prisoners, 642 So. 2d 724 (Fla. 1994) (the "*Prisoners Advisory Opinion*").

The Respondents denigrate the advisory opinion process as some form of superficial review that has no real meaning. In addition to ignoring the policies underlying that process, they fail to address this Court's explanation that although it is called "advisory," an opinion that a summary is misleading results in "removal of the amendment from the ballot." (Petition at 30 (quoting *Ray v. Mortham*, 742 So. 2d 1276, 1284 (Fla. 1999).) And even if no party appears in opposition, the Court still undertakes a thorough review to ensure the ballot summary is not misleading. *See Prisoners Advisory Opinion*, 642 So. 2d at 725 (rejecting ballot summary even though no party filed an opposition). Thus, an advisory opinion under the 1986 Amendments has more "teeth" than an advisory opinion to the Governor, and this Court has never given any indication that it treats a ballot summary case with any less attention or thought than any other case.

IV. A Constitutional Provision Placing an Issue Under This Court's Jurisdiction Removes It from the Circuit Courts' Jurisdiction.

The Respondents argue that circuit courts have jurisdiction over any kind of dispute unless a constitutional or statutory provision expressly denies circuit courts

jurisdiction over a matter.[6] But this Court has previously held that other grants of jurisdiction to this Court implicitly deprive circuit courts of jurisdiction to entertain the matter. For example, in *Florida Public Service Commission v. Bryson*, 569 So. 2d 1253 (Fla. 1990), a gas and electricity provider sued the Public Service Commission ("PSC") in circuit court to enjoin it from reviewing a consumer's complaint. *Id.* at 1254. Although no constitutional or statutory provision expressly precludes circuit courts from entertaining such claims, this Court concluded that the PSC has exclusive jurisdiction to entertain these claims subject only to judicial review by this Court. *Id.* at 1255-56. Thus, the Court concluded, the circuit court lacked subject matter jurisdiction. *Id.* at 1256.

Similarly, circuit courts may not determine issues of judicial procedure or lawyer regulation even though no constitutional provision or statute removes those issues from their jurisdiction. For example, a circuit court may not prohibit defense attorneys who are employed as full-time counsel of an insurance company from using their individual firm names in pleadings and correspondence. *USAA v.*

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[6] They also rely heavily on *Lane v. Chiles*, 698 So. 2d 260 (Fla. 1997), because the Court held that a post-election challenge of a ballot summary in circuit court was too late. They argue that the Court could have pointed out that a pre-election claim could not have been brought in circuit court, but did not do so. But there was no reason for the Court to address whether the pre-election challenge should have been brought in this Court or could have been brought in the circuit court. The point in that case was that it was not brought, period.

Goodman, 826 So. 2d 914, 915 (Fla. 2002). Nor can a circuit court determine that a case cannot be assigned to a senior circuit judge, as opposed to an elected judge. *Physicians Healthcare Plans, Inc. v. Pfeifler*, 846 So. 2d 1129, 1133 (Fla. 2003).

V. A Constitutional Writ May Be Used to Protect the Court's Jurisdiction Over a Prior or Future Proceeding.

The House argues that a constitutional writ is not appropriate because there is no pending proceeding in this case. But this Court has made it clear that a constitutional writ may issue to protect the future exercise of the Court's ultimate jurisdiction. *Florida Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982); *see generally* Robert T. Mann, *The Scope of All Writs Powers*, 10 Fla. Stat. L. Rev. 197 (1982). Because this Court has jurisdiction to entertain a mandamus petition pursuant to *Florida League of Cities*, all writs jurisdiction is available now.

Additionally, a constitutional writ may be issued to protect the Court's jurisdiction over prior cases that have concluded. *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005) (citing *Bedford v. State*, 633 So. 2d 13, 14 (Fla. 1994)). Thus, this Court has all writs jurisdiction based on the *Redistricting Advisory Opinion.*

VI. Pre-Election Challenges to the Substantive Legality of Constitutional Amendments Proposed by Initiative Are Not Justiciable.

Finally, the Senate argues that the prohibition on considering the substantive legality of an initiative proposed amendment on which the Secretary relies in her

petition only applies in advisory opinion proceedings in this Court and not to proceedings in circuit court.[7] This argument fails for two reasons.

First, as the Secretary demonstrated at length in her petition, following the 1986 Amendments, this Court has made clear that the only pre-election challenges to an initiative petition that are ripe and justiciable are claims that the ballot summary or title are misleading or that the amendment violates the single-subject rule. (*See* Petition at 34-39 (reviewing case law).) The Senate's response relies upon *Dade County v. Dade County Florida League of Municipalities*, 104 So. 2d 512, 514 (Fla. 1958). But that opinion was written almost thirty years before the adoption of the 1986 Amendments and involved a county charter amendment rather than a voter initiative. 104 So. 2d at 513.

The Secretary does not dispute that, prior to 1986, a circuit court could consider the constitutionality of a proposed amendment to the Florida constitution *E.g., Evans v. Firestone*, 457 So. 2d 1351, 1352 (Fla. 1984). Nor does she contest that a circuit court may do so now if the amendment is actually passed by the voters. But only this Court may consider the validity of citizens' initiative proposed amendments to the Florida Constitution. And its review is "limited to two

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[7] Contrary to the Senate's claim otherwise, the Secretary's justiciability argument was addressed in its motion to dismiss in the trial court as part of her argument for why that Court lacked subject matter jurisdiction. (1 App. at 11-15.)

legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary of the proposed amendment are misleading, in violation of section 101.161(1), Florida Statutes." *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 801 (Fla. 1998) ("*Term Limits Advisory Opinion*").

This Court did not explicitly or implicitly indicate that any other bases for challenging a voter initiative proposed amendment may be brought in a subsequent pre-election circuit court declaratory action. Rather, by clear implication, this Court's self-limited review of pre-election voter initiative petitions is meant to preserve the people's right to vote on an amendment.

> This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments, and we have not done so. .... Infringing on the people's right to vote on an amendment is a power this Court should use only where the record shows the constitutional single-subject requirement has been violated or the record establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment and its effect on the present constitution.

Advisory Opinion to the Attorney General Re: Tax Limitation, 644 So. 2d 486, 489 (Fla. 1994).

The Senate's argument must also fail because, outside the initiative context, the scope of review in a pre-election challenge to the validity of a proposed amendment is strictly limited to facial challenges to the amendment in its entirety:

> We limit our consideration of the problem entirely to a determination of whether the proposal in its entirety contravenes the provisions of Article VIII, Section 11, Florida Constitution. We have used the word "entirety" advisedly. When a proposal of the nature here involved is assaulted on the ground that it violates the Constitution, the courts will not interfere if upon ultimate approval by the electorate such proposal can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law. In other words, if an examination of the proposed amendment reveals that if adopted it would be legally operative in part, even though it might ultimately become necessary to determine that particular aspects violate the Constitution, then the submission of such a proposal to the electorate for approval or disapproval will not be restrained.

Dade County, 104 So. 2d at 515; *see also Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1146-47 (Fla. 2d DCA 2006) ("Only when a petition is unconstitutional in its entirety may it be precluded from placement on the ballot."); *Gaines v. City of Orlando*, 450 So. 2d 1174, 1178 (Fla. 5th DCA 1984) ("[W]here part of an initiative or referendum is unconstitutional and other parts are constitutional, the valid proposals should nevertheless be submitted to the voters, if they would have a possible field of operation.").

The Senate's claims in this case are not that Amendments 5 and 6 violate the Florida Constitution. Rather, they claim that parts of the amendments, **in practice**, will violate the federal Voting Rights Act of 1965. (1 App. at 61-66.) But the amendments make clear on their face that at least part of them will give way to federal law. Thus, the Senate's claims are not justiciable at this stage. If the Senate or any other aggrieved party wants to challenge the legality of any portion

of the amendments or their application to a given district, they will be free to do so if the people of Florida approve these amendments.

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/s/ Michael G. Tanner
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I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.100(*l*), Florida Rules of Appellate Procedure.

/s/ Michael G. Tanner
Attorney

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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,
and BOB GRAHAM,

Petitioners,

vs.

Case No. 10-1362
L.T. Case No. 2010 CA 1824

CORRINE BROWN, MARIO DIAZ-BALART,
FLORIDA HOUSE OF REPRESENTATIVES, and
THE FLORIDA SENATE,

Respondents.

VERIFIED MOTION FOR ADMISSION TO APPEAR *PRO HAC VICE* PURSUANT TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.510

Comes now Paul M. Smith, Movant herein, and respectfully represents the following:

1. Movant resides in Washington, DC. Movant is not a resident of the State of Florida.

2. Movant is an attorney and a member of the law firm of Jenner & Block LLP, with offices at 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000.

3. Movant's above-named law firm was retained in July 2010 by the Florida NAACP and Democracia Ahora to provide legal representation in

connection with the above-styled matter now pending before the above-named court of the State of Florida.

4. Movant is an active member in good standing and currently eligible to practice law in the following jurisdictions: District of Columbia (Bar No. 358870); Maryland (Bar No. 27182); New York (Bar No. 4372447); Supreme Court of the United States; U.S. Court of Appeals for the Federal Circuit; U.S. Court of Appeals for the First Circuit; U.S. Court of Appeals for the Second Circuit; U.S. Court of Appeals for the Third Circuit; U.S. Court of Appeals for the Fourth Circuit; U.S. Court of Appeals for the Fifth Circuit; U.S. Court of Appeals for the Sixth Circuit; U.S. Court of Appeals for the Seventh Circuit; U.S. Court of Appeals for the Eighth Circuit; U.S. Court of Appeals for the Ninth Circuit; U.S. Court of Appeals for the Tenth Circuit; U.S. Court of Appeals for the District of Columbia Circuit; U.S. District Court for the District of Columbia; U.S. District Court for the District of Colorado; U.S. District Court for the Northern District of Illinois; U.S. District Court for the District of Maryland; and U.S. District Court for the Southern District of New York.

5. There are no disciplinary proceedings pending against Movant.

6. Within the past five (5) years, Movant has not been subject to any disciplinary proceedings.

7. Movant has never been subject to any suspension proceedings.

8. Movant has never been subject to any disbarment proceedings.

9. Movant, either by resignation, withdrawal, or otherwise, never has terminated or attempted to terminate Movant's office as an attorney in order to avoid administrative, disciplinary, disbarment, or suspension proceedings.

10. Movant is not an inactive member of The Florida Bar.

11. Movant is not now a member of The Florida Bar.

12. Movant is not a suspended member of The Florida Bar.

13. Movant is not a disbarred member of The Florida Bar nor has Movant received a disciplinary resignation from The Florida Bar.

14. Movant has not previously been disciplined or held in contempt by reason of misconduct committed while engaged in representation pursuant to Florida Rule of Judicial Administration 2.510.

15. Movant has filed motions to appear as counsel in Florida state courts during the past five (5) years in the following matters:

February 9, 2005; *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.;* Case No. 2003 CA 005405 AJ; Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County; motion granted February 11, 2005.

August 25, 2005; *Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings Inc.;* Case No. 4D05-2606; District Court of Appeal, Fourth District; motion granted September 2, 2005.

August 25, 2005; *Thomas A. Clare v. Coleman (Parent) Holdings Inc.;* Case No. 4D05-2936; District Court of Appeal, Fourth District; motion granted September 1, 2005.

August 25, 2005; *Thomas A. Clare v. Coleman (Parent) Holdings Inc. and Morgan Stanley & Co. Inc.;* Case No. 4D05-1575; District Court of Appeal, Fourth District; motion granted September 21, 2005.

August 2, 2007; *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.;* Case No. SC07-1251; Supreme Court of Florida; motion granted August 2, 2007.

October 31, 2008; *Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc.;* Case No. 4D-08-4022; District Court of Appeal, Fourth District; motion granted November 5, 2008.

February 16, 2009; *Howard Curd, et al., v. Mosaic Fertilizer, LLC;* Case No. SC08-1920; Supreme Court of Florida; motion granted February 24, 2009.

16. Local counsel of record associated with Movant in this matter is James W. Gustafson, Jr. Florida Bar No. 0008664, who is an active member in good standing of The Florida Bar and has offices at Searcy Denney Scarola Barnhart & Shipley, 517 N. Calhoun Street, Tallahassee, Florida, 32301, Tel. (850) 224-7600.

17. Movant has read the applicable provisions of Florida Rule of Judicial Administration 2.510 and Rule 1-3.10 of the Rules Regulating The Florida Bar and certifies that this verified motion complies with those rules.

18. Movant agrees to comply with the provisions of the Florida Rules of Professional Conduct and consents to the jurisdiction of the courts and the Bar of the State of Florida.

WHEREFORE, Movant respectfully requests permission to appear in this court for this cause only.

DATED this 21st day of July, 2010.

I

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CHICAGO: SS

I, PAUL M. SMITH, do hereby swear or affirm under penalty of perjury that I am the Movant in the above-styled matter; that I have read the foregoing Motion and know the contents thereof, and the contents are true of my own knowledge and belief.

Paul M. Smith

The foregoing instrument was acknowledged before me this 9th day of July, 2010, by Paul M. Smith who is personally known to me or who has produced _____ as identification and who did take an oath.

DATED this 9th day of July, 2010.

Notary Public

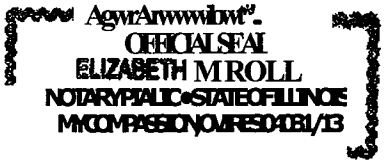
Nota Public (Signature)

I (z- A-0-N+

(Printed or Typed Name)

Commission Number:

My commission expires: 6/01-1-

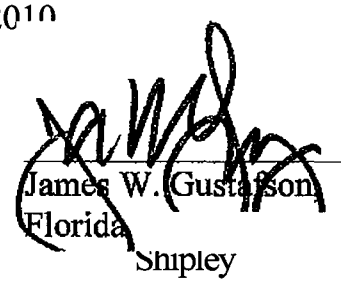


CONSENT OF LOCAL COUNSEL

I hereby consent to be associated as local counsel of record in this cause pursuant to Florida Rule of Judicial Administration 2.510.

DATED this 11th day of July, 2010

Jr.
Ba



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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida,
and BOB GRAHAM,

Petitioners,

vs.

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THE FLORIDA SENATE,

Respondents.

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Comes now Michael B. DeSanctis, Movant herein, and respectfully represents the following:

1. Movant resides in Washington, DC. Movant is not a resident of the State of Florida.

2. Movant is an attorney and a member of the law firm of Jenner & Block LLP, with offices at 1099 New York Avenue, NW, Washington, DC 20001, (202) 639-6000.

3. Movant's above-named law firm was retained in July 2010 by the Florida NAACP and Democracia Ahora to provide legal representation in

connection with the above-styled matter now pending before the above-named court of the State of Florida.

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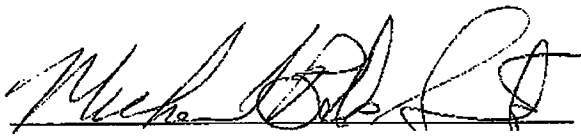
16. Local counsel of record associated with Movant in this matter is James W. Gustafson, Jr. Florida Bar No. 0008664, who is an active member in good standing of The Florida Bar and has offices at Searcy Denney Scarola Barnhart & Shipley, 517 N. Calhoun Street, Tallahassee, Florida, 32301, Tel. (850) 224-7600.

17. Movant has read the applicable provisions of Florida Rule of Judicial Administration 2.510 and Rule 1-3.10 of the Rules Regulating The Florida Bar and certifies that this verified motion complies with those rules.

WHEREFORE, Movant respectfully requests permission to appear in this court for this cause only.

DATED this 21st day of July, 2010.

Michael B. DeSane is Jenner & Block LLP



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I, MICHAEL B. DESANCTIS, do hereby swear or affirm under penalty of perjury that I am the Movant in the above-styled matter; that I have read the foregoing Motion and know the contents thereof, and the contents are true of my own knowledge and belief.

ichae B eSanct

The foregoing instrument was acknowledged before me this 7.1 day of July, 2010, by frt, cutc,2_1 De, Setoc-Kc , who is personally known to me or who has produced A pc 01;,,,,.c,, identification and who did take an oath.

DATED this 21 day of July, 2010.

Notary Public

Notary Public (Signature)

(Lc) Lo A—Gue t+-1

(Printed or Typed Name)

Commission Number:

My commission expires:

G. HIROKO TACIL1C1-11
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My Commission Expires May 31, 2013

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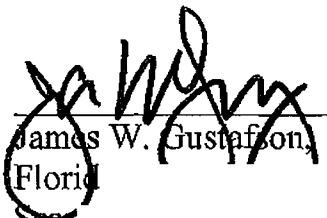

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On this 72,14'day of July, 2010:

James W. Gustafson, Jr.
Florida Bar No. 0008664

IN THE SUPREME COURT OF FLORIDA

CASE NO. 10-1362

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of Florida,

Petitioner,

vs.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, AND FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Florida NAACP is comprised of 67 local branches throughout Florida with over 11,000 individual members. Like its national parent organization, the Florida NAACP's missions are the advancement and improvement of the political, educational, social and economic status of minority persons, including African-Americans; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of legal redress to secure the elimination of racial and ethnic bias. The Florida NAACP has participated actively in litigation on behalf of Florida's minority voters, including prior litigation involving reapportionment and redistricting. *See, e.g.*, *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009); *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

Democracia Ahora is a Florida-based civic organization that is affiliated with the national Hispanic civic organization, Democracia U.S.A. It has offices in Florida and individual members throughout the state. Democracia Ahora's primary purposes are to empower Hispanic citizens who are engaged in civic and democratic endeavors; and to assist members of Hispanic communities in identifying and articulating issues of concern, including voting rights issues. Democracia Ahora is an organization dedicated to increasing the prominence and participation of Hispanics in every aspect of the political process.

As organizations representing minority communities and dedicated to protecting and advancing those communities' interests, *amici* cannot let stand the Respondents' perverse and misleading characterizations of the ballot amendments at issue in this case and their interplay with federal voting rights laws — laws designed specifically to protect minority voting interests. *Amici* are uniquely positioned to present these arguments.

SUMMARY OF ARGUMENT

Amendments 5 and 6, if adopted, will ensure the protection of minority voting rights in Florida and will bring other legitimate, mainstream and much needed reform to Florida's redistricting processes. To prevent the Amendments even from being placed before the voters, however, Respondents insist that the Amendments represent a "wholesale restructuring of Florida voting rights and reapportionment," Senate Resp. at 26; are "plainly violative of the Voting Rights Act," *id.*; will have the effect of "disenfranchising minorities," *id.*; will "eviscerate minority voting rights," *id.* at 7; and will cause minorities to lose "at least half their state and federal congressional and legislative seats in Florida," Senate Resp. at 26; *see also* Brown and Diaz-Balart Resp. at 5-7 (suggesting that the Amendments' requirements will "decrease, rather than increase . . . the Florida Legislature's ability to draw districts to protect minority voting interests").

These remarkable statements are nothing but scare tactics. They could not be further from the truth. Indeed, if *any* of them were true, *amici* would not be supporting the Amendments on behalf of racial and language minorities.[1] Nor would this Court have approved the Amendments for placement on the ballot over a year and a half ago. *See Advisory Opinion*, 2 So. 3d 175 (Fla. 2009).

As we show below, Amendments 5 and 6 advance the voting rights interests of minorities in a manner that is perfectly consistent with both the letter and intent of federal law. In turn, we demonstrate that Respondents' specific federal law arguments are not just wrong but they are in effect hypothetical as-applied challenges that are premature — because until districts are drawn applying the Amendments, no facts exist to support Respondents' claims. As a result, they are unripe and neither this Court nor the circuit court has jurisdiction over them.

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[1] And *amici* are not the only ones. *See, e.g.,* Editorial, *Good Call on Ballot-Packing Suit*, The Lake Wales News, July 17, 2010 (arguing that the Legislature's claims that Amendments 5 and 6 would decrease minority representation are disingenuous because the amendments "strive to maintain minority opportunity"); Editorial, *End the Gerrymandering for Good*, The Miami Herald, January 31, 2010 (endorsing Amendments 5 and 6 and contending that their "wording on protecting minorities' voting opportunities is stronger than even in the federal Voting Rights Act").

ARGUMENT

I. AMENDMENTS 5 AND 6 ARE CONSISTENT WITH FEDERAL VOTING RIGHTS LAW AND TRADITIONAL PRINCIPLES OF REDISTRICTING.

Amendments 5 and 6 are perfectly consistent with federal voting rights law and with traditional principles of redistricting. Indeed, much of the Amendments' language faithfully tracks the core provisions of federal law that have been protecting minority voting rights nationwide for over forty years.

One of the primary ways in which the federal Voting Rights Act of 1965 advances minority voting rights is Section 2's mandate that members of protected minority classes not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (explaining that Section 2 of the Voting Rights Act applies to "the right to vote of any citizen who is a member of a protected class of racial and language minorities"). In the redistricting context, this prohibits legislatures from drawing districts with the "intent" or "result" of denying racial and language minorities equal access to the electoral process or the opportunity to elect the candidate of their choice. *See Gingles*, 478 U.S. at 42-46. Wholly consistent with Section 2 of the Voting Rights Act, Amendments 5 and 6 prohibit the drawing of districts "with

the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process."

Similarly, Section 5 of the Voting Rights Act prohibits any voting-related changes in law that have the effect of causing a "retrogression" in the position of racial or language minorities. *See generally Beer v. United States*, 425 U.S. 130, 141 (1976). That is, Section 5 "mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. 952, 983 (1996); 42 U.S.C. § 1973b. Here again, the language of Amendments 5 and 6 tracks federal law by providing that "districts shall not be drawn with the intent or result . . . to diminish [racial or language minorities'] ability to elect representatives of their choice."

Respondents' insistence that the Amendments are wildly inconsistent with federal laws protecting minority voting rights is inexplicable. In fact, the Amendments provide even greater protections for minority voters than does Section 5 of the Voting Rights Act. Whereas, the protection afforded to minority voters under Section 5 apply in only five enumerated counties in Florida, Amendments 5 and 6 will apply statewide.

By contrast, the Voting Rights Act does *not* require that state legislatures draw districts with the intent to favor or disfavor a political party or an incumbent. To be sure, courts have recognized that legislatures may, under appropriate

circumstances, consider certain types of incumbency *data* for the purpose of complying with Section 5's guarantee against redistricting changes that diminish a "minority groups' equal opportunity to participate in the political process." *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). Nothing in the Voting Rights Act, however, requires legislatures to draw district lines for the *purpose* of favoring or disfavoring a political party or incumbent. To suggest otherwise, *see* Brown and Diaz-Balart Resp. at 6, is an insult to the very integrity of the Voting Rights Act, itself.

Consistent with this federal regime, Amendments 5 and 6 prohibit the drawing of district lines for the *purpose* (i.e., with the intent) of favoring or disfavoring a political party or incumbent. Many states have adopted similar reforms to limit the scourge of intentional partisan gerrymandering. *See, e.g.*, Iowa Code § 42.4(5) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group."), Cal. Const. art. 21, § 2(e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an

incumbent, political candidate, or political party.").[2] Far from being patently violative of federal law, the California amendment, which is almost identical to Amendments 5 and 6 in this regard, was pre-cleared by the Department of Justice as *satisfying* the requirements Section 5.[3]

Beyond these provisions — which affirmatively advance, rather than frustrate, federal voting rights law — the reforms contained in Amendments 5 and 6 represent core, traditional redistricting principles that legislatures across the country have been harmonizing with the Voting Rights Act's protection of minority interests for decades. The Amendments' equal population requirement, for example, mirrors the fundamental one-person-one-vote and equal population

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[2] *See also* Del. Code § 804 ("Each district shall, insofar as is possible . . . [n]ot be created so as to unduly favor any person or political party."); Haw. Const. § 6 ("No district shall be so drawn as to unduly favor a person or political faction."); Idaho Code § 72-1506 ("Counties shall not be divided to protect a particular political party or a particular incumbent."); Mont. Code Ann. § 5-1-115(3) ("A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress."); L.R. 7, 97th Leg., 1st Sess. (Neb. 2001) ("District boundaries shall not be established with the intention of favoring a political party or any other group or person."); Or. Rev. Stat. § 188.010 ("No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."); Wash. Rev. Code § 44.05.090 (1990) ("The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.").

[3] *See* Letter from Gerald Hebert on behalf of California State Auditor, Elaine M. Howle to Christopher Coates, Chief, Civil Rights Division Department of Justice, available at http://www.wedrawthelines.ca.gov/downloads/submission_letter.pdf ("The provisions of the Voter FIRST Act were pre-cleared on March 2, 2009, and we incorporate that submission file (No. 2008-5888) by reference.").

requirements of the U.S. Constitution, which are fundamental to any redistricting analysis. *See Reynolds v. Sims*, 377 U.S. 533 (1964), *Karcher v. Daggett*, 462 U.S. 725 (1983), and *Brown v. Thomson*, 462 U.S. 835 (1983).

Similarly, the Amendments' requirements that districts (i) consist of contiguous territory, (ii) be compact, and (iii) utilize existing political and geographical boundaries have routinely been recognized as core redistricting principles and sound policy. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("We have explained that 'traditional districting principles,' which include 'compactness, contiguity, and respect for political subdivisions,' are 'important not because they are constitutionally required ... but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered . . . .'"); *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (recognizing that the contiguous territory requirement has been a feature of federal redistricting law since at least 1842 and was first adopted as "an attempt to forbid the practice of the gerrymander").

It does not require extended analysis to see that the requirements of Amendments 5 and 6 are thoroughly consistent with the Voting Rights Act's text and its emphasis on protecting the equal opportunities of minorities. They likewise are consistent with traditional and historically recognized redistricting principles. Respondents' over-the-top assertions to the contrary should be dismissed out of

hand, and certainly do not justify additional pre-election review of the Amendments in this or any other Court.

II. BEYOND THE FRIVOLOUS ARGUMENTS THAT THE AMENDMENTS VIOLATE FEDERAL LAW IN GENERAL, RESPONDENTS' SPECIFIC ARGUMENTS ARE BOTH WRONG AND UNRIPE.

As we have shown, there is no conceivable basis on which this Court or the circuit court below could determine that Amendments 5 and 6 violate federal law "in every way." Respondents' more specific arguments are equally unavailing as they facially lack merit and, in any event, are essentially unripe as-applied challenges that require the assumption of hypothetical facts that do not and cannot exist at this time.

First, Respondents Brown and Diaz-Balart claim to have "evidence" concerning the Census's American Community Survey ("ACS") showing that the "ballot summary is misleading in telling the voters that the Legislature will be able to discern with any degree of accuracy where 'language minorities' reside." Brown and Diaz-Balart Resp., at 18. They argue that because the decennial "Census no longer collects language usage data, the ballot summary 'flies under false colors,' promising what the Legislature cannot possibly deliver." *Id.*

Neither the Amendments nor the ballot summaries, however, say anything about how the Legislature will identify the residences of members of language minorities or the data on which it will rely. The summary simply explains the

Amendments' prohibition upon drawing districts in such a way so as to deny language minorities equal opportunity to participate in the political process or to diminish their ability to elect representatives of their choice. The summary thus cannot possibly be misleading in the way Respondents claim. *See Advisory Opinion To Att'y Gen. re Right To Treatment and Rehabilitation*, 818 So. 2d 491, 498 (Fla. 2002) (rejecting claim that ballot summary was misleading where the summary "sa[id] nothing" about the issue raised by plaintiffs and instead simply "apprised the voter of the chief purpose of the amendment"); *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986) (while the ballot summary must state in clear and unambiguous language the chief purpose of the measure, it "need not explain every detail or ramification of the proposed amendment").

Furthermore, Respondents are wrong on the facts. In 2000, the Census "long form" asked as to each person in a household whether that person speaks a language other than English, what that language is, and how well that person speaks English.[4] In 2010, the Census is no longer using the long form. Instead, however, the ACS is asking the same questions and collecting the very same data.[5] Indeed, the ACS is an official survey conducted by the Census Bureau and is charged with collecting official data regarding language minorities. *See Benavidez*

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4 *See* http://www.census.gov/dmd/www/pdf/d02p.pdf (Question 11).

5 *See* http://www.census.gov/acs/www/Downloads/ACS-1(info)(2010)%20Statesi de %20English_web.pdf (Question 14).

v. Irving Indep. Sch. Dist., 690 F. Supp. 2d 451, 457 (N.D. Tex. 2010). As courts relying on ACS data have noted, the ACS is "intended to replace the Census long form, but it is conducted annually with the results averaged over time periods to get the same level of statistical sampling as the long form." *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 715 (N.D. Tex. 2009). Moreover, the Voting Rights Act *mandates* that states and political subdivisions rely on the ACS to implement the Voting Rights Act's protections for language minorities. *See* 42 U.S.C. § 1973aa-1a(b)(2)(A). As one court recognized "the Census Bureau considers ACS data reliable and intends for it to be relied upon in decisions such as Voting Rights Act compliance." *Benavidez*, 638 F. Supp. 2d at 721.

Thus, it is simply not true that data on where language minority populations reside will not exist. That is not to say that the legislature necessarily will use the data properly with respect to every district it draws. Once districts are drawn — which will not happen until 2012 — a party will be entitled to challenge the legislature's use of ACS data and any districts drawn using it. Claims raising such challenges now, however, are both incurably unripe and irrelevant to the validity of Amendments 5 and 6 and the ballot summary.

Second, in its response, the Senate concedes that the circuit court's "jurisdiction is limited to a facial review of the proposed constitutional amendments." Senate Resp., at 2-3. Indeed, that court has already ruled that there

will be no discovery and no trial with respect to Respondents' claims and decided it will limit itself to ruling on dispositive motions for judgment on the pleadings. *See* Order (July 13, 2010). Nevertheless, the House argues that it is entitled to a factual hearing on its claim that the amendments' ballot summaries are misleading because they do not inform voters that the Amendments' allegedly "binding" compactness and local boundary requirements will prevent the election of minority candidates. House Resp., at 14-15.

The plain text of the Amendments precludes this argument. The Amendments provide that,

> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; *and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice*; and districts shall consist of contiguous territory.

Advisory Op., 2 So. 3d at 179 (emphasis added). The next paragraph reads:

> (2) *Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law*, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

Id. at 179-80 (emphasis added). Thus, the compactness and political and geographical boundaries requirements are not "binding." Rather, they would apply only to the extent that they do not conflict with the minority-protection

requirements of paragraph (1), and they do not conflict with federal law (which of course includes the Voting Rights Act as well as the Fifteenth Amendment to the United States Constitution). As a result, the scenario imagined by the House can occur only if Amendments 5 and 6 pass on election day and the legislature then *misapplies* them. In that event, any party would be able to bring an as-applied challenge. Until then, the House's claim is at best unripe.

Third, the House claims that this case is in part a response to the United States Supreme Court's decision in *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). According to the House, *Bartlett* limits the protections that federal law provides to minorities from the harm allegedly caused by the Amendments' contiguity, compactness and local boundary requirements. As an initial matter, Respondents have no explanation for why they waited over a *year* after *Bartlett* was decided to file their suit in the circuit court. Moreover, and as discussed, the Amendments' compactness and local boundary requirements expressly yield to the Amendments' protections for minority voter interests and to federal voting rights laws. Thus, it cannot be that those requirements will ever harm minority voters, because they always will be trumped by protections for minority voters in the Amendments and in federal law.

In addition, *Bartlett* held merely that the Voting Rights Act does not require the creation of a very specific type of district, known as a minority cross-over

district (in which minorities constitute less than 50% of the relevant population but nevertheless can elect the candidate of their choice). *Bartlett*, 129 S. Ct. at 1246. It in no way altered or amended the text of the federal Voting Rights Act. In fact, the Court in *Bartlett* made clear that state legislatures retain discretion to draw cross-over districts. *Id.* at 1248. *Bartlett* would not affect the validity of the minority protection provisions contained in Amendments 5 and 6 as a matter of state law. Accordingly, there is no conceivable way in which the *Bartlett* decision could be read to render Amendments 5 and 6 wholly unlawful or fatally unworkable — if at all. *If* Amendments 5 and 6 are adopted by the electorate, and *if* the legislature subsequently misapplies them in a way that actually diminishes minority voting interests, then an aggrieved party could bring an as-applied challenge. Until then, the claim is, like the others, unripe at best.[6]

This Court long has recognized that pre-election challenges to ballot initiatives are permitted only in extraordinary circumstances, where a party can

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[6] To the extent Respondents truly believe that *Bartlett* narrows the role of Section 2 in protecting minority interests, Respondents should welcome the new state law protections that the Amendments guarantee. If the Amendments are adopted, a voter could seek redress under state law if a district is drawn "with the . . . result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process," or to "diminish" minorities' "ability to elect representatives of their choice." *Advisory Op.*, 2 So. 3d at 180. Currently, Florida voters do not have such a state-law right. Thus, if anything, the Amendments only enhance the protections available to minorities. Respondents' attack on the Amendments in the name of protecting minority voting rights is clearly indefensible.

show that the proposed initiative is invalid on its face and in its entirety. *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 515 (Fla. 1958). Beyond that, challenges to the substance and operation of a proposed amendment are not yet ripe — and therefore are not justiciable — until the amendment has been approved and appropriate facts are developed and presented in an appropriate proceeding to evaluate how the amendment actually operates on a real set of existing facts. As the Court has held:

> We limit our consideration of the problem entirely to a determination of whether the proposal *in its entirety* contravenes the provisions of Article VIII, Section 11, Florida Constitution. *We have used the word 'entirety' advisedly.* When a proposal of the nature here involved is assaulted on the ground that it violates the Constitution, *the courts will not interfere if upon ultimate approval by the electorate such proposal can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law.* In other words, if an examination of the proposed amendment reveals that if adopted it would be legally operative in part, even though it might ultimately become necessary to determine that particular aspects violate the Constitution, then the submission of such a proposal to the electorate for approval or disapproval will not be restrained.

Dade County League of Municipalities, 104 So. 2d at 515 (emphasis added) (citing *Gray v. Moss*, 136 So. 262 (Fla. 1934), and *Gray v. Winthrop*, 156 So. 270 (Fla. 1934)); *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1146-47 (Fla. 2d DCA 2006).

As such, Respondents' own contention that their claims require extensive factual development about hypothetical scenarios are proof positive that their

claims are as-applied challenges to "particular situations" that might arise in the future under "particular segments of the proposal." It follows that Respondents' claims cannot possibly be ripe. *See Santa Rosa County v. Administration Comm'n, Div. of Administrative Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) (quoting *LaBella v. Food Fair, Inc.*, 406 So. 2d 1216, 1217 (Fla. 3d DCA 1981) (quoting *Williams v. Howard*, 329 So.2d 277, 283 (Fla. 1976)). It also follows that, while Respondents' claims clearly lack any merit whatsoever, this Court and the circuit court lack jurisdiction to grant Respondents the relief they seek. "Absent a bona fide need for a declaration based on present, ascertainable facts, the circuit court lacks jurisdiction to render declaratory relief." *Id.* (citations omitted).

CONCLUSION

Consistent with the Voting Rights Act, it is plainly evident that one of the core virtues of ballot Amendments 5 and 6 is to guarantee to racial and language minority voters in Florida the equal opportunity to participate in the political process and the preservation of their ability to elect candidates of their choice. That is why the misrepresentations of the Respondents are so unfortunate. And it is why this Court should grant the Petition, and dismiss Respondents' claims pending in the circuit court.

Dated: July 22, 2010

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 10-1362

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of Florida,

Petitioner,

vs.

CORRINE BROWN, MARIO-DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, BOB GRAHAM, AND FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

FLORIDA STATE CONFERENCE OF BRANCHES OF NAACP BRANCHES AND DEMOCRACIA AHORA'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE FLORIDA STATE CONFERENCE OF NAACP BRANCHES AND DEMOCRACIA AHORA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, the Florida State Conference of NAACP Branches ("Florida NAACP") and Democracia Ahora hereby move this Court for leave to file the attached *amicus curiae* brief in support of the petition for constitutional writ or, alternatively, for writ of prohibition in this case.

The Florida NAACP is comprised of 67 local branches throughout Florida with over 11,000 individual members. Like its national parent organization, the Florida NAACP's missions are the advancement and improvement of the political, educational, social and economic status of minority persons, including African-Americans; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of legal redress to secure the elimination of racial and ethnic bias. The Florida NAACP has participated actively in litigation on behalf of Florida's minority voters, including prior litigation involving reapportionment and redistricting. *See, e.g.*, *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009); *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

Democracia Ahora is a Florida association that is affiliated with the national Hispanic civic organization, Democracia U.S.A. It has individual members

throughout Florida. Democracia Ahora's primary purposes are to empower Hispanic citizens who are engaged in civic and democratic endeavors; and to assist members of Hispanic communities in identifying and articulating issues of concern, including voting rights issues.

The Florida NAACP and Democracia Ahora have publicly announced their support for Amendments 5 and 6, which are scheduled to be placed on the general election ballot on November 2, 2010. Unless this case is resolved in favor of the petitioners, the individual members of the Florida NAACP and Democracia Ahora will be deprived of an important opportunity to cast their votes in favor of constitutional amendments that will significantly enhance their electoral standing.

Potential *amici* file their brief to respond to several specific and quite outlandish misrepresentations raised by Respondents for the first time in their responsive papers before this Court. The Secretary's petition did not raise any issues of federal law, characterizations of the Voting Rights Act, or contentions about the impact on minority voters that the proposed Amendments might have. Yet in their responses to the Secretary's petition, Respondents blatantly contort the law to make a variety of claims that the proposed constitutional amendments at issue would "patently violate" federal voting rights law and would gravely harm the interests of minority voters. These arguments, raised for the first time by Respondents, are fundamentally misleading and potential *amici* could not let them

go unaddressed. As potential *amici* show, the proposed amendments are perfectly consistent with federal law, advance the protection of minority voting rights, and thus are strongly supported by the minority communities.

As both members and representatives of racial and language minority communities, potential *amici* are uniquely positioned to address these issues and to provide critical clarification of the obviously complimentary interplay between the constitutional amendments at issue and the federal voting rights laws designed to advance the rights of minorities to participate in the political process and to give effectiveness to their votes.

Petitioners have consented to the filing of this brief. Potential *amici* have sought consent from Respondents on numerous occasions, but, as of noon on July 22, 2010, have not received responses granting or withholding their consent. Because of the short time constraints applicable to the briefing schedule in this case, and the fundamental importance of the issues at stake, potential *amici* respectfully request the Court's leave to file the attached brief pursuant to Florida Rule of Appellate Procedure 9.370(c).

Wherefore, the Florida NAACP and Democracia Ahora respectfully move this Court for leave to file their brief and participate as *amici*.

Dated: July 22, 2010

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IN THE SUPREME COURT OF FLORIDA

DAWN K. ROBERTS, in her capacity as Interim Secretary of State of the State of Florida,

Petitioner,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, FLORIDA SENATE, and BOB GRAHAM, and FAIRDISTRICTSFLORIDA.ORG, INC.,

Respondents.

Case No.: SC10-1362
L.T. No: 37-2010-CA-001824

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant, and

BOB GRAHAM,

Intervening Defendant.
_____/

ORDER TERMINATING DISCOVERY AND CANCELING TRIAL

This cause came before the Court on the Defendants' and Intervening Defendants' Motions to Stay Discovery. The Court has considered the motions, the parties' responses, and argument of counsel. The Court finds and orders the following:

1. The Court will not hold a trial in this case or consider live testimony.

2. Discovery is therefore terminated.

ORDERED this 13th day of July, 2010, at Leon County, Florida.

Jackie L. Fulford
Circuit Judge

Copies to Counsel of Record

IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1362
LT Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida
and BOB GRAHAM,

Petitioners,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure The League of Women Voters of Florida hereby moves this Court for leave to file the attached *amicus curiae* brief in support of the petition for constitutional writ or, alternatively, for writ of prohibition in this case.

The League of Women Voters of Florida is comprised of 67 local branches throughout Florida with over 11,000 individual members. Like its national parent

organization, The League of Women Voters of Florida's missions are the advancement and improvement of the political, educational, social and economic status of minority persons, including African-Americans; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of legal redress to secure the elimination of racial and ethnic bias. The League of Women Voters of Florida has participated actively in litigation on behalf of Florida's minority voters, including prior litigation involving reapportionment and redistricting.

The League of Women Voters of Florida is a Florida association that is affiliated with the national Hispanic civic organization, Democracia U.S.A. It has individual members throughout Florida. The League of Women Voters of Florida's primary purposes are to empower Hispanic citizens who are engaged in civic and democratic endeavors; and to assist members of Hispanic communities in identifying and articulating issues of concern, including voting rights issues.

The League of Women Voters of Florida has publicly announced their support for Amendments 5 and 6, which are scheduled to be placed on the general election ballot on November 2, 2010. Unless this case is resolved in favor of the petitioners, the individual members of The League of Women Voters of Florida will be deprived of an important opportunity to cast their votes in favor of constitutional amendments that will significantly enhance their electoral standing.

Due to the time constraints imposed by the briefing schedule in this matter, Counsel for the proposed *amicus* has been unable to seek consent of all parties to the filing of their brief. Petitioners have consented to the filing of this brief. However, we were unable to request the consent of the respondents prior to our deadline.

Wherefore, The League of Women Voters of Florida respectfully moves this Court for leave to file this brief.

Dated: July 22, 2010.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1362
LT Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida
and BOB GRAHAM,

Petitioners,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Respondents.

CORRECTED *AMICUS CURIAE* BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The League of Women Voters of Florida ("League") is a nonpartisan political organization founded in 1920 with the goals of improving our system of government and of influencing public policy through citizen education and advocacy. The League is a grass roots organization, working at the national, state and local levels. The League has been an advocate for, and involved in, Florida's citizen initiative petition process since its inception. Over the decades the League has staunchly opposed efforts to restrict citizens' ability to amend the constitution through the initiative process.

The League views the efforts of Brown, Diaz-Balart, the Florida House of Representatives, and the Florida Senate as an impermissible attempt to thwart the will of the voters by undermining the citizens' initiative process set forth in the 1986 Amendments to the Florida Constitution, which are the preeminent law of the State of Florida. Allowing serial pre-election challenges to approved Amendments in the Florida circuit courts creates a dangerous precedent that would completely render the citizens initiative process codified in Article XI, Section 3 meaningless. Because the League has been a long-standing proponent of the citizens' initiative process, the league wholeheartedly endorses the arguments made by the Secretary of State and rejects any attempts to improperly interfere with initiative process.

SUMMARY OF THE ARGUMENT

Due to the relatively short length of our argument, we request the Court's indulgence in allowing us to forego a summary.

ARGUMENT

While the Secretary of State has appropriately avoided addressing the effect of Amendments 5 and 6 should they become law, we find it difficult to make our arguments in such a vacuum. The simple truth is that Amendments 5 and 6, if passed, will directly impact the ability of our current elected officials to configure their voting districts in a fashion that maximizes their prospects for re-election. As such, these amendments are perceived as a direct threat to their ability to remain in office. As a result, the Plaintiffs' attempts to interfere with the citizens' initiative process in the instant matter should be subject to heightened scrutiny, as their motivation to maintain their ability to remain in office cannot be simply discounted or ignored. By placing Amendments 5 and 6 on the ballot through the use of the citizens' initiative process, the people of Florida have expressed their desire to end the practice of gerrymandering in this state. Despite this clear expression of the citizens' desire, the legislature, and Representatives Brown and Diaz-Balart, elected representatives of the citizenry, have taken it upon themselves to thwart the

intent of those who elected them in the first place. The conflict between their self-interest and the interest of the Florida citizens they represent cannot be ignored.

I. PROCEDURAL HISTORY OF AMENDMENTS 5 AND 6

In September 2006, FairDistrictsFlorida.org ("FDF") submitted two proposed constitutional amendments to the Secretary of State for approval. The form of the petitions was approved later that month. Pursuant to the Florida constitution and the law, FDF proceeded to gather signatures on the two petitions for the next six months. In April 2007, FDF reached its initial goal of gathering 10% of the total signatures needed, which entitled them to review of the amendments by the Supreme Court. FDF raised and spent hundreds of thousands of dollars and engaged hundreds of citizen volunteers, including many members of the League, to support the signature collection operation.

This 10% made the petitions eligible for their mandatory review in the Supreme Court and, on April 23, 2007, the Attorney General requested an advisory opinion from the Court as to whether the language of the proposed amendments and their ballot summaries complied with the legal requirements for ballot certification. All interested persons were invited to participate in the process. Soon thereafter, the Florida Legislature filed papers to oppose the placement of the proposals on the ballot. No other parties intervened. Because of the intervenors' action, FDF halted signature collection pending the Court's determination so it did

not expend time and money to gather signatures until it was certain that the measures would be allowed on the ballot.

On January 29, 2009, the Supreme Court issued its advisory opinion that the measures did not violate the single subject rule and that the ballot summaries provided a clear and accurate statement of the chief purpose and effect of the amendments. The Florida House and Senate were parties to that case and Representatives Brown and Diaz-Balart could have participated individually, but chose not to do so.

FDF immediately began to gather the balance of the 676,811 signatures needed for each of the amendments to be certified for the ballot. These signatures were gathered at great expense (over $2,000,000) and with tens of thousands of hours of volunteer time. The League took a leadership role in this effort. It took almost a full year to complete that process, but on January 22, 2010, the citizens of Florida had spoken, the requisite numbers of signatures were collected and filed, and the amendments were certified for the ballot.

Plaintiffs in this case were well aware of the amendments. In fact, in October 2009, both houses of the legislature began to hold hearings extolling the "dangers" of passing the amendments. In early November 2009, Reps. Diaz-Balart and Brown wrote to the legislature claiming that they had questions about how the amendments would impact minority voting rights. Many of the questions they

raised in that letter form the basis for the allegations in the present litigation. On January 11, 2010, they testified in opposition to Amendments 5 and 6 before a joint meeting of the House and Senate Committees dealing with reapportionment.

Notwithstanding that the Plaintiffs could have raised any issue they wanted in the Advisory proceedings of 2008, and that they openly opposed the Amendments starting in November 2009, they waited until May 24, 2010 to file this lawsuit. In the interim, and in reliance on this Court's ruling and the process set forth in the Florida Constitution, FDF, with significant assistance from the League, has spent millions of dollars and tens of thousands of hours preparing for November 2, when Florida's voters are scheduled to vote on Amendments 5 and 6.

II. THE TRIAL COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE PLAINTIFFS' ATTACK ON PROPOSED AMENDMENTS 5 AND 6

The legal arguments against Plaintiffs' attempt to invalidate Amendments 5 and 6 prior to November have been ablely stated by the Secretary of State and former Senator Bob Graham. However, we want to take the opportunity to reiterate and summarize them here.

First, as this Court has noted time and again, it has ***original*** and ***exclusive*** jurisdiction over challenges to constitutional amendments proposed by the citizens' initiative process. *See Advisory Opinion to Attorney General re: Stop Early Release of Prisoners*, 661 So.2d 1204, 1205 (Fla. 1995). This jurisdiction is

clearly granted by Article V, Section 3(b)(10) of the Florida Constitution. No such jurisdiction was granted to the Circuit Courts as part of the 1986 amendment. The terms "original" and "exclusive" are unambiguous and clearly divest the circuit court of jurisdiction to hear the Plaintiffs' challenge to Amendments 5 and 6. The Plaintiffs' reliance on statutes of general applicability regarding the jurisdiction of the circuit courts ignores the long-established maxim of statutory construction that the specific statute controls over the general, as well as the plain meaning of "exclusive" and "original."

It is also a general rule of statutory construction that where there is ambiguity in a statute, the court may refer to the legislative history to resolve the ambiguity. As explained by the Secretary of State in its Reply Brief, the sole purpose of the 1986 Amendments was to protect the citizen's initiative process from precisely the type of attack being launched here. It was passed in direct response to this Court's *Firestone* striking a proposed voter's initiative amendment shortly before the election. *Askew v. Firestone*, 421 So.2d 151 (Fla. 1982). This prompted the Court to recommend that the legislature enact a process that would allow valid initiatives to be reviewed early so defects could be corrected well before the election and the initiatives could then still be considered by Florida voters. The legislature enacted the 1986 Amendments in response, creating the

current procedure which allows the Florida Supreme Court – and only the Supreme Court – to vet proposed initiatives in a timely fashion before an election.

The Plaintiffs' attempt to invalidate Amendments 5 and 6 is an attempt to circumvent this process and is no different from the attacks levied in the *Firestone* cases. Thus, allowing the trial court case to proceed would be tantamount to acknowledging that the 1986 Amendments did not accomplish their purpose and did not in any material way alter the review process for voter initiatives or protect them from delaying attacks disfavored by the Court. It is clear from both the judicial and legislative history that this was neither the intent nor the effect of the 1986 Amendments. It would also turn the 1986 Amendments on their head, making them yet another hurdle to the citizens' petition process on top of those that already existed, thus making it more difficult and more expensive to place an amendment on the ballot, which is of course the exact opposite of the judicial and legislature history on the issue.

Allowing the case to proceed in the trail court also necessarily suggests that citizen's initiative amendments are subject to piecemeal attacks at any time before the election by any party that can establish standing. This again flies in the face of the clear language of the 1986 Amendments, the legislative history, and the application of the 1986 Amendments over the past 24 years. Nothing in the Plaintiffs' argument suggests that there is something unique about their ability to

challenge these initiatives. Therefore, to be consistent, their position must be that any party with standing can challenge a citizens' amendment in the circuit courts of this state at any time before an election. Such an argument is unsupportable on its face.

In addition, the Senate and the House have once again raised arguments related to the language of the proposed amendments. To the extent that the arguments related to the ballot language were made, or could have been made, in the original proceedings before the Supreme Court approving the ballot language, they have been ruled on. To the extent they were not raised, they have been waived. The circuit court has no jurisdiction to deviate from this Court's previous ruling on the issue. Representatives Brown and Diaz-Balart could also have participated in that process individually at the time. Because they failed to take part in the initial advisory opinion in this matter, they too have waived their right to raise these issues. *See Advisory Opinion to the Attorney General,* 642 So. 2d 724 (Fla. 1994) ("all parties who may have had an interest in this proceeding have waived any rights they may have had to advise this court of their view points and legal analysis of these issues").

Finally, the Plaintiffs' other objections to the Amendments are simply not ripe for determination. In order for the injury that they complain of to occur, the Amendments must first be passed by the voter in November of this year. Then an

attempt to redistrict under the new rules must be implemented. Only at that point will the Plaintiffs have an injury in fact that a court can redress. This Court has expressed on numerous occasions that it is not its role to weigh in on the merits of a proposed amendment before it becomes law. If an amendment in fact becomes law, the Court can address any injuries from or constitutional challenges to that law once it is enacted. There is nothing about this amendment that suggests it deserves treatment different from any other proposed constitutional amendment or law.

III. THE PLAINTIFFS' AND LEGISLATURE'S ATTEMPT TO INTERFERE IN THE CITIZENS INITIATIVE PROCESS UPSETS THE "DELICATE SYMMETRIC BALANCE" OF THE CONSTITUTIONAL AMENDMENT SCHEME

Recently, in *Browning v. Florida Hometown Democracy,* 29 So.3d 1053 (Fla. 2010), this Court faced an attempt by the legislature to interfere in the citizens' initiative process. In *Browning,* this Court rejected the legislature's attempt to pass a law setting forth procedures to allow for the revocation of signatures on petition forms. This Court invalidated the law on the grounds that it would "essentially eviscerate and render meaningless to citizens' initiative process." *Browning* at 1057. While the Plaintiffs in the instant case are attempting to interfere with the citizens' initiative process through the judicial system, rather

than the legislature, the policy arguments raised in *Browning* are equally applicable here.

In *Browning,* the court noted that "any restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process." *Browning* at 1058, citing to *Citizens Proposition for Tax Relief v. Firestone,* 386 So.2d 561, 566 (Fla. 1980). This statement is doubly meaningful in the instant case because not only does the legislature's attempt to interfere in the citizens' initiative process through the use of the Circuit Court weaken the power of the initiative process, the amendments that are under attack here directly affect the legislature's ability to maintain its power and every Floridian's right to fair and proportional representation.

As a starting point, the very purpose of the citizens' initiative power is to allow the populace to change the constitution in a way that their elected leaders refuse to do on their own. It is, in a sense, the purest form of democracy. The people speak for themselves, not through the voice of their representatives. As a result, it is the sole method available to the populace to affect change when their elected representatives refuse, for whatever reason, to do so. Oftentimes, they refuse to do so because the proposed change in the law is adverse to the vested interests of those in power. It is difficult to imagine amendments that strike at the very core of these policies more than Amendments 5 and 6. After all, their very

purpose is to eliminate, or at least reduce, the ability of those in power to manipulate the system in order to stay in power.

This Court made a similar point in *Browning*:

> First, the fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.
>
> Second, article XI, section 3 is a "self executing" constitutional provision which was adopted to bypass legislative and executive control and to provide the people of Florida a narrow but direct voice in amending their fundamental organic law. As a result, article XI, section 3 provides an additional check and balance against legislative and executive power, which is not present at the federal level. Hence, [the] assertion that the legislature and the executive branch possess broad power to regulate the initiative process, subject in all cases to deferential review, is in direct conflict with the very nature of the conferred fundamental right, which acts as a check on such power.
>
> . . .
>
> [T]he initiative petition method to amend the constitution is a fundamental right and any rule or statute which regulates this initiative process must not unduly burden the petitioners' initiative access.
>
> . . .
>
> It remains a basic legal principle that no department, not even the legislative, has unlimited power under our system of government.

Browning, at 1063-1064 (Internal quotes and citations omitted).

This Court concluded:

> When a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way. For these reasons, we have previously held: In considering any legislative act or administrative rule which concerns the initiative amending process, we must be careful that the legislative statute or implementing rule is necessary for ballot integrity since any restriction on the initiative process would strengthen the authority and power of the legislature and weaken the power of the initiative process. The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity.

Browning at 1064 (Internal citations omitted).

All of these arguments are equally applicable in the instant case. Article XI, section 3 dictates the manner in which a ballot initiative is proposed and reviewed by the judiciary. It does not allow for piecemeal attack at the circuit court level, at any time, let alone after the amendment has been approved by this Court. Because article XI, section 3 dictates how the citizens' initiative process shall be performed and reviewed, it also prohibits any other type of review, including review at the circuit court level. While judicial review of the amendments is not a legislative act or administrative rule, the Plaintiffs are seeking to use it act as a restriction on the initiative process and that in and of itself strengthens the authority and power of the legislature. Allowing such attacks would simply destroy the delicate symmetric balance created by this constitutional scheme. Furthermore, attacking the amendments peacemeal in the circuit court in no way helps to ensure ballot

integrity. Ballot integrity has already been ensured by the Supreme Court's initial review of these amendments. Attacks like the Plaintiffs' therefore can only serve to undermine ballot integrity. If the rationale behind this Court's ruling in *Browning* is applied to the Plaintiffs' circuit court challenge, as it should be, it is self-evident that the Plaintiffs' attempt to interfere with the citizens' initiative process here must be similarly rejected.

CONCLUSION

For the reasons set forth above, and in the briefs of the Secretary of State, Senator Bob Graham, and fellow *amici*, The League of Women Voters respectfully requests that this Court reach a find that the Plaintiffs' claims are not justiciable.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Amicus Brief has been prepared using 14-point Times New Roman font.

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SUPREME COURT OF FLORIDA

Case No. SC10-1362
LT Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida
and BOB GRAHAM,

Petitioners,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE
OF REPRESENTATIVES, and FLORIDA SENATE,

Respondents.

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ARGUMENT

This reply brief addresses the arguments raised in all three responses filed by U.S. Congresswoman Corrine Brown and U.S. Congressman Mario Diaz-Ballart ("Respondents"), the Florida House of Representatives ("House") and the Florida Senate ("Senate").

I. Standing

The Senate contends that Graham's interest is insufficient to confer standing to seek a petition for writ of all writs. This argument is essentially the same argument the Senate raised in its objections to Graham's motion to intervene in the circuit court. (Graham App. 1-6). There, it argued that Graham's interest was not of such a direct and immediate character that he will gain or lose by the direct legal operation and effect of the judgment. (Graham App. 2-4). The circuit court rejected this argument and granted Graham's motion to intervene. The Senate's argument has no more merit in this proceeding.

As Graham asserted in the circuit court, standing in an election case must not be confused with standing in other types of cases. (Senate App. 5-7). Voters have standing to participate in litigation regarding whether a proposed constitutional amendment satisfies constitutional and statutory requirements for placement on the ballot. *See Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000)(an ad hoc group of concerned citizens had standing to challenge a legislatively proposed

amendment); *Crawford v. Gilchrist*, 59 So. 963 (Fla. 1912)(Governor had standing to challenge a legislatively proposed amendment); *City of Hialeah v. Delgado*, 963 So. 2d 754, 756 (Fla. 3d DCA 2007)(the trial court was "entirely correct" in ruling that the plaintiff had standing as a citizen and voter to challenge ballot language).

If a citizen and voter has standing to sue or to intervene and defend a lawsuit challenging a proposed constitutional amendment, clearly he or she also must have sufficient interest or injury to seek a petition like the one filed in this case. Graham is a strong supporter of Amendments 5 and 6, and he intervened in the circuit court action on behalf of Florida citizens and voters, like him, who wish to vote in favor of Amendments 5 and 6. If the Respondents, House and Senate are successful in their suits, Amendments 5 and 6 will be removed from the ballot causing injury to Graham and other supporters of the amendments - such injury is sufficient to confer standing. *See City of Hialeah*. Thus, Graham has standing to seek an extraordinary writ in this Court. *See, e.g., State es rel. Roundtree v. Johnson*, 247 So. 2d 54 (Fla. 1971)(finding that a citizen and attorney had standing to seek a petition for writ of prohibition in the Supreme Court).

II. Further Proceedings Should Either Be Prohibited or Transferred to This Court.

Respondent and the House cite general jurisdictional provisions and rely predominantly on *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) in their attempt to retain their challenges in the circuit court. They completely fail to

address the Secretary and Graham's assertion that their claims if allowed to proceed in the circuit court would directly interfere with and render meaningless the advisory opinion process and specifically, article IV, section 10 and article V, section 3(b)(10)'s grant of jurisdiction to this Court.

A. Allowing Piecemeal Litigation Would Render Article IV, Section 10 Meaningless and Would Be a Misuse of Process.

As explained in the petition, article IV, section 10 created a process for ensuring the facial validity of the ballot titles and summaries for citizen initiated constitutional amendments "*before* the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot." *Armstrong v. Harris*, 773 So. 2d 7, 14 n. 18 (Fla. 2000)(emphasis in original). The genesis of article IV, section 10 and article V, section 3(b)(10) of the Florida Constitution was fully explained in the Secretary's petition which Graham adopted. (Petition p. 13-23). However, it bears repeating in light of the Respondents' collective dismissal of the advisory opinion process as having little to no significance.

The advisory opinion process was devised in response to this Court's removal of two proposed amendments after the sponsor expended the time and money necessary to collect sufficient signatures and this Court's request that a process be created that would provide sufficient time to correct problems in a ballot title or summary prior to the election and before the significant expenditure

of time and money. *See Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984); *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982). Thus, the Legislature proposed the amendments creating the advisory opinion process in order to provide "a method by which an initiative proposal's compliance with constitutional and statutory requirements could be ascertained expeditiously." (App. V. II 317-322; 318, 321).

While the Respondents, House and Senate contend that the advisory opinion process, which was specifically enacted to provide expeditious review of citizen initiated amendments, is no impediment to additional, unlimited challenges to the ballot title and summaries in the circuit court, adoption of their interpretation of the relevant constitutional and statutory provisions would vitiate and render meaningless article IV, section 10 and section 16.061, Florida Statutes. It is well settled that a court should not adopt an interpretation which renders a provision meaningless. *See Burnsed v. Seaboard Coastline Railroad Co.,* 290 So. 2d 13 (Fla. 1974); *Broward County v. City of Ft. Lauderdale*, 480 So. 2d 631 (Fla. 1985).

Moreover, allowing eleventh hour attacks on an amendment's ballot summary substantially and impermissibly chills the constitutional rights of citizens to change the constitution through the initiative process. The extreme prejudice that would result under the Respondents' interpretation is evident from a brief examination of the history of Amendments 5 and 6. FairDistrictsFlorida.org, Inc.

as the sponsor of Amendments 5 and 6 invested extraordinary time and resources to obtain ballot placement for the amendments as set forth below:

- **September 28, 2007** - Petitions filed with Division of Elections and approved for circulation.
- **April 23, 2008 – May 2, 2008** - Sufficient signatures gathered to submit to Attorney General in order to request Supreme Court to review Amendments 5 and 6 for compliance with article XI, section 3 and section 101.161, Florida Statutes.
- **May 29, 2008 – June 18, 2008** - Attorney General writes to the Supreme Court requesting review of Amendments.
- **January 29, 2009** - Supreme Court opinion.
- **October 21, 2009 – November 3, 2009** - First meetings of legislative committees opposing amendments.
- **November 6, 2009** - Representatives Brown and Diaz-Balart publicly express concerns about the impact of the amendments on minority voting rights and minority representation.
- **January 11, 2010** - Representatives Brown and Diaz-Balart appear at joint meeting of House and Senate redistricting committees and again express concerns about the Amendments.
- **January 22, 2010** - Both amendments certified for the ballot with the sponsor having spent well over $2,000,000 and having gathered over 676,811 signatures for each.
- **Late May, 2010** - challenge to amendments filed.

The gathering of signatures took over two years. In order to obtain the 676,811 signatures from at least one-half of the congressional districts in Florida, as required by article XI, section 3 of the Florida Constitution, FairDistricts coordinated a statewide network of volunteers, donors and supporters. In an effort to conserve resources, FairDistricts ceased collecting signatures once the advisory opinion process began and did not resume until after this Court issued its opinion. Then relying on this Court's approval of the amendments for ballot placement,

FairDistricts resumed its efforts to gather signatures, organized volunteers, raised money to gather the necessary signatures and began its campaign to pass the amendments.

Meanwhile, the legislature, having lost their initial challenge, and Representatives Brown and Diaz-Balart being fully aware of the amendments, laid in wait. On May 24, 2010, they filed last minute challenges to Amendments 5 and 6 in the circuit court. These challenges were filed by two elected officials and the branch of government who, by the amendments, the citizens were seeking to regulate. They filed their challenges at least seven months after they had publicly expressed the very concerns raised in their new challenges. This was over two years after the petitions were approved for circulation, over a year after the Supreme Court approved the amendments for ballot placement, four months after the amendments were certified for the November 2010 ballot, and seven months after Representatives and the Legislature had publicly expressed opposition to the amendments. They are challenges that could have been raised by the Legislature and the Representatives in the original review process. And the late filing created the very sort of burden on citizens trying to change their government that article IV, section 10 and article V, section 3(b)(10) were adopted to prevent. They are last minute challenges to proposed amendments after the sponsor has expended an

enormous amount of time and money to collect a huge number (676,811) of signatures. [1]

If proposed amendments are open to this sort of deliberately timed pre-election challenge, the chilling effect on citizens who might want to exercise their constitutional right to petition their government is overwhelming and obvious. The door would be opened to any challenger who wants to harass citizens who have worked hard to get their amendments on the ballot and passed. While the prejudice to citizens is extensive and obvious, the advantage to opponents of an amendment is tremendous. Late filed challenges drain the resources of citizen petitioners after they have already been required to gather an onerous number of signatures and go through one legally required court proceeding.

Indeed, allowing ballot summaries to be challenged in the circuit court in the months leading up to the election encourages opponents not to participate in the advisory opinion process. By ambushing amendments close to the election, the opponents force sponsors to choose between allocating their finite resources

[1] Fair Districts and Florida Hometown Democracy are the only two sponsors with amendments certified for placement on the November 2010 ballot. Like Fair Districts, it took Florida Hometown Democracy over two years to achieve ballot placement for Amendment 4. To date, these sponsors have expended millions of dollars. Campaign finance data is available on the Division of Elections website at http://election.dos.state.fl.us/committees/ComDetail.asp?account=37681 and http://election.dos.state.fl.us/committees/ComDetail.asp?account=43605.

toward defending the amendments in court or disseminating communications to urge the public's support for the amendments. This type of misuse of process already has been condemned by this Court. *See Advisory Op. to Att'y Gen. re Referenda Required for Adoption and Amend. of Local Govt. Comprehensive Land Use Plans*, 938 So. 2d 501, 505 (Fla. 2006)(prohibiting the raising of additional claims against a ballot summary in a second advisory opinion proceeding after the first initiative's ballot summary was found misleading as "unfair to the proponent" and a "misuse of the process for approval of citizen initiatives").

It is entirely appropriate for this Court to exercise its all writs authority to prevent the interference with the Court's jurisdiction pursuant to article IV, section 10 and article V, section 3(b)(10) of the Florida Constitution.

B. *Florida League of Cities* Does Not Confer Jurisdiction on the Circuit Court

The Respondents, House and Senate rely extensively on this Court's decision in *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) as authorizing pre-election challenges to ballot summaries in the circuit court. However, *Smith* does not provide the asserted support for circuit court jurisdiction.

In *Smith,* this Court determined that outside the advisory opinion process, it would entertain renewed litigation, by petition for writ of mandamus, "only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion." *Id.* at 399. Although the Court found that its

advisory opinion did not preclude its consideration of the petition for writ of mandamus, the Court did not determine that a pre-election challenge could be raised in the circuit court. Importantly, the staff analyses on article IV, section 10 relied upon by the Court states that an advisory opinion would be persuasive but not binding on "a challenge brought *subsequent* to the adoption of the proposed amendment." (App. V. II 318)(emphasis added).

In the twenty-four years since the advisory opinion process was implemented, the only published opinions addressing pre-election challenges to ballot summaries have emanated from this Court, and in the only case to mention a circuit court action, that action was transferred to this Court. *Advisory Op. to Att'y Gen. re Fee on Everglades Sugar Products*, 681 So. 2d 1124 (Fla. 1996). The dearth of cases is because this Court has exclusive jurisdiction. However, the challenges in this case could not be filed in this Court because no extraordinary circumstances necessary for renewed litigation exist.[2] Regardless, any consideration of the parties' claims must occur in this Court and not in the circuit court.

[2] To the extent the Respondents, House and Senate appear to assert that the U.S. Supreme Court's opinion in *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009) provides extraordinary circumstances, such assertion should be rejected. *Bartlett* did not alter or amend the text of the Voting Rights Act in any way.

C. Substantive, As Applied Challenges Requiring Factual Development Are Not Justiciable in a Pre-Election Challenge.

The Respondents and House's assertion that their claims require the presentation of factual matters inappropriate for this Court does not support jurisdiction lying in the circuit court – rather - it supports a finding that their claims are not justiciable in any court at this time. In a pre-election challenge to enjoin election officials from placing a proposed amendment on the ballot, the question before the court is limited to whether the requirements for placing the amendment on the ballot have been met. *Crawford v. Gilchrist*, 59 So. 963, 966 (1912). The Respondents and House's claims which they allege require the introduction of evidence masquerade as ballot summary claims, but are challenges to the implementation, merits and wisdom of the amendments. These claims are, at this time, purely speculative.

This Court has repeatedly held that such claims are not properly considered pre-election. *See Fine v. Firestone*, 448 So. 2d 984, 992 (Fla. 1984)(stating "it is not our responsibility to address the wisdom or merit of this proposed initiative amendment and we have not done so"); *Advisory Opinion to the Attorney General Re Florida Marriage Protection Amendment*, 926 So. 2d 1229 (Fla. 2006). Where, as here, the Court examines a facial challenge to be determined as a matter of law, the consideration of evidence is inappropriate. *See Dep't of Revenue v. Fla. Home Builders Assoc.*, 564 So. 2d 173, 175 (Fla. 1st DCA 1990)(finding that in a facial

challenge to the constitutionality of a statute, factual assertions regarding the statute's effect on specific contracts were irrelevant and that the court properly declined to consider them). [3]

Additionally, Courts have repeatedly rejected challengers' pre-election claims that would require detailed examinations of an amendment's interaction with existing provisions. In *Smathers v. Smith*, 338 So. 2d 825 (Fla. 1976), this Court approved a proposed amendment because there was a reasonable basis to find the amendment was germane to the provisions it amended. *Id.* at 831. But as to the challengers' claims that the amendment conflicted with other provisions of the constitution, the court stated that the claims were premature and that ". . . *if* the amendment should be adopted by the voters, it may then become our responsibility, in an appropriate case, to harmonize its reach and meaning with other provisions of the Constitution." *Id.* (emphasis added); *see also Gray v. Moss*, 156 So. 262 (Fla. 1934)(explaining "an adjudication of the extent to which the amendment may legally operate, if at all should not be had before its submission for adoption, since it might not be adopted; and, if adopted, its illegal operation in whole or in part upon organic rights might be waived or be obviated by other laws or by controlling circumstances"); *Dade County v. Dade County*

[3] Judge Fulford ruled in her order on the motion to dismiss that she would limit her consideration of the claims to facial, not as applied, challenges. (App. V. II 327). She reinforced this ruling in her order dated July 13, 2010, stating she would not hold a trial or consider live testimony. (Graham App. 7-8).

League of Municipalities, 104 So. 2d 512, 518 (Fla. 1958) (stating, "[a]ny effort on our part to attempt to reconcile the provisions of the existing charter with the proposed amendment prior to the approval of the latter would be an encroachment on the political functions of the electorate. . .").

III. The Senate's Claims Are Not Justiciable.

The Senate mistakenly asserts that its claims, which do not challenge the ballot summaries of Amendments 5 and 6 but rather allege that the amendments cannot be implemented in a manner consistent with the Voting Rights Act and the Florida Constitution, are properly before the circuit court in a pre-election challenge. Its assertion is based upon a misapplication of the relevant law. This Court has repeatedly held that challenges to the substance and effect of a proposed amendment are not justiciable in a pre-election proceeding relating to the validity of a proposed constitutional amendment, whether proposed by initiative petition or by the legislature. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 801 n.1 (1998) (declining to pass on constitutionality of proposed amendment because Court's jurisdiction to issue advisory opinions regarding proposed amendments is limited to the single subject requirement and accuracy of ballot title and summary); *Advisory Opinion to the Attorney Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991) (finding opponents' "various constitutional challenges" to proposed constitutional

amendment "not justiciable in the instant proceeding") (citing Art. XI, § 3, Fla. Const., Art. IV, § 10, Fla. Const.; § 16.061(1), Fla. Stat.); *Grose v. Firestone*, 422 So. 2d 303, 306 (1982) (refusing to engage in pre-election consideration of whether constitutional amendment proposed by the legislature was unconstitutional because such argument "is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented.")

These cases recognize that challenges to the substance and operation of a proposed amendment are not yet ripe—and therefore are not justiciable—until the amendment has been approved by the voters *and* appropriate facts are developed and presented to the court in an appropriate proceeding to evaluate how the amendment will operate on a real set of existing facts. *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 515 (Fla. 1958) (courts will not interfere with placement of proposed amendment on the ballot if, upon approval, the proposal can have a valid field of operation "even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law"); *Gray v. Winthrop*, 156 So. 270, 272 (Fla. 1934) (holding submission of proposed amendment to electorate should not be enjoined if amendment is not wholly void, "even though, if adopted, it may in appropriate procedure by proper parties, allegations of facts, and proof or admissions, be shown that the amendment violates paramount federal law"); *Gray v. Moss*, 156

So. 262, 266 (Fla. 1934) (rejecting effort to enjoin Secretary of State from placing proposed constitutional amendment on ballot and noting if adopted "the amendment may by due procedure be shown to be invalid if and to the extent that it operates to violate any controlling provision of the . . . Federal Constitution"); *Grose*, 422 So. 2d at 306 (constitutionality of proposed amendment may be raised in an appropriate proceeding in due course when the issue is properly presented).

In light of these authorities, the Senate's claims regarding the substance and operation of Amendments 5 and 6 are not justiciable in *any* court unless and until the amendments are approved by the requisite percentage of Florida voters and a set of operative facts is developed against which to evaluate the new provisions. At that time, an interested party may bring an appropriate action to challenge the effect of the amendments as applied to a real set of facts.

The Senate asserts a right to challenge proposed amendments before the election based upon alleged conflict with federal law, citing *Gray v. Winthrop*, 156 So. 270 (Fla. 1934). As the above discussion demonstrates, the Florida Supreme Court has squarely held such claims are not justiciable before the election. Even if *Gray v. Winthrop* were applicable in the present proceeding, which it is not, the principles espoused in that case and its progeny would not save the Senate's claims. In *Gray v. Winthrop*, the Florida Supreme Court held that a court could enjoin the submission of a proposed amendment to the electorate when the

amendment, on its face, violated the Federal Constitution such that no portion of the amendment could legally be effective. 156 So. at 272. However, that high standard was not met in *Gray v. Winthrop*: "The language of the amendment does not express or imply an intent that [its terms] shall operate to violate any provision of the paramount Federal Constitution, and it must be assumed, in the absence of express terms to the contrary, that the . . . amendment was intended to be operative in accord with such dominant federal law." *Id.*; *see also Gray v. Moss*, 156 So. 262 (Fla. 1934). The Senate makes no claim that Amendments 5 and 6 expressly violate the Federal Constitution. Accordingly, to the extent the Senate seeks to apply the principles of *Gray v. Winthrop* to its claims in the present case, those principles necessitate a finding that the claims are not justiciable.[4]

---

[4] While the Senate wrongly accuses the Secretary of partisan interest, it is the party trying to score political points. The Senate characterizes the amendments as intended to disenfranchise minorities and undermine the Voting Rights Act. However, several civil rights organizations and newspaper editorial boards clearly and strongly disagree with the Senate's position. *See, e.g.,* Aaron Deslatte, *Civil-Rights Groups Sue to Block Lawmakers' Redistricting Amendment*, Orlando Sentinel, May 21, 2010 (noting that the NAACP, Florida League of Women Voters and Democracia Ahora are battling the Legislature in support of Amendments 5 and 6), http://www.orlandosentinel.com/news/politics/os-legislature-redistricting-lawsuit-20100521,0,969352.story; Editorial, *Good Call on Ballot-Packing Suit*, The Lake Wales News, July 17, 2010 (arguing that the Legislature's claims that Amendments 5 and 6 would decrease minority representation are disingenuous because the amendments "strive to maintain minority opportunity"), http://www.lakewalesnews.com/articles/2010/07/19/opinion/our_viewpoint/doc4c40a7ec52f4d007843866.txt.; Editorial *End the Gerrymandering for Good*, The Miami Herald, January 31, 2010(endorsing Amendments 5 and 6 and contending that their "wording is stronger than even in the federal Voting Rights Act"), http://www.miamiherald.com/2010/01/31/1454257/end-the-gerrymandering-for-good.html.

Respectfully submitted,

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/s/
Jennifer S. Blohm

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief uses font size Times New Roman 14 in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/
Jennifer S. Blohm

IN THE
SUPREME COURT OF FLORIDA

Case No. SC10-1362
LT Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida
and BOB GRAHAM,

Petitioners,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE
OF REPRESENTATIVES, and FLORIDA SENATE,

Respondents.

APPENDIX TO REPLY BRIEF OF PETITIONER BOB GRAHAM TO RESPONDENTS' RESPONSES TO PETITION FOR CONSTITUTIONAL WRIT OR, ALTERNATIVELY, FOR WRIT OF PROHIBITION

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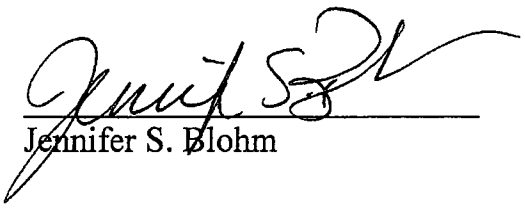

Jennifer S. Blohm

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

CASE NO: 10-CA 1824

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs,

vs.

DAWN K. ROBERTS, in her capacity As Interim Secretary of State of the State of Florida,

Defendant.
_____/

THE FLORIDA SENATE'S RESPONSE IN OPPOSITION TO MOTION OF BOB GRAHAM TO INTERVENE AS DEFENDANT

COMES NOW, the FLORIDA SENATE ("Florida Senate"), by and through its undersigned counsel and hereby files this, its Response in Opposition to the Motion of Bob Graham ("Graham") to Intervene as a Defendant into the above styled litigation and in support thereof states the following:

I. INTRODUCTION

1. On June 11, 2010, potential Intervenor Graham filed a Motion to Intervene into the case at bar as a party Defendant.

2 For the reasons more fully stated herein, Graham's Motion to Intervene must be denied as he does not have a direct or immediate legal interest in the narrow subject matter of this litigation sufficient to warrant intervention as a party. Furthermore, Graham will not gain or lose anything by the direct legal operation and effect of any judgment in this case.

II. MEMORANDUM OF LAW

A. Standard of Review

Under Florida Rule of Civil Procedure 1.230, a court must first "determine that the interest asserted is appropriate to support intervention" by the movant. *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992). The asserted interest must be "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Sullivan v. Sapp*, 866 So. 2d 28, 33 (Fla. 2004) (quoting *Carlisle*, 593 So. 2d at 507). A showing of an indirect, inconsequential or contingent interest is wholly inadequate. *Stefanos v. Rivera-Berrios*, 673 So.2d 12, 13 (Fla. 1996). Furthermore, to justify intervention, the asserted interest must be already at issue and be of a kind the would-be intervenor is a proper part to raise. *Y.H. v. F.L.H.*, 784 So.2d 565 (Fla. 1st DCA 2001).

"Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention." *Carlisle*, 593 So. 2d at 507. In the exercise of its discretion, the court must consider any "relevant circumstance." *Id.* Intervention, while it can be liberally granted, is not an absolute right and rests within the sound discretion of the trial court. *Florida Wildlife Federation, Inc. v. Board of Trustees of Internal Imp.*, 707, So.2d 841 (5th DCA. 1998).

B. Graham Does Not Have a Sufficient Interest to Intervene as a Party Defendant

Florida case law unambiguously demands the denial of Graham's Motion to Intervene. As sole justification for his Motion to Intervene as a party-defendant, Graham alleges that he has a "direct and immediate interest" in this litigation only because he is a registered voter and taxpayer in the State of Florida who intends to vote in the November 2010 general election. (Graham Motion to Intervene, par. 5). Graham further states, albeit erroneously and in

conclusory fashion, that he has a right to intervene into this case as an interested party because the Plaintiffs' are allegedly seeking to nullify his right to amend the Florida Constitution. (Graham Motion to Intervene, par. 10). Graham's contention in this regard is simply incorrect. The narrow legal issue before the Court in this litigation is not whether the Florida Constitution can be amended by initiative but whether the two proposed constitutional amendments on redistricting are, in fact, legal and valid under Florida and federal law. Graham remains free to vote in the general election and to support various constitutional initiatives. However, he has no legitimate interest in being allowed to vote on proposed constitutional amendments that may be illegal and invalid.

Plainly, the allegations contained in Graham's Motion to Intervene fall far short of establishing the requisite "interest" in the narrow scope of this litigation so as to justify intervention. Simply put, this litigation is a narrowly-tailored and time-sensitive challenge to the legal and procedural validity of two proposed constitutional amendments currently set to be placed on the November 2010 general election ballot. In his Motion to Intervene, Graham has failed to establish any special interest or personal right, aside from the right to participate in the initiative process as millions of other Florida citizens have (not the legal process of determining the validity of proposed constitutional amendments), that would make his participation in the narrow legal issue presented by this case necessary. Absent such a direct showing, Graham is not entitled to intervene into this case as he will not gain or lose by legal operation of a judgment herein. *See Kissoon, M.D. v. Araujo*, 849 So.2d 426 (Fla. 1st DCA 2003)

Indeed, Grahams' proffered support and desire to vote for the proposed constitutional amendments at issue, should they be found to be legal and placed on the ballot, is the kind of contingent and indirect interest that has been found to be wholly inadequate to support

intervention. *See Stefanos v. Rivera-Berrios, supra.* Additionally, Graham, in his individual capacity, is not a proper party-defendant to assert a claim relative to the ministerial responsibilities of the Secretary of State relative to placing the proposed constitutional amendments at issue onto the 2010 general election ballot, nor is he, solely as a Florida voter, a proper party to defend the validity and constitutionality of these proposed amendments which seek to vastly alter the reapportionment responsibilities of the Florida Legislature. *See Y.H. v. F.L.H. supra.*

It should be noted that Graham serves as an Honorary Co-Chair of Fair Districts Florida, a political organization that sponsored the proposed constitutional amendments at issue. Graham's status within the organization that sponsored the Amendments at issue raises serious questions as to whether FDF is entitled to intervene into the case at bar. However, since Fair Districts Florida has not yet sought intervention into this litigation, the Florida Senate will not address their ability to do so at this juncture. Should Fair Districts Florida seek intervention through Graham or others subsequent to Graham's instant application, the Florida Senate expressly reserves the right to file supplemental memorandums of law relative to whether Fair Districts Florida possesses a sufficient "interest" in this litigation to justify formal intervention.

WHEREFORE, the Florida Senate respectfully requests that this Honorable Court enter an Order denying the Motion of BOB GRAHAM to Intervene as a Defendant, and for all such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by email and U.S. mail to the counsel of record listed below this 17th day of June, 2010.

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

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v. Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida,

Defendant, and

BOB GRAHAM,

Intervening Defendant.
_____/

ORDER TERMINATING DISCOVERY AND CANCELING TRIAL

This cause came before the Court on the Defendants' and Intervening Defendants' Motions to Stay Discovery. The Court has considered the motions, the parties' responses, and argument of counsel. The Court finds and orders the following:

1. The Court will not hold a trial in this case or consider live testimony.

2. Discovery is therefore terminated.

ORDERED this 13th day of July, 2010, at Leon County, Florida.

Jackie L. Fulford
Circuit Judge

Copies to Counsel of Record

Supreme Court of Florida

FRIDAY, JULY 23, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC., ET AL. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

The motion for leave to file brief as amici curiae filed by Florida State Conference of Branches of NAACP Branches and Democracia Ahora and the motion for leave to file brief as amicus curiae filed by League of Women Viters of Florida is hereby granted and they are allowed to file briefs only in support of petitioners. The briefs by the above referenced amici curiae were filed with this Court on July 22, 2010.

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Clerk, Supreme Court

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Supreme Court of Florida

FRIDAY, JULY 23, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC., ET AL. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

The motion to appear pro hac vice filed in the above cause by Paul M. Smith and Michael B. DeSanctis, on behalf of amici curiae Florida State Conference of Branches of NAACP Branches and Democracia Ahora, is hereby granted contingent upon each counsel's payment of the $100.00 fee required by section 25.241(3), Florida Statutes (2004), within ten days from the date of this order. FAILURE TO TIMELY COMPLY WITH THE PAYMENT REQUIREMENT COULD RESULT IN THIS ORDER BEING VACATED AND THE MOTION BEING DENIED.

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DOUGLAS F. EATON
MICHAEL B. DESANCTIS

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1362

DAWN K. ROBERTS,

Petitioner,

vs.

CORRINE BROWN, MARIO DIAZ-BALART,
Respondents

On Appeal From The Denial Of A Motion To Dismiss For Lack of Jurisdiction

---

THE FLORIDA SENATE'S MOTION TO STRIKE AMICUS BRIEFS OR, ALTERNATIVELY, FOR LEAVE TO FILE REPLY

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COMES NOW, THE FLORIDA SENATE, by and through undersigned counsel, and hereby moves, pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, that this Court strike the late-filed amicus briefs filed in the instant matter or, alternatively, that it allow the Florida Senate a suitable opportunity to respond thereto in a manner consistent with the appellate rules. In support of this Motion, the Florida Senate asserts the following:

Rule 9.370 of the Florida Rules of Appellate Procedure sets both time limits and content limits on amicus briefs filed in the Florida courts. The Rule provides in its entirety:

> **(a) When Permitted.** An amicus curiae may file a brief only by leave of court. A motion for leave to file must state the movant's interest, the particular issue to be addressed, how the movant can assist the court in the disposition of the case, and whether all parties consent to the filing of the brief.
>
> **(b) Contents and Form.** An amicus brief must comply with Rule 9.210(b) but shall omit a statement of the case and facts and may not exceed 20 pages. The cover must identify the party or parties supported. An amicus brief must include a concise statement of the identity of the amicus curiae and its interest in the case.
>
> **(c) Time for Service.** An amicus curiae must serve its brief no later than 5 days after the first brief, petition, or response of the party being supported is served. An amicus curiae that does not support either party must serve its brief no later than 5 days after the initial brief or petition is served. A court may grant leave for later service, specifying the time within which an opposing party may respond. The service of an amicus curiae brief does not alter or extend the briefing deadlines for the parties. An amicus curiae may not file a reply brief.

> **(d) Notice of Intent to File Amicus Brief in Supreme Court.** When a party has invoked the discretionary jurisdiction of the supreme court, an amicus curiae may file a notice with the court indicating its intent to seek leave to file an amicus brief on the merits should the court accept jurisdiction. The notice shall state briefly why the case is of interest to the amicus curiae, but shall not contain argument. The body of the notice shall not exceed one page.

With respect to the time of service for amicus briefs, Rule 9.370(c) makes it very clear that an amicus brief must be served contemporaneously (within 5 days) of the brief it supports or leave must be sought from the Court for later service. The purpose of subsection (c) is to allow parties opposing the viewpoints of the amicus a fair opportunity to respond. In this case, the NAACP and Democracia Ahora and the League of Women Voters filed two separate amicus briefs in this constitutional writ proceeding on the very day that the last briefs were due to be filed, thereby depriving the Respondents of a fair opportunity to respond. Hence, the filing of the amicus brief was both untimely and violated the very premises of subsection (c). Moreover, neither brief sought leave to serve a late-filed brief with the Court.

It is important for this Court to understand that the Florida Senate has not had any opportunity to have its substantive claims that Proposed Amendments 5 and 6 facially violate paramount federal law heard in any court, despite the fact that it has been asking for just such an opportunity to be heard on the merits. Despite this, it is plain from even a cursory review of the amicus briefs that they attempt to argue the merits of the Florida Senate's constitutional and federal claims

when the Florida Senate has not even had a chance to do that itself. Indeed, the Florida Senate has repeatedly requested that a court hear its challenge to the validity of Proposed Amendments 5 and 6 because it believes that these ballot initiatives wholly violate paramount federal law for the following reasons:

- The express terms of the proposed constitutional amendments contradict the "one person, one vote" primary federal standard by making the "one person, one vote" mandate subservient to the drawing of districts with no intent to favor/disfavor a political party or incumbent and contiguity requirements while also making the "one person, one vote" standard equal to drawing compact districts and where, feasible, districts consistent with existing political and geographic boundaries and are, thus, plainly violative of that primary federal requirement.

- The proposed ballot initiatives expressly forbid any priority amongst redistricting categories, they plainly violate federal law which must be paramount and have top priority.

- The proposed ballot initiatives also violate the minority vote dilution and non-retrogression mandates of paramount federal voting rights law by impermissibly equating such federal mandates with incumbent-neutrality and party-neutrality.

- Because the proposed constitutional amendments facially violate controlling federal law, they cannot be placed on the November, 2010 general election ballot and an injunction should issue.

The fact that the amici have filed untimely briefs in this proceeding that read only part of the amendments' phrases in isolation and not *in pari materia* with the other mandates of the whole proposed text (much less the controlling requirements of federal law) demonstrates undisputedly that there is a justiciable issue here

requiring prompt judicial resolution. This case is not about what various stakeholders might want the proposed ballot initiatives to mean, but what the words of the ballot proposals actually say. If the voters of the State of Florida are going to vote on these proposals, it is imperative that some court makes sure beforehand that they are not at least facially—and fatally-- flawed.

The case law is clear that the Florida Senate should have the opportunity to present the merits of its claims in a suitable proceeding. But, this appeal is not about the merits of these proposals yet. Instead, this proceeding deals with a constitutional writ sought by the Secretary of State to deprive the circuit court of jurisdiction to hear substantive arguments on the Florida Senate's claims that these ballot proposals violate federal law and are, thus, illegal. It is neither allowed nor appropriate for these amici to be arguing the merits at this stage of the appeal. *See Acton v. Ft. Lauderdale Hosp.*, 418 So.2d 1099 (Fla. 1st DCA 1982)(amici do not have standing to raises issues not available to the parties). Hence, to the extent that these amicus briefs impermissibly attempt to argue the merits or inject facts into the purely jurisdictional proceedings pending before this Court, they are plainly outside the bounds of legitimate amicus advocacy. Moreover, the Florida Senate has argued in its jurisdictional brief here that Petitioners do not actually have standing to seek the constitutional writs requested in their pleadings, an amicus supporting them would lack standing as well. *Id.*

WHEREFORE, for all the foregoing reasons, the Florida Senate respectfully requests that the untimely amicus briefs filed by the NAACP and Democracia Ahora and the League of Women Voters be stricken for multiple violations of Rule 9.370 of the Florida Rules of Appellate Procedure. These amici remain free to file timely and appropriate pleadings in support of the Petitioners at the merit stage of these proceedings. In the alternative, the Florida Senate requests that it be given the opportunity to file a reply as contemplated in Rule 9.370(c). This is only fair, and is actually mandated by the governing rule. The Florida Senate further requests any further relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished via email to: all counsel on he attached service list on this 26th day of July, 2010.

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Roberts v. Brown et al
Supreme Court Case No.: SC10-1362

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Roberts v. Brown et al
Supreme Court Case No.: SC10-1362
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Roberts v. Brown et al
Supreme Court Case No.: SC10-1362
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Supreme Court of Florida

TUESDAY, JULY 27, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC., ET AL. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

The Florida Senate's Motion to Strike Amicus Briefs or, Alternatively, for Leave to File Reply is hereby denied.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

ab
Served:

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JOHN STEWART MILLS
LYNN COLBY HEARN
RONALD GUSTAV MEYER
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FILED
THOMAS D. HALL
2010 JUL 27 AM 10:04
CLERK, SUPREME COURT
BY

July 26, 2010

VIA OVERNIGHT DELIVERY

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Re: Filing Fees for *Pro Hac Vice* Admissions

Dear Clerk's Office:

I write with respect to pending motions for admission *pro hac vice* in *Dawn K. Roberts, et al. v. Corrine Brown, et al.*, No. SC10-1362. On July 22, 2010, Paul M. Smith and I submitted motions to appear *pro hac vice* in that case on behalf of *amici curiae* the Florida State Conference of NAACP Branches and Democracia Ahora. The next day, the Court granted those motions to appear, "contingent upon each counsel's payment of the $100.00 fee required by section 25.241(3), Florida Statutes (2004)."

Pursuant to that order, enclosed are two checks for $100, made payable to "Clerk, Florida Supreme Court." We have sent these checks via overnight delivery given the expedited basis on which *Brown v. Roberts* has proceeded.

Sincerely,

Michael DeSanctis/mlm

Michael B. DeSanctis

MBD:mlm

Encls.

FILED
THOMAS D. HALL
2010 JUL 28 AM 10: 15
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1362
LT Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida
and BOB GRAHAM,

Petitioners,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE
OF REPRESENTATIVES, and FLORIDA SENATE,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure The League of Women Voters of Florida hereby moves this Court for leave to file the attached *amicus curiae* brief in support of the petition for constitutional writ or, alternatively, for writ of prohibition in this case.

The League of Women Voters of Florida is comprised of 67 local branches throughout Florida with over 11,000 individual members. Like its national parent

organization, The League of Women Voters of Florida's missions are the advancement and improvement of the political, educational, social and economic status of minority persons, including African-Americans; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of legal redress to secure the elimination of racial and ethnic bias. The League of Women Voters of Florida has participated actively in litigation on behalf of Florida's minority voters, including prior litigation involving reapportionment and redistricting.

The League of Women Voters of Florida is a Florida association that is affiliated with the national Hispanic civic organization, Democracia U.S.A. It has individual members throughout Florida. The League of Women Voters of Florida's primary purposes are to empower Hispanic citizens who are engaged in civic and democratic endeavors; and to assist members of Hispanic communities in identifying and articulating issues of concern, including voting rights issues.

The League of Women Voters of Florida has publicly announced their support for Amendments 5 and 6, which are scheduled to be placed on the general election ballot on November 2, 2010. Unless this case is resolved in favor of the petitioners, the individual members of The League of Women Voters of Florida will be deprived of an important opportunity to cast their votes in favor of constitutional amendments that will significantly enhance their electoral standing.

Counsel for the proposed *amicus* have made a good-faith effort to obtain the consent of all parties to the filing of their brief. Petitioners have consented to the filing of this brief. It has not been possible to obtain consent of the respondents due to the time constraints imposed by the briefing schedule in this matter.

Wherefore, The League of Women Voters of Florida respectfully moves this Court for leave to file this brief.

Dated: July 22, 2010.

Respectfully submitted,

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Attorneys for Amicus Curiae The League of Women Voters of Florida

FILED
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2010 JUL 28 AM 10: 15
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1362
LT Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as
Interim Secretary of State of the State of Florida
and BOB GRAHAM,

Petitioners,

v.

CORRINE BROWN, MARIO DIAZ-BALART, FLORIDA HOUSE
OF REPRESENTATIVES, and FLORIDA SENATE,

Respondents.

NOTICE OF SCRIVENER'S ERROR AND NOTICE OF FILING CORRECTED *AMICUS CURIAE* BRIEF OF THE LEAGUE OF WOMEN VOTERS OF FLORIDA IN SUPPORT OF PETITIONER

THE LEAGUE OF WOMEN VOTERS OF FLORIDA filed *their Amicus Curiae* Brief in support Petitioners on July 22, 2010 in the above-styled adversary proceedings. The *Amicus Curiae* Brief contains scrivener's errors, and the LEAGUE OF WOMEN VOTERS OF FLORIDA files herein the attached corrected *Amicus Curiae* Brief to correct the scrivener's errors. This Corrected

Amicus Curiae Brief replaces in its entirety the July 22, 1010 *Amicus Curiae* Brief filed and a copy will be served on all interested parties.

Dated: July 23, 2010.

Respectfully submitted,

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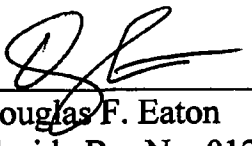

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Supreme Court of Florida

WEDNESDAY, JULY 28, 2010

CASE NO.: SC10-1362
Lower Tribunal No(s).: 37-2010-CA-001824

DAWN K. ROBERTS, ETC., ET AL. vs. CORRINE BROWN, ET AL.

Petitioner(s) Respondent(s)

The League of Women Voters of Florida's motion to file amended amicus brief is granted and said amended brief was filed with this Court on July 28, 2010.

The amicus brief filed with this Court on July 22, 2010, is hereby stricken.

A True Copy
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Supreme Court of Florida

No. SC10-1362

DAWN K. ROBERTS, etc., et al.,
Petitioners,

vs.

CORRINE BROWN, et al.,
Respondents.

[August 31, 2010]

PER CURIAM.

Interim Secretary of State Dawn Roberts has filed an extraordinary writ petition that invokes this Court's all writs jurisdiction. Secretary Roberts also seeks a writ of prohibition on the basis that the Second Judicial Circuit Court is acting in excess of its jurisdiction by accepting jurisdiction to consider a pre-election action for declaratory and injunctive relief that seeks to remove two citizen-initiative proposed constitutional amendments from the November ballot. We have jurisdiction. See art. V, § 3(b)(7), Fla. Const. For the reasons discussed, we grant the petition and direct the circuit court to dismiss the pre-election proceedings below on the basis of lack of subject matter jurisdiction.

FACTS AND PROCEDURAL BACKGROUND

FairDistrictsFlorida.org, a registered political committee, invoked the citizen-initiative process of article XI, section 3 of the Florida Constitution to propose two constitutional amendments designed to delineate mandatory standards to be applied to the establishment of legislative and congressional district boundaries. On January 29, 2009, this Court approved the proposed amendments for placement on the ballot and determined that the proposed amendments satisfied the single-subject requirement of article XI, section 3, and that the accompanying ballot titles and summaries complied with section 101.161, Florida Statutes (2008). See Advisory Op. to Att'y Gen. re Standards for Establishing Legis. Dist. Boundaries, 2 So. 3d 175, 191 (Fla. 2009). The legislative amendment was designated "Amendment 5" by the Division of Elections, and the congressional amendment was designated "Amendment 6." See Fla. Dep't of State Division of Elections: Initiatives/Amendments/Revisions, http://election.dos.state.fl.us/initiatives/initiativelist.asp?year=2010&initstatus=ALL&MadeBallot=Y&ElecType=GEN (last visited August 31, 2010).

On June 23, 2010, plaintiffs Corrine Brown and Mario Diaz-Balart, both members of the United States House of Representatives, filed an amended complaint for declaratory and injunctive relief in the circuit court against Secretary Roberts and FairDistrictsFlorida.org which challenged the validity of only

Amendment 6. The Florida House of Representatives and the Florida Senate attempted to intervene as plaintiffs. The intervenors attempted to challenge a different provision, the ballot summary of Amendment 5. The intervenors also sought to inject two different claims—that the proposed amendments would violate the federal Voting Rights Act and that the amendments are "vague, conflicting, and unworkable." Notwithstanding these significant differences, the circuit court permitted the addition of these claims even though they were different and beyond the scope of the original proceeding.

Secretary Roberts, FairDistrictsFlorida.org, and intervening defendant Bob Graham filed motions to dismiss the complaint on the basis of lack of subject matter jurisdiction. The motions to dismiss asserted that the Florida Supreme Court has exclusive jurisdiction to determine pre-election challenges to proposed citizen-initiative amendments, and that this Court's advisory opinion approving Amendments 5 and 6 for ballot placement precluded this additional litigation. Governor Charlie Crist, as amicus curiae, filed a memorandum of law in support of Secretary Roberts' motion to dismiss.

The circuit court conducted a hearing on July 8, 2010, and issued a written order denying the motions to dismiss on July 12, 2010. The circuit court held that even though the Florida Constitution was amended in 1986 to create the advisory opinion review process for citizen-initiative amendments, the adoption of these

provisions did not divest the circuit courts of jurisdiction to consider pre-election declaratory actions that challenge such amendments. The circuit court relied on the language from Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992):

> When [the constitutional provisions creating the advisory opinion process] were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised. Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986) (available from Fla. Div. of Archives); Staff of Fla. H.R. Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986) (available from Fla. Div. of Archives). This necessarily implies that other legal challenges would continue to be permissible under existing precedent; and our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution.

Id. at 398-99 (footnotes omitted). Based upon this reference to legislative staff summaries, the circuit court below accepted the argument that any method of challenging initiative amendment proposals that existed prior to 1986 survived the 1986 constitutional revision. The trial judge ultimately concluded that circuit courts retained full jurisdiction pursuant to sections 26.012(3) and 86.011, Florida Statutes, to consider pre-election declaratory and injunctive actions that challenged the validity of citizen initiative amendment proposals. The circuit court also relied

upon Lane v. Chiles, 698 So. 2d 260 (Fla. 1997), in which this Court held that a post-election challenge to an initiative ballot summary was untimely.[1]

Secretary Roberts subsequently filed an extraordinary writ petition with this Court, which was joined by defendant Graham, and asked this Court to either exercise its all writs jurisdiction or issue a writ of prohibition to preclude the circuit court from proceeding with pre-election subject matter jurisdiction of the action challenging Amendments 5 and 6.

ANALYSIS

All Writs and the Writ of Prohibition

As a preliminary matter, the doctrine of all writs is not an independent basis for this Court's jurisdiction. See Besoner v. Crawford, 357 So. 2d 414, 415 (Fla. 1978). Rather, its use is restricted to preserving jurisdiction that has already been invoked or protecting jurisdiction that likely will be invoked in the future. See, e.g., United Servs. Auto. Ass'n v. Goodman, 826 So. 2d 914, 915 (Fla. 2002) (exercising all writs jurisdiction where circuit court orders "encroach[ed] upon this Court's ultimate jurisdiction to adopt rules for the courts, see article V, section 2(a), specifically Rules of Judicial Administration, Rules of Civil Procedure, and Rules Regulating The Florida Bar"); Arbelaez v. Butterworth, 738 So. 2d 326, 326

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1. The order of the circuit court also dismissed FairDistrictsFlorida.org as a party to the proceeding.

(Fla. 1999) (considering all writs petition based upon Court's jurisdiction over death penalty cases); Wild v. Dozier, 672 So. 2d 16, 17-18 (Fla. 1996) (finding independent basis to review judicial assignment exists where Court has "exclusive jurisdiction to review such assignments under its article V, section 2(a) authority to oversee the administrative supervision of all courts"); Florida Senate v. Graham, 412 So. 2d 360, 361 (Fla. 1982) (finding underlying basis for jurisdiction to challenge Governor's authority to limit a special apportionment session; that is, the Court's constitutional authority in the second year following each decennial census to review a legislative plan of apportionment).

Here, Secretary Roberts contends that we should exercise our all writs jurisdiction to protect our exclusive authority pursuant to article V, section 3(b)(10) of the Florida Constitution to consider pre-election challenges to the validity of citizen-initiative petitions. Thus, to determine whether the use of our all writs jurisdiction is warranted, we must determine whether our jurisdiction over such matters is exclusive.

With regard to prohibition, this Court has explained the limited applicability of the writ as follows:

> Prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction. It is preventive and not corrective in that it commands the one to whom it is directed not to do the thing which the supervisory court is informed the lower tribunal is about to do. Its purpose is to prevent the doing of something, not to compel the undoing of something already done.

English v. McCrary, 348 So. 2d 293, 296-97 (Fla. 1977). The applicability of the writ of prohibition in this case hinges upon the identical issue that is determinative of whether the doctrine of all writs applies; that is, the exclusiveness of this Court's jurisdiction to consider pre-election challenges to proposed citizen-initiative constitutional amendments. If this Court maintains exclusive jurisdiction over such challenges, the circuit court is acting in excess of its jurisdiction by accepting jurisdiction to consider the declaratory action filed by the respondents, thereby warranting prohibition relief.

We conclude that, based upon the history of the advisory opinion amendments to the Florida Constitution and case precedent, our jurisdiction with regard to such pre-election matters is indeed exclusive, and therefore, use of our all writs and prohibition jurisdiction is both necessary and appropriate.

The 1986 Constitutional Amendments

In 1986, the Florida Constitution was amended to create the advisory opinion review process for citizen-initiative petitions. The purpose of the process "is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot." Armstrong v. Harris, 773 So. 2d 7, 13 n.18 (Fla. 2000); see also Askew v. Firestone, 421 So. 2d 151, 157 (Fla. 1982) (Overton, J., specially concurring) (noting with regard to the Court's

removal of a legislatively proposed amendment from the ballot, "It concerns me that 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. To avoid future situations in which this Court may again have to exercise this extraordinary power of striking an amendment from the ballot due to misleading ballot language, the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal.").

Article IV, section 10 of the Florida Constitution provides that "[t]he attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI," the provision of the Constitution which addresses amendment by citizen initiative. Article V, section 3(b)(10), provides that this Court "[s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law." (Emphasis supplied.) General law requires this Court to address and determine the single-subject requirement delineated in article XI, section 3 of the Florida Constitution, and the requirements for the ballot title and summary delineated in section 101.161(1), Florida Statutes (2009). See Advisory Op. to Att'y Gen. re 1.35% Property Tax Cap, Unless Voter

Approved, 2 So. 3d 968, 971 (Fla. 2009). Our review of these requirements is governed by two principles:

> First, the Court will not address the merits or wisdom of the proposed amendment. Advisory Op. to Att'y Gen. re Treating People Differently Based on Race in Pub. Educ., 778 So. 2d 888, 891 (Fla. 2000). Second, "[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." Askew v. Firestone, 421 So. 2d 151, 156 (Fla.1982).

Id. This Court has previously explained that the Florida Constitution expressly authorizes judicial review of constitutional amendments that are proposed by citizen initiative only in this Court. See Armstrong, 773 So. 2d at 14 n.18. Thus, the one constitutional provision that expressly addresses the jurisdiction of the judiciary for pre-election review of proposed constitutional amendments affords that jurisdiction exclusively to this Court with regard to citizen initiative amendments. Contrary to the position of the dissent, the Florida Constitution simply does not contemplate that the validity of an initiative petition will be challenged pre-election in any proceeding other than that expressly authorized by the Constitution, which permits this Court exclusively to address pre-election challenges when an advisory opinion is requested by the attorney general. See art. V, § 3(b)(10), Fla. Const.

Exclusive Jurisdiction of this Court

This Court in unequivocal terms has stated on at least two separate occasions that it has exclusive jurisdiction to consider the validity of citizen-initiative

petitions. See Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners, 661 So. 2d 1204, 1205 (Fla. 1995) ("The Attorney General of Florida has requested this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do . . . . We have original and exclusive jurisdiction." (emphasis supplied)); Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners, 642 So. 2d 724, 725 (Fla. 1994) ("The Attorney General of Florida has petitioned this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. We have original and exclusive jurisdiction." (emphasis supplied) (citation omitted)).

Further, although the circuit courts may be courts of general jurisdiction under the Florida Constitution and have the general authority to consider declaratory actions and issue injunctions, under rules of constitutional construction a specific statement that jurisdiction over one type of legal matter exists in another court removes jurisdiction from the circuit court to consider such matters. See McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994) ("[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute." (citations omitted)); see also Coastal Florida Police Benev. Ass'n, Inc. v. Williams, 838 So. 2d 543, 548 (Fla. 2003) ("The rules which govern the construction of statutes are

generally applicable to the construction of constitutional provisions."). Thus, article V, section 3(b)(10), which provides that this Court shall consider the validity of citizen-initiative amendments, indicates that no other Florida court has jurisdiction to consider these types of pre-election petitions. Indeed, we adopted such an interpretation in the Stop Early Release of Prisoners opinions. See, e.g., 661 So. 2d at 1205 ("We have original and exclusive jurisdiction.").

Moreover, when attempts to challenge citizen initiatives in other courts have surfaced, we have previously transferred pre-election declaratory actions challenging initiative proposals to our Court, an action which is entirely consistent with our holding today that we possess exclusive jurisdiction to consider such matters. In Advisory Opinion to the Attorney General—Fee on Everglades Sugar Production, 681 So. 2d 1124 (Fla. 1996), a declaratory action was filed in the circuit court while advisory opinion proceedings were pending in this Court with regard to three proposed initiative amendments. See id. at 1126-27. The sponsor of the proposed amendments, Save Our Everglades (SOE), petitioned this Court for an extraordinary writ, contending that

> [t]he . . . opponents have brought an action in the Leon County Circuit Court, which is improper, has no jurisdictional basis, and subverts the electoral process. SOE brings this petition to stop this invalid action and to preserve this Court's jurisdiction over the initiative petition process.
>
> . . . [I]t is unquestionable that this Court has sole jurisdiction over the initiative petition process. See Article XI, Section 3 and 5(a); Article IV, Section 10; Article V, Section 3(b)(10), Florida

> Constitution. This power is not vested in the Leon County Circuit Court or any other Circuit Court in the State. Additionally, the advisory opinion/initiative petition process has already begun in this Court. . . . This Court has the authority and obligation to enter an order transferring the lower court case to this Court for consideration.

Petition for Constitutional Writ at 1-2, Advisory Opinion to the Attorney General—Fee on Everglades Sugar Production, 681 So. 2d 1124 (Fla. 1996) (No. SC88343) (citation and footnote omitted). After considering the all writs petition, this Court ordered transfer of the declaratory action, demonstrating our agreement with SOE that the circuit court lacked subject matter jurisdiction to consider the validity of the proposed amendments.

Of necessity, a pre-election challenge to a citizen initiative proposed constitutional amendment is always in the nature and form of requesting an advisory opinion, which is specifically contemplated and addressed in the Florida Constitution to be exclusively within the authority of this Court. Further, there is no jurisdiction in any circuit court to render in the form of a declaratory judgment a determination with regard to the impact of a citizen initiative, which pre-election would be an advisory opinion addressing merely the possibility of legal injury based on purely hypothetical facts which have not arisen and are only contingent, uncertain and rest entirely on future possible facts. See, e.g., Santa Rosa County v. Admin. Comm'n, 661 So. 2d 1190, 1193 (Fla. 1995) ("[A]bsent a bona fide need for a declaration based on present, ascertainable facts, the circuit court lacks

jurisdiction to render declaratory relief." (emphasis supplied)); Martinez v. Scanlan, 582 So. 2d 1167, 1170 (Fla. 1991) ("[A]lthough a court may entertain a declaratory action regarding a statute's validity, there must be a bona fide need for such a declaration based on present, ascertainable facts or the court lacks jurisdiction to render declaratory relief." (emphasis supplied)); Bryant v. Gray, 70 So. 2d 581, 584-85 (Fla. 1954) (holding that circuit court lacked jurisdiction to enter a declaratory decree on the issue of whether an individual who desired to run for governor in 1954 to serve the unexpired term of a deceased governor would be eligible to seek re-election during the general election of 1956; the Court explained that "[n]o present right is involved. His question is hypothetical and is too remote as to time and too uncertain as to contingencies. He does not allege that he will be nominated or elected to either the unexpired term or a full term. There is no certainty that he will be." (emphasis supplied)).

Florida League of Cities v. Smith and Lane v. Chiles

Despite this constitutional and case law, the circuit court concluded below that it retained jurisdiction to consider the respondents' declaratory action based primarily on statements in Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992), and the decision in Lane v. Chiles, 698 So. 2d 260 (Fla. 1997). However, neither of these decisions supports the assertion that following the 1986

amendments to the Florida Constitution, circuit courts retained jurisdiction to consider pre-election challenges to amendments proposed by citizen initiative.

In Smith, we had previously approved a citizen-initiative proposal that governed homestead exemptions for placement on the ballot. See 607 So. 2d at 398. Shortly before the date of the election, two entities that had not participated in the earlier advisory opinion proceeding filed a petition for writ of mandamus with this Court contending that, if adopted, the proposed amendment would trigger a repeal of a portion of the Florida Constitution that governed the homestead exemption. See id. A party asserted that the repeal of this provision would have extreme and significant consequences for Florida taxpayers and local governments which the proposed ballot summary did not mention and sought to remove this proposed amendment from the ballot. See id.

This Court first addressed whether the earlier advisory opinion would operate as a procedural bar to this Court considering the subsequent challenge. See id. ("Initially, we must address the question of whether our earlier advisory opinion precludes us from considering the present cause." (emphasis supplied)). In determining this issue, this Court relied upon legislative staff summaries and wrote the language that the circuit court relied upon below:

> When those provisions were under consideration before the 1986 Legislature, the accompanying legislative staff summaries stated a belief that any advisory opinion regarding initiative petitions would not be binding precedent and would only constitute persuasive

> authority as to any other adversarial legal challenge that might later be raised. Staff of Fla. H.R. Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986) (available from Fla. Div. of Archives); Staff of Fla. H.R. Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986) (available from Fla. Div. of Archives). This necessarily implies that other legal challenges would continue to be permissible under existing precedent.

Id. at 398-99 (footnotes omitted). This Court ultimately concluded that "our precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution." Id. at 399 (emphasis supplied).

Although the language used in the opinion relied on legislative staff summaries, the Smith case only addressed this Court's ability to revisit an initiative proposal that it had previously approved for placement on the ballot. Indeed, there is no indication whatsoever that our analysis applied beyond a discussion of our own jurisdiction. See id. at 399 ("We emphasize, however, that relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction." (emphasis supplied)). More recently we addressed the doctrine of law of the case and res judicata in this context. See Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 938 So. 2d 501, 505 (Fla. 2006).

Further, although this Court relied on the legislative staff material in concluding that its advisory opinions are not "binding," the Smith decision inadvertently paraphrased those legislative staff analyses such that their actual meaning was obscured. The legislative staff summaries specifically provided:

> It should be noted, however, that an advisory opinion would not be binding on a challenge brought subsequent to the adoption of the proposed amendment. Nonetheless, to the extent the challenge raises issues addressed in the advisory opinion, the opinion would, as a practical matter, prove to be extremely persuasive.

Fla. H.R. Comm. on Judiciary, CS for HJR 71 (1986) Staff Analysis at 2 (March 6, 1986); Fla. H.R. Comm. on Judiciary, PCS for HJR 71 (1986) Staff Analysis at 2 (Feb. 18, 1986) (emphasis supplied). Thus, the discussion of advisory opinions as non-binding in the staff summaries referred to challenges raised after adoption of the proposal, not before. Those legislative staff summaries do not support jurisdiction pre-election in any other court.

The ambiguous reference in Smith to the availability of "other legal challenges" appears to have led the circuit court here to erroneously conclude that all pre-election means of challenging citizen-initiative amendments in any Florida court survived the 1986 constitutional amendments. However, our later clear proclamation of exclusive jurisdiction to determine the validity of citizen-initiative proposals pre-election in the Stop Early Release of Prisoners opinions and Land Use Plans demonstrates that such a broad interpretation of Smith was not intended.

Further, despite our description in Smith of advisory opinions as non-binding precedent, we later clarified in Ray v. Mortham, 742 So. 2d 1276 (Fla. 1999), that an "advisory" opinion produces significant consequences:

> [T]he amici have suggested that advisory opinions from this Court have little precedential value and are only persuasive . . . . However, none of these cases concern advisory opinions required by section 16.061, Florida Statutes (1997) [governing initiative proposals]. At the outset, we point out that when our "advisory" opinions conclude that there is a defect in the ballot title and summary or a violation of the single-subject requirement, the effect of our "advice" is the removal of the amendment from the ballot.

Id. at 1284. We also addressed the doctrine of law of the case and res judicata in Land Use Plans.

The respondents' reliance on Lane v. Chiles, 698 So. 2d 260 (Fla. 1997), is similarly unavailing. In Lane, individuals challenged in the circuit court a fishing "net ban" amendment that previously had been adopted through an initiative petition. See id. at 262. In addition to procedural and substantive challenges, the individuals challenged the sufficiency of the ballot summary. See id. After the trial court granted summary judgment, upheld constitutionality of the amendment, and found that the time to challenge the ballot summary had passed, this Court accepted pass-through review of the trial court's order. See id. With regard to the challenge to the sufficiency of the ballot summary, this Court stated in full:

> We find this claim to be untimely and without merit. In addition to the fact that this Court specifically approved the ballot summary, the general rule is that a challenge to the form of a proposed amendment

> must be made before the amendment is adopted. Sylvester v. Tindall, 18 So. 2d 892 (Fla. 1944). Lane filed this challenge on June 20, 1995, eight months after the amendment was adopted by a vote of the people and less than two weeks before the amendment was to be effective on July 1, 1995.

Id. at 265 (footnote omitted).

Contrary to the respondents' assertions, this brief analysis does not constitute a holding that the circuit court maintains jurisdiction to consider pre-election ballot initiative challenges. Notably, our decision in Lane was issued in 1997, only two years after we proclaimed our original and exclusive jurisdiction over these matters. See Stop Early Release of Prisoners, 661 So. 2d at 1205. Had we intended to overrule our prior declaration of exclusive jurisdiction, we would have done so in a more definite and express manner than the aforementioned language in Lane. As we previously explained in Puryear v. State, 810 So. 2d 901 (Fla. 2002):

> [T]his Court does not intentionally overrule itself sub silentio. Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding.

Id. at 905 (emphasis supplied). We have not receded from the Stop Early Release of Prisoners opinions, and our express statement of exclusive jurisdiction in those cases prevails.

We conclude that to hold that an advisory opinion pursuant to article V, section 3(b)(10) is not an exclusive and final determination of the pre-election validity of an initiative proposal would be contrary to the Florida Constitution, the intent behind the 1986 amendments, and precedent from this Court. As a matter of policy, the purpose for the advisory opinion amendments was to allow citizen-initiative sponsors time to correct, if necessary, an invalid proposal in time for the proposed amendment to appear on the ballot. See Armstrong v. Harris, 773 So. 2d 7, 14 n.18 (Fla. 2000); Fla. S. Comm. on Judiciary, CS for HJR 0071 (1986) Staff Analysis at 1-2 (May 20, 1986). To interpret the 1986 amendments in any other manner would be to simply nullify them and encourage serial attacks on citizen initiatives to thwart consideration indefinitely because the advisory opinion process would no longer serve its intended purpose. An opponent would be permitted to challenge an initiative proposal immediately before an election in an effort to remove that proposal from the ballot before it could ever be voted upon, thereby frustrating the democratic process. Thus, a pre-election declaratory challenge to an initiative proposal would be nothing less than a veiled attempt to re-write the Constitution and remove this Court's exclusive responsibility to issue advisory opinions pursuant to article V, section 3(b)(10). Circuit courts are not authorized to issue advisory opinions. See Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 721 (Fla. 1994) ("[P]arties must not be requesting an advisory opinion except in

those rare instances in which advisory opinions are authorized by the Constitution." (citation omitted)). The interpretation of the 1986 amendments advanced by the respondents would eviscerate any protections to ballot initiatives that those amendments were intended to ensure. We conclude that this interpretation is incorrect.

Application to this Case

In light of the foregoing, we hold that the circuit court's determination that it retains subject matter jurisdiction to consider a pre-election declaratory challenge to an initiative proposal is erroneous. By continuing to consider the respondents' challenges to Amendments 5 and 6, the circuit court is encroaching on this Court's exclusive jurisdiction and is acting in excess of its jurisdiction. With this conclusion we need not address additional issues concerning the propriety of the intervention, law of the case, or res judicata. Our limited determination here requires that we grant the petition and order the circuit court to dismiss the declaratory action.

The respondents have not demonstrated that the present matter is a "truly extraordinary case[]" as required by our cases or that they have raised a "vital issue" that was not addressed in the prior advisory opinion. Smith, 607 So. 2d at 399. The respondents do not contend that adoption of the amendments will negate or vitiate a portion of the Florida Constitution. The challenges asserted in the

amended complaint do not present a significant, undiscovered issue of potential internal constitutional conflict such as was asserted in Smith, so the high standard we have established for reopening citizen-initiative validity proceedings has not been satisfied.[2] We instead conclude that dismissal of the declaratory action will protect the integrity of the citizen-initiative process by precluding last-minute ballot challenges that seek to remove initiative amendments from the ballot where those challenges could have easily been presented during the advisory opinion process.

CONCLUSION

Accordingly, we grant the petition and utilize our jurisdiction under article V, section 3(b)(7) of the Florida Constitution to preclude the circuit court from taking any further pre-election action in this matter other than to dismiss the proceedings below. We trust that the circuit court will comply with our direction, and therefore, we withhold issuance of the writ.

It is so ordered.

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2. Further, certain claims raised by the respondents involve challenges to the constitutionality of the amendments, which are not now justiciable under this Court's exclusive jurisdiction to review initiative proposals. See Advisory Op. to Att'y Gen.—Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 227 (Fla. 1991) (stating that challenges other than whether a proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution, and section 101.161, Florida Statutes, are "not justiciable in the instant proceeding").

CANADY, C.J., and LEWIS, QUINCE, and LABARGA, JJ., concur.
QUINCE, J., concurs with an opinion.
POLSTON, J., concurs in part and dissents in part with an opinion.
PARIENTE and PERRY, JJ., recused.

NO MOTION FOR REHEARING WILL BE ALLOWED.

QUINCE, J., concurring.

I concur in the majority opinion because the only issues that can be raised that will result in the striking of either one or both proposed amendments from the ballot are whether the proposals violates the single subject requirement and whether the ballot title and summary are misleading. Those issues have already been addressed by this Court, resulting in the placement of these two proposals on the ballot. The other issues raised by the parties are premature and cannot serve as a basis to remove the proposals from the ballot. The wisdom and feasibility of a proposal are not matters that a court, even initially, can take into consideration in determining whether a measure should be on the ballot. These issues may well be the subject of litigation if the proposals are voted on favorably by the elector.

POLSTON, J., concurring in part and dissenting in part.

I would partially grant Interim Secretary of State Roberts' petition and direct the circuit court to dismiss any claims involving the single-subject requirement of article XI, section 3 of the Florida Constitution or the ballot title and summary

requirements of section 101.161, Florida Statutes. However, because this Court's exclusive jurisdiction over initiative petitions does not extend beyond these single-subject and ballot title and summary issues,[3] I do not believe that this Court can direct the circuit court to dismiss the other pre-election claims raised by the parties by exercising our all writs jurisdiction or granting a prohibition petition. In addition, I disagree with the majority's determination that the other claims are not justiciable.

Accordingly, I concur in part and dissent in part.

I.

As the majority accurately notes, the applicability of the doctrine of all writs and the applicability of the writ of prohibition in this case depends upon this Court having exclusive jurisdiction over the challenges involved. See majority op. at 7.

Article V, section 3 of the Florida Constitution outlines this Court's jurisdiction as follows:

> (b) JURISDICTION.—The supreme court:
>
> . . . .
>
> (10) Shall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law.

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3. This Court's precedent may also support exclusive jurisdiction to review the financial impact statements of ballot initiatives. See Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans, 963 So. 2d 210 (Fla. 2007).

And section 10 of article IV states:

> SECTION 10. Attorney General. —The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters pursuant to Section 5 of Article XI.

(Emphasis added.) Based upon the plain language of these provisions, this Court has original and exclusive jurisdiction to render advisory opinions to the attorney general regarding the validity of initiative petitions circulated under section 3 of article XI. See Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners, 661 So. 2d 1204, 1205 (Fla. 1995); Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners, 642 So. 2d 724, 725 (Fla. 1994).

Importantly, however, our precedent indicates that this exclusive jurisdiction is quite limited. Specifically, "[t]he Court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999)." Advisory Op. to Att'y Gen. re Protect People, Especially Youth, from Addiction, Disease, & Other Health Hazards of Using Tobacco, 926 So. 2d 1186, 1190 (Fla. 2006) (quoting Advisory Op. to Att'y Gen. re Amendment to Bar Gov't from Treating People

Differently Based on Race in Pub. Educ., 778 So. 2d 888, 890-91 (Fla. 2000)); see also Advisory Op. to Att'y Gen.—Ltd. Political Terms in Certain Elected Offices, 592 So. 2d 225, 227 (Fla. 1991). Therefore, this Court only has exclusive jurisdiction over determinations regarding the single-subject requirement and the ballot title and summary requirements. Neither our precedent nor the plain language of the constitution supports the majority's expansion of our exclusive jurisdiction to include every possible pre-election challenge of an initiative petition.

II.

In addition to ruling that this Court has exclusive jurisdiction over all pre-election challenges to initiative petitions, the majority rules that the other claims brought by the parties (those that do not involve the single subject, ballot title, and summary requirements) are not justiciable. See majority op. at 21 n.2. In reaching this conclusion, the majority cites Advisory Opinion to Attorney General—Limited Political Terms in Certain Elective Offices, 592 So. 2d at 227. This Court, in that term limits opinion, ruled that other claims, like the constitutional claims brought in the instant case, cannot be heard in an advisory opinion proceeding, which is limited to whether a ballot title and summary comply with article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes. 592 So. 2d at 227 ("[W]e find that those issues are not justiciable in the instant proceeding.

(emphasis added)). The Court did not hold that these other claims could not be brought in a different proceeding in circuit court.[4]

Circuit courts in Florida routinely address constitutional issues pre-election to determine whether a proposed amendment should go on the ballot. For example, in Citizens for Responsible Growth v. City of St. Pete Beach, 940 So. 2d 1144, 1147 (Fla. 2d DCA 2006) (quoting W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs, 448 So. 2d 1212, 1214 (Fla. 4th DCA 1984)), the Second District noted that "[i]f the opponent of a proposed amendment 'in good faith questions the constitutionality of the ordinance in its entirety and on its face[,] the court may properly consider that question in advance of an election concerning its approval.' " The Second District went on to hold that the circuit court had jurisdiction to entertain the declaratory action. Citizens for Responsible Growth, 940 So. 2d at 1147; see also Gaines v. City of Orlando, 450 So. 2d 1174 (Fla. 5th DCA 1984) (holding that a circuit court may make a pre-election determination of the facial constitutionality of any proposed amendment). No jurisdictional infirmities exist, and none are specifically created by the Florida Constitution for citizen initiative amendments that would cause them to be different than other proposed amendments. Therefore, the circuit court has

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4. This Court's holding in the term limits case is consistent with this Court's ruling in Florida League of Cities v. Smith, 607 So. 2d 397, 399 n.3 (Fla. 1992), that advisory opinions do not act as precedent over issues "not addressed at all in a prior advisory opinion."

jurisdiction before the election to determine whether a citizen-initiative amendment is constitutional, just as the circuit court has jurisdiction before the election to determine whether other proposed amendments are constitutional.

The majority justifies its decision in part by referencing the rule of law that a circuit court does not have jurisdiction to render an advisory opinion based on hypothetical facts. See majority op. at 12. But this entirely misses the point of who gets to decide whether the claims are based on hypothetical facts. The majority's ruling is in violation of the well-settled law that a court itself decides whether it has jurisdiction or not. "Every court has judicial power to hear and determine the question of its own jurisdiction, both as to parties and as to subject matter, and necessarily does so by proceeding in the cause." State ex rel. B. F. Goodrich Co. v. Trammell, 192 So. 175, 177 (Fla. 1939) (quoting 15 C.J. § 170, at 851 (1918)). Here, the majority unjustifiably takes the claims not yet decided by the circuit court and decides they are not justiciable without giving the circuit court an opportunity to rule on them or determine whether they are justiciable. The majority has overreached.

Arguments could be made as to whether the various claims raised by the parties in this case are justiciable for determination prior to adoption. But the petitioners did not raise those arguments in their motions to dismiss; therefore, the trial court did not address the issue in its Order on Motions to Dismiss subject to

the writ filed in this Court. Instead, as the trial court noted, the petitioners argued that this Court has present mandatory and exclusive jurisdiction over all pre-election challenges to voter initiative petitions to amend the Florida Constitution. Accordingly, I do not decide this justiciable issue because it is not properly before us. Those arguments and any related facts should be decided by the circuit court rather than by this Court in an original writ proceeding. See art. V, § 5(b), Fla. Const.; §§ 86.011, 86.051, Fla. Stat. (2009); Davis v. Gulf Power Corp., 799 So. 2d 298, 299 n.1 (Fla. 1st DCA 2001) (ruling that Gulf Power stated a claim for declaratory relief regarding tax treatment of a proposed electric power plant expansion, citing section 86.051, which provided that "[a]ny declaratory judgment rendered pursuant to this chapter may be rendered by way of anticipation with respect to any act not yet done or any event which has not yet happened").

III.

To summarize, based upon the Florida Constitution and our precedent, this Court only has exclusive jurisdiction over initiative petition claims involving the single-subject, ballot title, and summary requirements. Therefore, I would only direct the circuit court to dismiss the parties' claims involving the single-subject requirement of article XI, section 3 of the Florida Constitution and the ballot title and summary requirements of section 101.161, Florida Statutes. The majority has decided that (i) this Court, not the circuit court, has jurisdiction over whether the

other claims, never addressed by any court, are justiciable, and (ii) these claims, on the merits, are not justiciable. There is no jurisdictional transport into the Florida Supreme Court provided by the Florida Constitution or otherwise for the majority to make such an expansive ruling. There is no basis for determining that this Court has exclusive jurisdiction over every possible pre-election matter.

I do not understand as a matter of law how the parties' challenges to the proposed amendment, not yet ruled on, may be procedurally or substantively barred on jurisdictional grounds. Moreover, it is not somehow preferable to wait to rule until after the citizens of Florida have voted to approve an amendment. See, e.g., Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

Accordingly, I respectfully concur in part and dissent in part.

Original Proceedings – Petition for All Writs

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