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

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Plaintiffs,

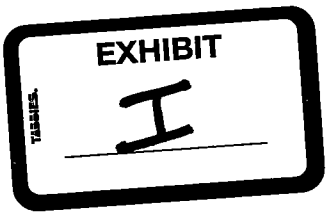
v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Intervening Defendants.
_____/



DOCKET

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Leon County Clerk of Courts
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Summary **Parties** **Events** **Dockets** **Disposition** **Costs**

37 2010 CA 001803 FLORIDA STATE CONFERENCE OF NAACP BRANCHES vs DEPT OF STATE

Plaintiffs	Defendants
FLORIDA STATE CONFERENCE OF NAACP BRANCHES NWEZE, ADORA OBI THE LEAGUE OF WOMEN VOTERS OF FLORIDA INC MACNAB, DEIRDRE MILLIGAN, ROBERT REED, NATHANIEL P AHORA, DEMOCRACIA MURSULI, JORGE	DEPT OF STATE ROBERTS, DAWN K
Plaintiff Attorney(s)	**Defendant Attorney(s)**
HERRON, MARK	GLOGAU, JONATHAN A UPTON, CHARLES B GLOGAU, JONATHAN A UPTON, CHARLES B
Case Comments	**Case Attributes**
HIGH PROFILE CASE	**Number:** 37 2010 CA 001803 **Action:** OTHER CONSTITUTIONAL CHALLENGE PROPOSED AMENDMENT **Status:** CLOSED **Filed :** 5/21/2010 **Citation:**

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Leon County Clerk of Courts
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Summary Parties Events Dockets Disposition Costs

37 2010 CA 001803 FLORIDA STATE CONFERENCE OF NAACP BRANCHES vs DEPT OF STATE

Docket Date	Docket Text	Amount	Amount Due	OR_Book	OR_Page
5/21/2010	FORMS COPIES Receipt: 351047 Date: 05/21/2010	$0.30			
5/21/2010	HIGH PROFILE CASE				
5/21/2010	CIVIL COVER SHEET				
5/21/2010	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF Receipt: 351047 Date: 05/21/2010	$400.00			
5/21/2010	SUMMONS ISSUED DAWN K ROBERTS (DEFENDANT); Receipt: 351047 Date: 05/21/2010	$10.00			
5/21/2010	NOTICE OF PRIORITY STATUS				
5/21/2010	SUMMONS ISSUED FLORIDA STATE CONFERENCE OF NAACP BRANCES (PLAINTIFF); Receipt: 351047 Date: 05/21/2010	$10.00			
5/24/2010	COPIES Receipt: 351551 Date: 05/24/2010	$16.00			
5/25/2010	FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO INTERVENE				
5/26/2010	MOTION TO INTERVENE				
5/27/2010	SUMMONS RETURNED EXECUTED 5/24 DEPT OF STATE (DEFENDANT);				
5/27/2010	SUMMONS RETURNED EXECUTED 5/24 DAWN K ROBERTS (DEFENDANT);				
6/4/2010	AMENDED CERTIFICATE OF SERVICE				
6/7/2010	NOTICE OF APPEARANCE OF CO-COUNSEL MIGUEL A DE GRANDY (Attorney) on behalf of FLORIDA HOUSE OF				

	REPRESENTATIVES (INTERVENOR)	
6/7/2010	NOTICE OF CASE MANAGEMENT CONFERENCE Event: NOTICE OF HEARING Date: 06/08/2010 Time: 11:00 am Judge: SHELFER, JAMES O Location: CHAMBERS	
6/8/2010	ORDER GRANTING MOTIONS TO INTERVENE	
6/11/2010	PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW	
6/11/2010	NOTICE OF HEARING - FINAL HEARING Event: NOTICE OF HEARING Date: 07/08/2010 Time: 9:00 am Judge: SHELFER, JAMES O Location: CHAMBERS	
6/11/2010	SCHEDULING ORDER - ORDER AS TO TIME LINES FOR FILING PLEADINGS	
6/18/2010	NOTICE OF FILING AMENDED CERTIFICATE OF SERVICE	
6/21/2010	COPIES Receipt: 363839 Date: 06/21/2010	$22.00
6/22/2010	GOVERNOR CHARLIE CRIST'S UNOPPOSED MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	
6/22/2010	COPIES Receipt: 364476 Date: 06/22/2010	$16.00
6/22/2010	GOVERNOR CHARLIE CRIST'S MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	
6/23/2010	COPIES Receipt: 365070 Date: 06/23/2010	$72.00
6/25/2010	INTERVENOR/DEFENDANT THE FLORIDA SENATE'S MOTION FOR SUMMARY JUDGMENT, RESPONSE TO PLAINTIFFS' SUMMARY JUDGMENT AND MEMORANDUM OF LAW	
6/25/2010	FLORIDA HOUSE OF REPRESENTATIVES' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO	

	PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	
6/28/2010	DEFENDANTS, DEPARTMENT OF STATE AND DAWN K. ROBERTS, MOTION FOR SUMMARY JUDGMENT, RESPONSE TO PLAINTIFF'S SUMMARY JUDGMENT AND MEMORANDUM OF LAW	
6/30/2010	PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT	
7/2/2010	INTERVENOR/DEFENDANT THE FLORIDA SENATE'S REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT	
7/2/2010	COPIES Receipt: 369188 Date: 07/02/2010	$37.00
7/2/2010	DEFENDANTS DEPARTMENT OF STATE AND DAWN K ROBERTS REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT	
7/2/2010	FLORIDA HOUSE OF REPRESENTATIVES' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT	
7/2/2010	COPIES Receipt: 368666 Date: 07/02/2010	$32.00
7/7/2010	ORDER GRANTING GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUUPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	
7/8/2010	MOTION FOR ORDER IMPOSING REMEDY	
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7/9/2010	PLAINTIFFS RESPONSE TO SENATES MOTION FOR ORDER IMPOSING REMEDY	
	NOTICE OF FILING	

7/9/2010	TRANSCRIPT OF HEARING HELD JULY 8, 2010			
7/9/2010	NOMAD A/V EQUIPMENT FEE Receipt: 371518 Date: 07/09/2010	$100.00		
7/12/2010	COPIES Receipt: 372716 Date: 07/12/2010	$20.00		
7/12/2010	ORDER GRANTING SUMMARY FINAL JUDGMENT		4138	1058
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7/13/2010	CERTIFIED COPY OF NOTICE OF APPEAL SENT TO DCA			
7/13/2010	NOTICE OF APPEAL TO DISTRICT COURT JONATHAN A GLOGAU (Attorney) on behalf of DEPT OF STATE, DAWN K ROBERTS (DEFENDANT)		4138	1008
7/13/2010	COPIES Receipt: 373165 Date: 07/13/2010	$169.00		
7/15/2010	ORDER FROM DCA - THIS COURT CERTIFIES ON ITS OWN MOTION THAT THIS APPEAL REQUIRES IMMEDIATE RESOLUTION BY THE SUPREME COURT OF FL BECAUSE THE ISSUES PENDING HEREIN ARE OF GREAT PUBLIC IMPORTANCE. THE EMERGENCY MOTION TO EXPEDITE FILED JUL 13, 10, IS HEREBY DEFERRED TO THE FL SUPREME COURT FOR DISPOSITION IF IT ACCEPTS JURISDICTION, IF THE SUPREME COURT DECLINES TO ACCEPT JURISDICTION, THE MOTION WILL BE DECIDED BY THIS COURT AT A LATER DATE.			
7/15/2010	DCA CASE NUMBER 1D10-3676			
7/19/2010	COPIES Receipt: 375541 Date: 07/19/2010	$44.00		
7/21/2010	TRANSCRIPT OF HEARING 7/8/2010			
7/21/2010	NOTICE OF FILING ORIGINAL HEARING TRANSCRIPT TO BE INCLUDED IN RECORD ON APPEAL			
	APPEAL INDEX AND RECORD			

7/21/2010	COMPLETED		
7/21/2010	APPEAL INDEX AND SUPPLEMENT RECORD COMPLETED		
9/2/2010	MANDATE AFFIRMING LOWER COURT DECISION	4158	1367
9/2/2010	APPEAL RECORD RETURNED FROM SUPREME COURT (3) VOLUMES		

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

CASE NO.: _____

vs.

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

---

1. This is an action for declaratory and injunctive relief challenging the legal sufficiency of a proposed amendment to the Florida Constitution submitted by the Florida Legislature for placement on the November 2, 2010 ballot, hereinafter referred to as "Amendment 7." Amendment 7 cannot be lawfully submitted to Florida voters because its ballot title and summary fail to

advise the voters of the chief purpose and true effect of the amendment and constitute a classic case of "hiding the ball" or "flying under false colors."

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over this action pursuant to Article V, Section 5(b), Florida Constitution, and Section 26.012, Florida Statutes.

3. This Court has jurisdiction to grant declaratory relief pursuant to Article V, Section 5(b), Florida Constitution, and Section 86.011, Florida Statutes, and to grant injunctive relief pursuant to Article V, Section 5(b), Florida Constitution, and Section 26.012(3), Florida Statutes, and Rule 1.610, Florida Rules of Civil Procedure.

4. Venue is proper in Leon County pursuant to Section 47.011, Florida Statutes.

Parties

5. Plaintiff FLORIDA STATE CONFERENCE OF NAACP BRANCHES is a Florida association that meets the requirements for associational standing in that a substantial number of its members would be affected if Amendment 7 were to be adopted; the subject matter of Amendment 7 is within the general scope and interest and activities of the FLORIDA STATE CONFERENCE OF NAACP BRANCHES and the requested relief is the type of relief for the FLORIDA STATE CONFERENCE OF NAACP BRANCHES to receive on behalf of its members.

6. Plaintiff ADORA OBI NWEZE is the President of the FLORIDA STATE CONFERENCE OF NAACP BRANCHES. She is a resident of Miami-Dade County, Florida, and a registered voter and taxpayer. She has regularly voted in Florida general elections and on ballot proposals and intends to vote in the November 2010 general election.

7. Plaintiff the LEAGUE OF WOMEN VOTERS OF FLORIDA, INC. is a Florida association that meets the requirements for associational standing in that a substantial number of its members would be affected if Amendment 7 were to be adopted; the subject matter of Amendment 7 is within the general scope and interest and activities of the LEAGUE OF WOMEN VOTERS OF FLORIDA, INC. and the requested relief is the type of relief for the LEAGUE OF WOMEN VOTERS OF FLORIDA, INC. to receive on behalf of its members.

8. Plaintiff DEIRDRE MACNAB is the President of the LEAGUE OF WOMEN VOTERS OF FLORIDA, INC. She is a resident of Orange County, Florida, and a registered voter and taxpayer. She has regularly voted in Florida general elections and on ballot proposals and intends to vote in the November 2010 general election.

9. Plaintiff BOB MILLIGAN is a resident of Leon 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.

10. Plaintiff NATHANIEL P. REED is a resident of Martin 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.

11. Plaintiff DEMOCRACIA AHORA, is a Florida association that meets the requirements for associational standing in that a substantial number of its members would be affected if Amendment 7 were to be adopted; the subject matter of Amendment 7 is within the general scope and interest and activities of DEMOCRACIA AHORA and the requested relief is the type of relief for DEMOCRACIA AHORA to receive on behalf of its members.

12. Plaintiff JORGE MURSULI is the President of DEMOCRACIA AHORA. He 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.

13. 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 Defendant DEPARTMENT OF STATE. Defendant Roberts is sued in her official capacity.

14. Defendant DEPARTMENT OF STATE is an agency of the State of Florida and it is responsible for placing proposed constitutional amendments that are legally sufficient on the ballot. Pursuant to Section 101.161(1), Florida Statutes:

(1) 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 .... The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution... 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.** (Emphasis added.)

The Florida Constitution

15. Article XI of the Florida Constitution provides five methods through which the Constitution can be amended, each of which involves placement of proposed amendments on the ballot for a general election, at which a vote of three-fifths of the electors voting on the measure is required to approve the proposed amendment. The sections of Article XI pertinent to this action are Section 1, which provides that the Legislature, upon a three-fifths vote of each house, may place proposed amendments to any part of the Constitution on a general election ballot, and Section 3, which grants to the people the power, by petition, to place proposed amendments to any part of the Constitution on a general election ballot.

16. Currently, Article III, Section 16(a), Florida Constitution, provides the following with respect to legislative districts:

(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. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.

17. Currently, there are no provisions in the Florida Constitution governing the Legislature in establishing congressional district boundaries.

18. Pursuant to Article XI, Section 3, Florida Constitution, on January 22, 2010, two citizen initiatives related to redistricting, were duly certified by Defendant DEPARTMENT OF STATE for placement on the 2010 general election ballot. The proposed amendments are intended to reduce or eliminate political favoritism in drawing Congressional and legislative districts. They would add carefully prioritized standards for redistricting to the Florida Constitution. Defendant DEPARTMENT OF STATE has designated these initiatives as Amendment 5 (legislative redistricting standards) and Amendment 6 (congressional redistricting standards) on the 2010 general election ballot. Copies of Amendments 5 and 6 and their respective ballot titles and summaries are attached hereto as Exhibits A and B respectively.

19. Amendment 5 would create Article III, Section 21, to provide the following additional, prioritized standards:

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 of this subsection conflicts with the standards of 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 another within that subsection.

The full text of Amendment 5 is attached hereto as Exhibit "A."

20. Amendment 6 would create Article III, Section 20, to provide the following additional, prioritized standards:

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 of this subsection conflicts with the standards of 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 another within that subsection.

The full text of Amendment 6 is attached hereto as Exhibit "B."

Amendment 7

21. On the last day of the 2010 legislative session (April 30, 2010), the Legislature passed by the constitutionally mandated two-thirds vote of each house, HJR 7231, a joint resolution with a ballot title almost identical to the titles of Amendments 5 and 6: "STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING." The full text of HJR 7231 is attached hereto as Exhibit "C." HJR 7231 has been assigned ballot position as Amendment 7 by the Defendant DEPARTMENT OF STATE.

22. Amendment 7 would create Article III, Section 20, to provide as follows:

> In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of the standards is rationally related to the standards contained in this constitution and is consistent with federal law.

23. The ballot title and summary for Amendment 7 read as follows:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING. - In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and

> implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of the standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

24. The summary of Amendment 7, although nearly identical to the text of the proposed amendment, is misleading and fails to inform the voter of the chief purpose and effect of the amendment. It provides a classic case of "flying under false colors" or "hiding the ball." Among other defects:

A. The ballot summary fails to inform the voter that the chief purpose and effect of Amendment 7 is to limit the mandatory application of constitutional standards including but not limited to those that will be placed in the constitution by the passage of Amendments 5 and 6 if they are adopted by the required vote in the 2010 election.

B. The ballot summary of Amendment 7 especially fails to inform the voter that:

(1) It is intended and would have the effect of permitting the Legislature to "consider" but not implement the specific protections for minority voters contained in Amendments 5 and 6, thus avoiding mandatory application of those protections.

(2) It is intended to permit the Legislature to balance standards so that it can continue to use redistricting to perpetuate political power by drawing districts with intent to favor or disfavor incumbents or political parties.

(3) It is intended to permit the Legislature to subordinate existing and future standards and provisions contained in Article III of the Florida Constitution and to elevate the priority of its two purported "standards" which are permissive and vague but not mandatory.

(4) It is intended to provide validity to any district or plan that is related in any way to its vague but not mandatory standards.

C. The ballot summary fails to adequately inform the voter of the meaning of its purported "standards."

25. The ballot title of Amendment 7 is misleading in that it purports to provide "standards" for redistricting. Amendment 7 has the purpose and intended effect of eliminating any "standards." In effect it is intended to give the Legislature discretion to ignore any limits on its ability to draw districts with intent to favor or disfavor incumbents or political parties. Its purpose and effect is to eliminate all "standards" and give the Legislature free reign to draw districts for political advantage.

26. The ballot title mimics the titles of Amendments 5 and 6 in an apparent effort to confuse voters and hide the true purpose of the Legislature's Amendment.

27. Because the ballot title and summary of Amendment 7 are misleading and fail to adequately inform the voter of the chief purposes of the amendment, placement of Amendment 7 on the ballot would violate Article XI, Section 5, Florida Constitution, and Section 101.161(1), Florida Statutes.

28. Plaintiffs will suffer immediate and irreparable harm if Amendment 7 with the accompanying ballot title and summary language is placed on the ballot for the 2010 general election.

29. Plaintiffs have no adequate remedy at law, and it is the public interest to ensure that Florida's electorate is accurately informed as to the true effect of proposed amendments to the Florida Constitution.

Prayer for Relief

WHEREFORE, Plaintiffs seek judgment declaring that Amendment 7 does not meet the constitutional and statutory requirements for placement on the ballot and enjoining Defendants from placing Amendment 7 on the 2010 general election ballot.

Respectfully submitted by:

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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 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

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

EXHIBIT B

House Joint Resolution

A joint resolution proposing the creation of Section 20 of Article III of the State Constitution to provide standards for establishing legislative and congressional district boundaries.

Be It Resolved by the Legislature of the State of Florida:

That the following creation of Section 20 of Article III of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE III

LEGISLATURE

SECTION 20. Standards for establishing legislative and congressional district boundaries.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law.

EXHIBIT C

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE III, SECTION 20

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

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

FLORIDA STATE CONFERENCE
(F NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs.

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants.

CLERK OF CIRCUIT COURT
LEON COUNTY, FLORIDA
10 MAY 21 AM 9:37
FILED

CASE NO.: 2010 CA 1803

NOTICE OF PRIORITY STATUS

Plaintiffs, pursuant to Rule 2.545(c)(1), Florida Rules of Judicial Administration, submit this Notice of Priority Status, stating their belief that the instant matter should be assigned priority status by this Court, and further states:

Nature of the Case

This is a declaratory judgment action challenging placement of HJR 7231, a proposed amendment to the State Constitution, which has been designated by the Defendant, Department of State as Amendment 7, on the 2010 general election ballot.

Plaintiffs seek an order from this Court removing Amendment 7 from the 2010 general election ballot.

Source of Priority Status

There is no statute, rule or case law which mandates that this Court assign priority status to this case. However, the duties and responsibilities imposed by law upon election officials compels that a final decision by the Florida Supreme Court with respect to the issues presented in this case be made on or before the practical deadline for the printing and mailing of ballots for the November 2010 general election.

Deadlines Imposed by Law on Any Aspect of Case

There is no statutory deadline for printing ballots. The first date set out in law relating to ballots is section 101.62(4)(a), Florida Statutes (2009), which requires supervisors of elections to mail absentee ballots to overseas voters no less than 45 days before a general election. This year that date is September 18, 2010.

In order to have the ballots ready to mail on that date, they must be printed in advance. Roughly 11.1 million (the current number of registered voters in Florida) paper ballots will need to be printed for the general election.[1] Only a small number of printing companies across the country are certified to print machine-readable optical scan ballots. Because of this, and because every state in the country is also holding an election on November 2, 2010, it is imperative that Florida counties submit their ballot orders to the printers as early as possible to ensure compliance with the September 18, 2010 deadline for mailing overseas ballots and to make absentee ballots generally available to voters thereafter.

[1] Although not all ballots need be printed prior to September 18, 2010, most counties find it more efficient and cost effective to print all the ballots at one time.

The supervisors of elections cannot finalize their ballots for the general election until the Department of State provides them the names of candidates nominated for office as required by Section 99.121, Florida Statutes. The county-level results for federal, statewide and multi-county races in the state's August 24, 2010, primary will be certified to the Secretary on August 31, 2010. *See* § 102.112(2), Florida Statutes (2009). The resulting winners are expected to be certified by the Elections Canvassing Commission the following day, September 1, 2010. *See id.* § 102.111(1). Candidates for the office of Governor must designate a Lieutenant Governor running mate and such candidate must qualify before 5:00 p.m. on September 2, 2010. *See* § 99.063, Florida Statutes (2009).

Section 99.121, Florida Statutes (2009), requires that the Department of State certify to the county supervisors of elections the names of persons nominated for each federal, state or multi-county office in each county sometime after on September 2, 2010. Recognizing the September 18, 2010 deadline for mailing overseas ballots, this will allow, at maximum, fifteen (15) days for counties to program the election information in their software, layout and proof their ballots, and have the ballots printed so as to meet the September 18 deadline for mailing overseas absentee ballots.

Although the post-September 2 certification pertains only to candidates and not to proposed constitutional amendments,[2] this date is also the pivotal date for removing a constitutional amendment from the ballot. This is because counties must await the candidate information provided pursuant to Section 99.121, Florida Statutes (2009), in order to finalize their ballot layout.

[2] There is no statutory deadline specifying when proposed constitutional amendments must be provided to the counties.

The duties and responsibilities imposed by law upon election officials require prompt consideration of this case as a priority matter by this Court. Following any decision by this Court, it is anticipated that the decision will be appealed to the First District Court of Appeal for review by that Court and the Florida Supreme Court.

Unusual Factors That May Bear on Meeting Imposed Deadlines

There are no known unusual factors that may bear on meeting any imposed deadlines.

WHEREFORE, Plaintiffs request that this Court assign the instant matter priority status pursuant to Rule 2.543(c)(1), Florida Rules of Judicial Administration.

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

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening 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 Defendant in this action.

1. The Legislature is vested with constitutional authority to propose amendments to the Florida Constitution upon the approval of a three-fifths supermajority in each chamber. Art. XI, § 1, Fla. Const. Any such proposal is then submitted to a vote of the people, Art. XI, § 5(a), Fla. Const., in whom "all political power is inherent," Art. I, § 1, Fla. Const.

2. During the 2010 legislative session, the Florida Senate and the Florida House of Representatives each passed House Joint Resolution 7231 with no less than three-fifths approval.

HJR 7231, a copy of which is attached to the Complaint as Exhibit C, is slated to appear on the November 2010 general election ballot as Amendment 7.

3. Plaintiffs, supporters of two other constitutional amendments, do not want the electorate to vote on Amendment 7. Alleging that voters will be confused by a ballot summary that is "nearly identical" to the amendment language itself (Complaint ¶ 24), Plaintiffs demand that the Court invalidate Amendment 7 altogether.

4. The Florida House of Representatives seeks to intervene as a Defendant in this action so that it may defend the validity of the joint resolution it proposed by a large majority.

INTERVENTION OF THE FLORIDA HOUSE OF REPRESENTATIVES IS PROPER.

5. 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."

6. 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."

7. 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 the validity of

Amendment 7, which is the sole issue in the case. And it would plainly lose if this Court were to enter a judgment invalidating the Amendment.

8. The existing Defendants, the Florida Department of State and its interim Secretary, are nominal parties only. As Plaintiffs allege, the Department of State is responsible for designating proposed amendments for ballot placement. Except to the extent it affects this ministerial duty, the existing Defendants have no apparent interest in the outcome of this case. They do not share the interest of the Florida House of Representatives in defending the validity of Amendment 7.[1] Regardless, even in cases where the existing defendant shared an interest in defending, courts have permitted the Legislature's intervention to represent its own unique interests. *See, e.g., Womancare of Orlando, Inc. v. Agwunobi*, 448 F. Supp. 2d 1293 (N.D. Fla. 2005) (Florida House of Representatives intervening as defendant in constitutional challenge to parental-notification statute); *Scott v. United States Dep't of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996) (Florida Senate intervening in challenge to legislative district boundaries).

9. The proposed intervention would not delay the case or prejudice any party. This Motion is filed immediately after the case was initiated, and the intervention will not add any new issues to the case.

10. Upon intervention, the Florida House of Representatives will assert the defenses presented in the attached Motion to Dismiss.

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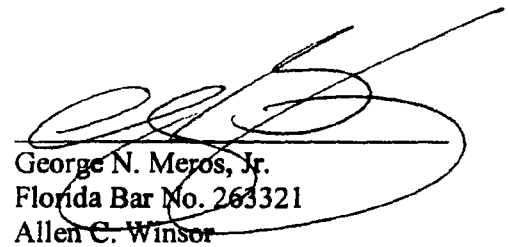
[1] Notwithstanding its position as a nominal defendant, the Department of State has filed substantive briefs defending other proposed amendments. *See, e.g., Florida Dep't of State v. Slough*, 992 So. 2d 142 (Fla. 2008); *Ford v. Browning*, 992 So. 2d 132 (Fla. 2008). Even if it elects to defend Amendment 7, however, it cannot represent the precise interests of the Florida House of Representatives.

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 Defendant, and (iii) granting such further relief as the Court finds 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

FLORIDA STATE CONFERENCE OF
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DEPARTMENT OF STATE, an agency of the
State of Florida, and DAWN K. ROBERTS, in
her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening Defendant.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' MOTION TO DISMISS

Pursuant to Florida Rule of Civil Procedure 1.140(b)(6), Proposed Intervening Defendant, the Florida House of Representatives, moves the Court to dismiss the Complaint for Declaratory and Injunctive Relief filed by Plaintiffs on May 21, 2010.

Introduction

This suit is the product of politics—not sound, legal reasoning. Goaded to bring *some* legal challenge to Amendment 7, Plaintiffs try arguments which, in challenges to other proposed amendments, the Florida Supreme Court has flatly rejected.

Plaintiffs attack as misleading a ballot summary that they acknowledge is "nearly identical" to the language of the proposed amendment. The Supreme Court has routinely—and logically—upheld ballot summaries that closely follow the language of the proposed amendment.

At bottom, Plaintiffs suggest that a ballot summary must explain the potential effect of a proposed amendment on other, mere *proposals* to amend the Florida Constitution. The Florida Supreme Court, however, has never required such explanations. In fact, only last year the Court approved a ballot summary against precisely the same challenge. Plaintiffs' claims fail under binding precedent. The Complaint must be dismissed.

Reflecting the political character of this litigation, Plaintiffs infuse their Complaint with the public-relations position that Amendment 7 harms minorities. It does not. Quite the reverse: Amendment 7 preserves the discretion of the Legislature to draw districts that promote minority representation—even where such districts are not compelled by other voting-rights provisions—without subordination to requirements such as compactness and adherence to local boundaries.

Memorandum of Law

The Legislature is vested with constitutional authority to propose amendments to the Florida Constitution upon the approval of three-fifths of each chamber. Art. XI, § 1, Fla. Const. Any such proposal is then submitted to the people for approval. Art. XI, § 5(a), Fla. Const.

A proposed constitutional amendment must be accompanied by a title and summary. § 101.161(1), Fla. Stat. (2009). The title and summary, which alone appear on the ballot, must be clear and unambiguous. *Id.* Ballot language is clear and unambiguous if it fairly describes the chief purpose of the amendment and does not mislead. *Adv. Opinion to the Att'y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1236 (Fla. 2006). In sum, ballot language must "accurately describe the scope of the text of the amendment." *Adv. Opinion to the Att'y Gen. re the Med. Liability Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004).

The Court's role in review of amendments proposed by the Legislature is especially limited. "The legislature which approved and submitted the proposed amendment took the same

oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done." *Smathers v. Smith*, 338 So. 2d 825, 826-27 (Fla. 1976) (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). "This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment . . . ." *Id.* at 827.

I. Because the Ballot Summary Is Substantively Identical to the Text of the Proposed Amendment, It Is Clear and Unambiguous.

As a matter of law (and plain common sense), a ballot summary that is identical in all material respects to the amendment language is clear and unambiguous. Plaintiffs' effort to find deception in a summary that faithfully echoes the proposed amendment ignores common sense. Worse, it disregards recent, binding, Florida Supreme Court precedent.

The ballot summary attacked as misleading is a nearly verbatim restatement of the amendment language. In fact, the only discrepancies between the text and summary actually enhance the clarity of the summary. The amendment language contains several noun phrases which, though clear in the context of a constitution, require clarification when presented in isolation on a ballot. Thus, "this constitution" was replaced with "the State Constitution," and "this article" became "Article III of the State Constitution." These changes—the only changes—are depicted in the following strikethrough comparison of the amendment text and summary:[1]

> In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in ~~this constitution~~the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of ~~this article~~Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally

[1] Underscored words appear in the summary, but not the amendment text. Stricken words appear in the text, but not the summary. All other words appear identically in both the text and the summary.

related to the standards in ~~this constitution~~the State Constitution and is consistent with federal law.

In similar circumstances, the Florida Supreme Court has, with little difficulty, approved proposed ballot language. In *Advisory Opinion to the Attorney General re the Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. 2004), the Court upheld a measure to limit attorney compensation in medical malpractice cases. In finding the title and summary clear and unambiguous, the Court identified no "material or misleading discrepancies between the summary and the amendment." *Id.* at 679. "In fact, the summary . . . [came] very close to reiterating the briefly worded amendment." *Id.* Thus, the Court concluded that "the wording of the title and summary was sufficient to communicate the chief purpose of the measure." *Id.*

In *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229 (Fla. 2006), the Court reviewed a proposed amendment to define marriage. The differences between the summary and text were minimal. In upholding the amendment, the Court explained that the "ballot title and summary do not impermissibly employ terminology divergent from that contained in the text of the actual proposed amendment," and "the language submitted for placement on the ballot contains language that is essentially identical to that found in the text of the actual amendment." *Id.* at 1237. The Court analogized the summary in question to the summary upheld in *Advisory Opinion to the Attorney General re the Medical Liability Claimant's Compensation Amendment*, where "there was no divergence in terminology between the summary and amendment." *Id.* at 1238. In both cases, the summaries "came very close to reiterating the briefly worded amendment." *Id.* (quoting *Adv. Opinion to the Att'y Gen. re the Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d at 679) (marks omitted).

In *Advisory Opinion to Attorney General re Funding of Embryonic Stem Cell Research*, 959 So. 2d 195 (Fla. 2007), the Court approved a proposed amendment to fund embryonic stem

cell research. The Court explained that, while the summary omitted some details of the proposal, its "language . . . closely tracks that which is used in the amendment itself." *Id.* at 201. And, in *Advisory Opinion to the Attorney General Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 488, 491 (Fla. 2007), the Court approved a summary that "closely follow[ed] the language of the full initiative," and that portion of a second summary that "follow[ed] the proposed constitutional amendment very closely."

The text and summary of Amendment 7 are substantively identical. As these multiple Supreme Court precedents recognize, it is impossible to communicate the substance of a proposed amendment more clearly and unambiguously than by a verbatim recitation. Voters presented with the actual words of the proposed amendment will not be misled.

II. The Ballot Title and Summary Need Not Explain the Proposed Amendment's Effect (If Any) on Other Proposed Amendments.

Plaintiffs complain that, while the summary restates the text, it must *also* explain the possible effects of the proposed amendment on *other* proposed amendments—amendments the people might never adopt. The Florida Supreme Court recently dismissed the same argument.

In *Advisory Opinion to Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court approved for ballot placement a proposed amendment sponsored by Florida Hometown Democracy, Inc., requiring voter approval of all amendments to comprehensive land-use plans.

Before voters could adopt the amendment proposed by Florida Hometown Democracy, Inc., the Court approved a "competing proposed amendment" designed (as the preamble in the amendment text expressly stated) to "pre-empt or supersede" the earlier proposal. *Adv. Opinion to Att'y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth*

Mgmt. Plan Changes, 2 So. 3d 118, 119, 121 (Fla. 2008). The Court was unconcerned with the new proposal's effect upon—and even preemption of—the earlier but still pending proposal.

Two Justices dissented. They argued that the proposal's title and summary were misleading because they were "*completely silent* with regard to the fact that one of the chief purposes of this amendment is to vitiate or overrule the effects of" the earlier proposal. *Id.* at 130 (Lewis, J., dissenting) (emphasis in original). The dissenters were unable to "agree with the majority that a ballot summary that . . . is silent with regard to the fact that the proposed amendment has the potential to destroy rights that would be created by a separate constitutional amendment does not 'hide the ball' and is not misleading." *Id.* at 131 (Lewis, J., dissenting).

The majority was unpersuaded. In approving the "competing" amendment for ballot placement, three Justices[2] noted that the proposed amendment would not substantially affect unidentified provisions of the Florida Constitution. *Id.* at 120-21. The Justices took no specific notice of the dissent, but tellingly noted that the proposed amendment "will not conflict with or restrict any *existing* rights to subject local growth management plans to local referenda." *Id.* at 123 (emphasis added).[3] The silence of the ballot summary with respect to *potential* rights—rights that might or might not come into existence—did not invalidate the proposed amendment.

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[2] Justices Wells, Canady, and Polston joined in the plurality opinion, while Justice Anstead concurred in the result. One of three dissenters (Justice Quince) did not join in the argument made by Justices Lewis and Pariente that the ballot summary was defective for its failure to disclose the proposed amendment's effect on a second proposed amendment.

[3] Even without this clear indication that the Court rejected the dissent's position, that position would be deemed rejected. An argument addressed in dissent, though not explicitly rejected, is rejected implicitly. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 11 (Fla. 5th DCA 2009).

A. The Ballot Summary.

In light of *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes*, Plaintiff's position that the ballot summary must describe the proposed amendment's effect on other proposed amendments rings hollow. The Florida Supreme Court confronted this very question, and only two dissenting Justices concurred in the position urged by Plaintiffs here. There, the text of the proposed amendment even declared its purpose to preempt or supersede another proposed amendment, while its ballot summary remained silent.

In one narrow and discrete line of cases, the Florida Supreme Court has held that the "electorate must be advised of the effect a proposal has on *existing sections* of the constitution." *Adv. Opinion to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994); (emphasis in original); *accord Adv. Opinion to Att'y Gen. ex rel. Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 893-94 (Fla. 2000).[4]

No Florida court, however, has ever invalidated one proposed amendment because its ballot summary did not explain its effect on, or interaction with, another proposed amendment. Ballot summaries must explain proposed changes to *existing* constitutional law, but not *potential* constitutional law. A mere proposal to amend the Constitution has not attained the dignity of an existing constitutional provision formally adopted by the people. Furthermore, the electorate can

[4] Thus, in *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), the Court struck a proposed amendment to *conditionally* bar legislators from lobbying within two years after vacating office. Because the summary did not indicate that the proposal would supersede an *unconditional*, two-year ban already contained in the Constitution, it created the false impression that the proposed amendment enacted a new prohibition, while in fact it relaxed an existing prohibition. Similarly, in *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the Court disapproved a proposal to conform Florida's prohibition against "cruel or unusual punishment" to the federal prohibition against "cruel and unusual punishment," because the summary did not inform voters that the amendment would weaken the Florida Constitution's existing protection against excessive punishments.

easily compare and contrast the summaries of various proposals simultaneously presented on one ballot, but the voting booth permits no ready access to the Constitution itself. *Cf. Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008) (noting that accuracy is important because the "title and summary will be the only information that is available to voters" in the voting booth).

Plaintiffs' claim is illogical and would invite gamesmanship. Because proposed amendments have not acquired an established meaning, any attempt to determine the potential effect of one proposal on another is highly speculative. *See Adv. Opinion to the Att'y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d at 1238 (concluding that the interpretation of a proposed amendment is "better left to subsequent litigation"). Further, on Plaintiffs' hypothesis, multiple proposals that affect one another—even unintentionally—would all be liable to mutual invalidation. Amendments 5 and 6 would themselves be invalid for failure of their summaries to explain their interaction with Amendment 7. And the amendment process could even degenerate into constitutional gamesmanship, as competitors attempt to invalidate proposed amendments by proposing *other* amendments that would be affected by the earlier proposals. Wisely, the Florida Supreme Court closed the door on the argument urged by Plaintiffs.[5]

B. The Ballot Title.

Plaintiffs allege that the word "standards" in the ballot title is misleading. Amendment 7 contains "standards" on any rational understanding of the word. A "standard" is any "criterion for measuring acceptability." Black's Law Dictionary (8th ed. 2004). Amendment 7 states that the Legislature must comply with federal and state standards. It establishes standards relative to

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[5] Any argument founded on the subjective motivations of the Legislature is irrelevant, just as the political motivations of the proponents of Amendments 5 and 6 (and this lawsuit) are not legally relevant to the ballot-clarity issues surrounding those proposals. "The chief purpose of an amendment, which must be conveyed in a ballot summary, is distinct from its potential effect or the motivations of the proponents." *Adv. Opinion to the Att'y Gen. re the Med. Liability Claimant's Comp. Amendment*, 880 So. 2d 675, 680 (Fla. 2004) (Pariente, J., concurring).

racial and language minorities and communities of common interest (other than political parties). It then prescribes the standard under which courts will assess the Legislature's compliance with applicable standards. The amendment relates to standards—indeed, it does nothing else.[6]

Returning to the tired theory that a proposed amendment's effect on other proposed amendments must be disclosed, Plaintiffs argue that the word "standards" is misleading because Amendment 7 eviscerates the standards that would be added to the Constitution if Amendments 5 and 6 pass. Even if this were so, it would be legally irrelevant. As discussed in Section II.A, *supra*, neither the title nor summary must account for the proposed amendment's possible effect on other proposed amendments. *Adv. Opinion to Att'y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118 (Fla. 2008).

WHEREFORE, Proposed Intervening Defendant, the Florida House of Representatives, moves the Court to dismiss the Complaint for Declaratory and Injunctive Relief with prejudice.

Respectfully submitted,

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[6] The "ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Adv. Opinion to the Att'y Gen. re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002). In *Advisory Opinion to Attorney General re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996), the Attorney General argued that the title's reference to "constitutionally imposed" taxes might be construed to mean either (i) taxes imposed by the Constitution itself; or (ii) taxes constitutionally imposed by the Legislature. The Court rejected the argument. It concluded that the ballot title was clear when "read with common sense and in context with the summary," and cautioned that the "title cannot be read in isolation." *Id.* Likewise in this case, as in most, the brief ballot title derives clarity from the additional information provided in the summary.

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CERTIFICATE OF SERVICE

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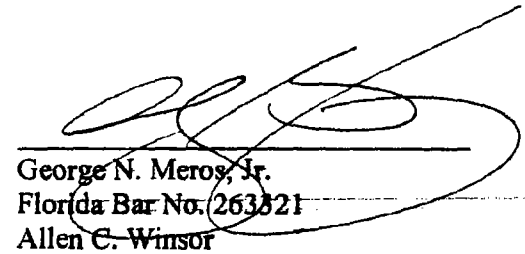

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 2010 CA 001803

FLORIDA STATE CONFERENCE OF NAACP BRANCHIES; ADORA OBI NWEZE; THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.; DEIRDRE MACNAB; ROBERT MILLIGAN; NATHANIEL P. REED; DEMOCRACIA AHORA; and JORGE MURSULI,

Plaintiffs,

vs.

DEPARTMENT OF STATE, an agency of the State of Florida; and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants.

MOTION TO INTERVENE

The Florida Senate moves, pursuant to Fla. R. Civ. P. 1.230, to intervene as a party defendant in the above-styled action, stating:

1. During the 2010 legislative session, the Florida Senate and the Florida House of Representatives passed House Joint Resolution 7231 which is the subject matter of this litigation.

2. Joint Resolution 7231 will appear as proposed Amendment 7 on the November general election ballot. Amendment 7, together with Amendments 5 and 6, set out standards by which the Legislature must reapportion after the completion of the 2010 census.

3. Fla. R. Civ. P. 1.230 provides that "[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention . . ." Rule 1.230 should be liberally construed. *National Wildlife Federation, Inc. v. Glisson*, 531 So. 2d 996 (Fla. 1st DCA 1988).

4. The Florida Senate has a direct interest in this litigation. The Senate passed the Joint Resolution to provide assistance and guidance in its reapportionment task and in doing so expressed the need for such an enactment. By way of this litigation, Plaintiffs request that this Court enjoin Defendant from placing Amendment 7 on the ballot and thereby depriving the Senate of the reapportionment tools it felt necessary to enact.

5. The Defendants named in the Complaint are nominal parties with no direct interest in this litigation. As stated in the Complaint, Defendants are responsible for the ministerial act of placing the proposed constitutional amendments on the ballot. As such, they are necessary parties to this litigation but unlike the Senate have no real interest in the outcome of this case.

WHEREFORE, the Florida Senate respectfully request the entry of an order granting this Motion to Intervene and designating the Florida Senate as a party defendant.

RESPECTFULLY SUBMITTED this 26th day of May, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to MARK HERRON, ESQUIRE, and ROBERT J. TELFER, III, ESQUIRE, of Messer, Caparello & Self, P.A., Post Office Box 15579, Tallahassee, Florida 32317-5579; and RONALD G. MEYER, ESQUIRE, JENNIFER S. BLOHM, ESQUIRE, and LYNN C. HEARN, ESQUIRE, of Meyer, Brooks, Demma and Blohm, P.A., Post Office Box 1547, Tallahassee, Florida 32302, this 26th day of May, 2010.

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

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening 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 Defendant, 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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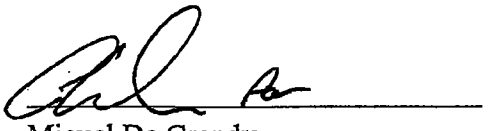

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Attorneys for Proposed Intervening Defendant, Florida House of Representatives

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

CASE NO.: 2010 CA 1803

vs.

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants.

NOTICE OF CASE MANAGEMENT CONFERENCE
NOTICE OF HEARING

Counsel for the Plaintiffs, after consultation with counsel for the Defendants and counsel for movant-Intervenors, have agreed that a Case Management Conference should be conducted for the purpose of simplifying the issues and considering other matters to bring about a prompt disposition of this action

The Case Management Conference will be held on Tuesday, June 8, 2010, commencing at 11:00 a.m., in the Chambers of the Honorable James O. Shelfer, Circuit Judge, Room 365-L, Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301. One (1) hour has been set aside by the Court.

During the course of the Case Management Conference, the Court will hear the motions of the Florida Senate and the Florida House of Representatives to intervene in this action. Plaintiffs do not object to the motions to intervene.

Respectfully submitted this 4th day of June 2010 by:

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Mark Herron

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

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Defendants.

_____/

ORDER GRANTING MOTIONS TO INTERVENE

This cause came before the Court on June 8, 2010, upon the respective Motions to Intervene filed by the Florida House of Representatives and the Florida Senate. Plaintiffs consent to the Motions. The Court, having reviewed the Motions and being otherwise fully advised, finds that the intervention of the Florida House of Representatives and the Florida Senate is appropriate. Accordingly, the Motions to Intervene filed by the Florida House of Representatives and the Florida Senate are **GRANTED**.

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

JAMES O. SHELFER
CIRCUIT JUDGE

Copies to Counsel of Record

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs. CASE NO.: 2010 CA 1803

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

_____/

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure and this Court's Scheduling Order, dated June 10, 2010, submit this Motion for Summary

Judgment and Incorporated Memorandum of Law. Plaintiffs seek a final judgment declaring that the ballot title and summary for Amendment 7 violate section 101.161(1), Florida Statutes, and removing the amendment from the ballot for the general election to be held November 2, 2010.

INTRODUCTION

Amendment 7 cannot lawfully be submitted to Florida voters because its ballot title and summary fail to advise the voters of the amendment's chief purpose and true effect; to the contrary, the ballot title and summary "hide the ball" and "fly under false colors." Despite its title purporting to establish "standards" for redistricting, the chief purpose and true effect of Amendment 7 is to free the Florida Legislature from any mandatory standards relating to drawing legislative and congressional district lines and to minimize the degree to which the redistricting plans must meet the standards in the Florida Constitution. Because the ballot title and summary fail to give voters notice of the true purpose and effect, the amendment must be stricken from the ballot.

BACKGROUND

Current Law

Currently, the only provision in the Florida Constitution imposing requirements upon how legislative districts are to be drawn provides that the legislature "shall apportion the state in accordance with the constitution of the state and of the United States into [specified numbers of senatorial and representative] districts of either contiguous, overlapping or identical territory." Art. III, § 16, Fla. Const. The Florida Constitution currently does not address how congressional districts are to be drawn.

Amendments 5 & 6

In January, 2010, two citizen initiatives related to redistricting were certified by the Department of State for placement on the 2010 general election ballot. (Exhibit 1) The proposed amendments are intended to curtail the practice of political gerrymandering and would add to the Florida Constitution specific, prioritized, mandatory standards for the legislature to follow in both legislative and congressional redistricting. The Department of State designated these initiatives as Amendment 5 (legislative redistricting standards) and Amendment 6 (congressional redistricting standards).

Amendment 5 would create Article III, Section 21, to read as follows:

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 of this subsection conflicts with the standards of 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 another within that subsection.

Amendment 6 would create Article III, Section 21, to read as follows:

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 of this subsection conflicts with the standards of 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 another within that subsection.

The Florida Supreme Court determined that Amendments 5 and 6 satisfied the single-subject requirement of Article XI, section 3 of the Florida Constitution, and that the ballot titles and summaries were accurate and not misleading as required by section 101.161(1), Florida Statutes. *Advisory Opinion to Attorny Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

Amendment 7

On the last day of the 2010 legislative session (April 30, 2010), the Legislature passed by the constitutionally mandated two-thirds vote of each house, HJR 7231, a joint resolution relating to redistricting. The Department of State designated HJR 7231 as Amendment 7. (Exhibit 2)

The ballot summary for Amendment 7 provides as follows:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING. - In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

The ballot summary is nearly identical to the full text of the amendment, with the addition of the ballot title and specific references to the Florida Constitution.

BALLOT SUMMARY REQUIREMENTS

Florida law imposes an "accuracy requirement" on all proposed constitutional amendments. *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000). This requirement flows from Article XI, section 5 of the Florida Constitution and is codified in Section 101.161(1), Florida Statutes:

> 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 . . . . [T]he substance of the amendment or other public measure shall be an explanatory statement . . . of the chief purpose of the measure.

Constitutional amendments proposed by joint resolution of the Florida Legislature must comply with this accuracy requirement. *Armstrong*, 773 So. 2d at 16 (accuracy

requirement "applies across-the-board to all constitutional amendments, including those proposed by the Legislature").

A ballot title and summary must provide a clear and unambiguous explanation of the measure's chief purpose. *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982). It must disclose substantial impacts to the Florida Constitution. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 803-804 (Fla. 1998). The ballot title and summary cannot be misleading, either expressly or by omission. *Askew*, 421 So. 2d at 155-56. A ballot title and summary cannot "fly under false colors" or "hide the ball" as to the amendment's true effect. *Armstrong*, 773 So. 2d at 16. Courts will strike proposed amendments from the ballot that are clearly and conclusively defective under these standards. *Askew*, 421 So. 2d at 154.

A ballot summary does not automatically satisfy the accuracy requirement by mirroring or closely tracking the full text of the amendment. The test is whether the title and summary "state in clear and unambiguous language the chief purpose of the measure" and "[advise the electorate] of the true meaning, and ramifications" of the amendment. *Askew*, 421 So. 2d at 154-55, 156. If the summary language placed on the ballot does not meet this standard, it is no defense that the summary is the same as the full text. *Wadhams v. Bd. of County Comm'rs*, 567 So. 2d 414, 416 (Fla. 1990) (invalidating amendment to county charter where full text of amendment was placed on ballot because the text did not inform the voter of the change to be accomplished); *see also Evans v. Bell*, 651 So. 2d 162, 166 (Fla. 1st DCA 1995) (invalidating amendment to city charter where full text was placed on ballot without a summary because "merely setting

forth the text of an amendment without explaining its legal effect on existing provisions can very likely be misleading, as it manifestly was in the instant case").

ARGUMENT

As detailed below, the ballot title and summary for Amendment 7 fail to give voters notice of the amendment's chief purpose which is to enable legislators to draw districts without compliance with any mandatory standards; to the contrary, the ballot title and summary affirmatively mislead the voters. Amendment 7 does not comply with the law and must be stricken.

I. AMENDMENT 7's CHIEF PURPOSE AND EFFECT

The chief purpose and effect of Amendment 7 is to eliminate mandatory application of any existing or potential requirements related to redistricting in the Florida Constitution and to reduce the required level of compliance with existing and potential constitutional requirements to the lowest level recognized in the law.

The Florida Constitution currently provides only minimal specifications regarding the legislative districts that the legislature is to redraw every ten years: the legislature "shall apportion the state . . . into . . . consecutively numbered . . . districts of either contiguous, overlapping, or identical territory." Art. III, § 16, Fla. Const. Amendment 7 would permit—but not require—the legislature to reference two additional factors when drawing legislative and congressional districts: one, "the ability of racial and language minorities to participate in the political process and elect candidates of their choice" is to be "*take[n] into consideration,*" and two, "communities of

common interest other than political parties *may be respected and promoted.*" (Emphasis added.) Although "*consideration*" of the specified interests of racial and language minorities is mandatory, action based upon these considerations is not. Therefore, it would be permissible under this provision for the legislature to consider the ability of a certain racial or language minority group to participate in the political process and elect a candidate of its choice but ultimately to decide, for any reason or for no reason at all, to decline to take these interests into account when drawing the districts. Treatment of "communities of common interest" is even more permissive: such communities "*may be* respected and promoted." (Emphasis added.) Thus under Amendment 7 it would be permissible for the legislature to decide, for any reason or for no reason at all, to decline to consider communities of common interest when establishing legislative and congressional districts.

Notwithstanding the permissive nature of these considerations, Amendment 7 allows them to be followed "without subordination to any other provision of Article III of the State Constitution." Thus, Amendment 7 effectively nullifies the existing constitutional requirement that districts be contiguous. Additionally, even though passage of Amendments 5 and 6 would result in additional mandatory redistricting standards, Amendment 7's "without subordination to" language would effectively nullify these new standards and allow them to be trumped by the permissive interests identified in the amendment. The result is there will be no mandatory standards, and the legislature will have unfettered discretion to draw districts motivated by purely political interests.

Further, whereas the Florida Constitution currently requires redistricting to be conducted "in accordance with the constitution of the state," Article III, Section 16, Florida Constitution, under Amendment 7 the state is to "balance and implement" the state constitutional standards, and its districts and plans are valid if such balancing and implementation is "rationally related" to the standards in the state constitution. Thus Amendment 7 would render valid all but "irrational" districts and plans, even when the plans violate requirements of the Florida Constitution that are by their own terms mandatory.

II. THE BALLOT TITLE AND SUMMARY DO NOT FAIRLY INFORM VOTERS OF THE CHIEF PURPOSE OF THE AMENDMENT OR OF MATERIAL CHANGES TO THE CONSTITUTION; TO THE CONTRARY, THE BALLOT TITLE AND SUMMARY MISLEAD VOTERS.

A. The ballot title and summary mislead the public by suggesting that the amendment creates "standards," when it does not.

The ballot title of Amendment 7 is "Standards for Legislature to Follow in Legislative and Congressional Redistricting." This title is misleading and flies under false colors in that it purports to provide "standards" for redistricting, when in fact Amendment 7 has the purpose and intended effect of eliminating all existing and future mandatory standards for legislative and congressional redistricting under the Florida Constitution. Far from creating standards, Amendment 7 will give the Legislature discretion to draw districts to suit its political interests without adhering to any mandatory requirements.

Although the amendment identifies two interests not in the current constitution, it sets no standard of compliance with these interests. The ability of racial and language minorities to participate in the political process and elect candidates of their choice need only be "take[n] into consideration," and "communities of common interest" (whatever they may be) "may be" (but don't have to be) "respected and promoted." These are not "standards." At best, they are suggestions. By leading the ballot summary with a title that states otherwise, Amendment 7 misleads voters. *See Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (statement that amendment would "establish" citizens rights in civil actions was misleading where amendment actually capped level of recoverable noneconomic damages); *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991) (ballot language especially defective if it "gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence").

B. The ballot summary does not inform voters that Amendment 7 would eliminate the current mandatory requirement that districts be contiguous.

The Florida Constitution requires the legislature to "apportion the state in accordance with the constitution of the state and of the United States into . . . districts of either contiguous, overlapping or identical territory." Art. III, § 16, Fla. Const. The Florida Supreme Court has interpreted "contiguous" in this section to apply only to the characteristics of any individual district, not to a district's relationship with any other districts. *Advisory Opinion to the Attorney Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 190-91 (Fla. 2009) (citing *In re Apportionment Law Appearing*

as Senate Joint Resolution No. 1E, 414 So. 2d 1040, 1045, 1050 (Fla. 1982)). Thus this section imposes a constitutional requirement that each individual district be contiguous within itself, while allowing an individual district to overlap with, or be identical to, another individual district. *Id.* at 191. The Court defines "contiguous" to mean "being in actual contact: touching along a boundary or at a point." *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1179 (Fla. 2003). A district fails to meet the contiguity requirement "when a part is isolated from the rest by the territory of another district or when the lands mutually touch only at a common corner or right angle." *Id.* at 1179 (Fla. 2003) (internal quotations and citations omitted).

By allowing consideration of the interests of racial and language minorities and communities of common interest "without subordination to" any other provision of Article III of the constitution, Amendment 7 allows these interests to trump the existing mandatory requirement in Article III, Section 16, that districts be contiguous. The result is that an individual district no longer must be contiguous or "in actual contact" with itself; part of a district can be isolated from the rest by the territory of another district. This could result in districts with disconnected, polka dot style segments wholly disconnected from each other. Thus the only existing mandatory standard in the Florida Constitution would be "subordinated" to wholly permissive considerations which carry no requirement that the legislature apply them when establishing legislative and congressional districts.

This effect of the amendment is not described in the ballot summary. The statement that certain interests may be considered "without subordination to any other

provision of Article III of the State Constitution" falls far short of a "clear and unambiguous" explanation that Amendment 7 will allow the constitutionally-mandated contiguity requirement to be ignored. Failure to give voters actual notice of such an important effect upon the state constitution calls for removal from the ballot. *Askew*, 421 So. 2d at 156 (ballot summary was defective because it failed to disclose that amendment would eliminate constitutional prohibition against lobbying for two years after leaving public office); *Armstrong*, 773 So. 2d at 18 (ballot summary defective for failing to disclose that main effect of amendment was to nullify the Cruel or Unusual Punishment Clause in the Florida Constitution); *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998) (ballot summary stating that amendment "[a]ffects powers of the Secretary of State under Article IV" was defective where amendment would grant secretary of state significant discretionary powers concerning elections he did not presently possess). As in these cases, the problem with Amendment 7 "lies not with what the summary says, but, rather, with what it does not say." *Askew*, 421 So. 2d at 156; *Term Limits Pledge*, 718 So. 2d at 804.

Although the Court is "wary of interfering with the public's right to vote" on a proposed amendment, it is "equally cautious of approving the validity of a ballot summary that is not clearly understandable." *Advisory Opinion to the Attorney Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

C. The ballot summary fails to inform voters of the meaning of the phrase "communities of common interest;" thus voters are left to guess at its meaning.

Amendment 7's ballot summary and text both provide that "communities of common interest other than political parties may be respected and promoted . . . without subordination to any other provision of Article III of the State Constitution." The phrase "communities of common interest" does not currently appear in the constitution and there is no definition or explanation of its meaning. This renders the amendment fatally ambiguous.

When a ballot summary uses a legal phrase, voters must be informed of its legal significance. *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 888, 889 (Fla. 2000) (striking proposed amendments relating to government discrimination because summary did not define "bona fide qualifications based on sex"). Otherwise, voters are left to guess at the term's meaning and will rely upon their own conceptions to do so. *Id.* A summary that does not define important terms is vague and ambiguous and thus violates Section 101.161, Florida Statutes. *Id; see also Advisory Opinion to the Attorney Gen. re People's Prop. Rights Amendments Providing Compensation for Restricting Real Prop. Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1309 (Fla. 1997) (striking ballot summary that failed to define "common law nuisance" because it did not inform the voter what restrictions were compensable under the amendment).

Without any definition of "communities of common interest," voters are left to guess at what this term means and will do so based upon their own conceptions and

experiences. Voters' perceptions of "communities of common interest" will range broadly, from immigrant communities to country club communities to communities of people with common physical characteristics. A common understanding of this term is especially important because Amendment 7 would allow such communities to be "respected and promoted" to the exclusion of every other redistricting standard in the constitution, both present and future. This means that respect and promotion of a community of common interest could permissibly be the sole justification for the shape of district. Failure to provide voters with a definition of this potentially dispositive term deprives them of fair notice of the effect of Amendment 7.

D. The ballot summary does not inform voters that Amendment 7 would permit redistricting plans to be scrutinized according to the lowest level of constitutional scrutiny recognized in the law.

Amendment 7 proposes to implement a new standard for judicial review of legislatively-apportioned districts and plans by declaring such districts and plans "valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution."

The "rationally related" language appears to refer to a constitutional standard applicable to certain claims under the Equal Protection Clause. However, because it is a legal term for which voters are given no definition, this provision suffers from the same fatal defect as the undefined phrase "communities of common interest." *See Advisory Opinion to the Attorney Gen. re Amendment to Bar Govt. from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 889 (Fla. 2000); *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, 1309.

In any event, a mere recitation of the legal definition of the "rational relationship" or "rational basis" constitutional test would be insufficient to satisfy the accuracy requirement in this context. The ballot summary must also reveal the manner in which the proposed test differs from the current constitutional standard. The Florida Supreme Court has not previously applied a rational basis test to evaluate a legislative redistricting plan; rather, it looks to whether the plan facially "violates" the Florida Constitution. *See In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002) (*In re HJR 1987*). Furthermore, the Court's determination of the facial validity of an apportionment plan is without prejudice to subsequent "as applied" challenges based upon specific factual situations. *In re Apportionment Law Appearing as Senate Joint Resolution Number 1305*, 263 So. 2d 797, 808 (Fla. 1972); *In re HJR 1987*, 817 So. 2d at 829-31. The ballot summary fails to inform the voters whether the new "rational relationship" standard of review applies only to the facial review or to the as-applied challenges as well.

The "rational relationship" standard is the lowest constitutional standard applied to equal protection claims and is appropriately applied where the challenged legislative action does not affect a fundamental right or a suspect class. *E.g., B.S. v. State,* 862 So. 2d 15, 18 (Fla. 2003). The query under this test is "whether it is conceivable that the . . . classification bears some rational relationship to a legitimate state purpose." *Fla. High School Activities Ass'n v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983).

Although it is not clear how an equal protection standard would be applied to specific constitutional standards, it is clear that the legislature intended to permit only the lowest level of constitutional review of its redistricting plans, and that the ballot summary does not inform voters of this chief purpose and effect. Accordingly, Amendment 7 must be stricken from the ballot.

E. The ballot summary does not inform voters that Amendment 7 would nullify Amendments 5 and 6, if approved by the voters.

Amendment 7 would not only eliminate the mandatory contiguity requirement currently in Article III, Section 16 of the Florida Constitution; it would also eliminate the additional standards that will be imposed by Amendments 5 and 6 (if passed) as well as any standards added in the future. Voters are not given fair notice of this purpose and effect.

Amendments 5 and 6, if approved by the voters, will add several mandatory standards to the congressional and legislative redistricting process. Under these amendments, legislative and congressional districts may not be drawn "with the intent to favor or disfavor a political party or incumbent" or "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." Furthermore, to the extent consistent with these mandatory standards and federal law, districts shall be "as nearly equal in population as is practicable; . . . compact ; and . . . where feasible, utilize existing political and geographical boundaries." (Exhibit 2.)

Amendments 5 and 6 were approved by the Florida Supreme Court on January 29, 2009, and received sufficient signatures for placement on the ballot nearly a year later, on January 22, 2010.[1] Thus not only was the Florida Legislature cognizant when it proposed HJR 7231 (which became Amendment 7) that Amendments 5 and 6 would be on the 2010 general election ballot, the legislative history demonstrates that Amendment 7 was drafted with the express purpose of eliminating the mandatory application of the standards contained in Amendments 5 and 6.[2] *See House of Representatives Staff Analysis for HJR 7231* at 17-19 (April 20, 2010) (noting that Amendments 5 and 6 would limit the legislature's discretion in drawing districts and that the consideration of the interests set forth in HJR 7231 would be "of at least equal dignity with the standards contained in Subsection (1) of [Amendments 5 and 6] and would be superior to the standards contained in Subsection (2)" of these amendments.) (Exhibit 3).

Failure to give voters notice of this purpose and effect renders the proposal misleading and contrary to section 101.161(1), Florida Statutes. *See Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), *rev. denied*, 523 So. 2d 577 (Fla. 1988). In *Kobrin*, a

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[1] *See* Fla. Dept. of State, Div. of Elections, 2010 Proposed Constitutional Amendments, http://election.dos.state.fl.us/initiatives/initiativelist.asp?year=2010&initstatus=ALL&MadeBallot=Y&ElecType=GEN (last visited June 9, 2010).

[2] Furthermore, to achieve ballot position immediately following Amendments 5 and 6, the legislature filed HJR 7231 with the Secretary of State ahead of other joint resolutions for proposed constitutional amendments passed earlier in the session. *Compare* HJR 7231, relating to redistricting (enrolled April 30, 2010, filed May 18, 2010, and designated as "Amendment 7") *with* SJR 2 relating to class size requirements (enrolled April 9, 2010, filed May 19, 2010, and designated as "Amendment 8") *and* HJR 37 relating to health care services (enrolled April 27, 2010, filed May 20, 2019, and designated as "Amendment 9"). *See* Fla. Dept. of State, Div. of Elections, 2010 Proposed Constitutional Amendments, http://election.dos.state.fl.us/initiatives/initiativelist.asp?year=2010&initstatus=ALL&MadeBallot=Y&ElecType=GEN (last visited June 9, 2010).

race to elect members to a county fire and rescue district was scheduled to be on the ballot. *Id.* The county then proposed to place a proposition in the ballot that would eliminate the district entirely, notwithstanding the election of district members to take place in the same election. *Id.* The court struck the proposition because it made no specific reference to the "totally inconsistent, but simultaneously conducted election, nor even to the elimination of the board itself." *Id.* The court concluded that "the apparent studied omission of such a reference and the consequent and just as obvious failure to dispel the confusion which must inevitably arise from this set of circumstances renders the language as framed fatally defective." *Id.*

The same is true here: Amendment 7's failure to notify voters that it would effectively nullify the mandatory elements of Amendments 5 and 6 renders it fatally defective. Amendments 5 and 6 achieved ballot position on January 22, 2010. The legislature knew these amendments would be on the 2010 general election ballot, and intentionally drafted Amendment 7 to interfere with their effectiveness. Under these circumstances, the ballot summary must inform voters that a chief purpose and effect of the amendment is to eviscerate the mandatory standards contained in Amendments 5 and 6.[3]

[3] Plaintiffs anticipate Defendants will contend this argument is foreclosed by *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 (2008). But that advisory opinion comes nowhere close to standing for the proposition that a ballot summary for a legislatively-proposed constitutional amendment in an upcoming general election need never reveal its intended effect on a citizens initiative that has been placed on the ballot in the same election.

The inaccuracy of Amendment 7 is compounded by the fact that its ballot title mimics the titles of Amendments 5 and 6 in an apparent effort to confuse voters. Voters will see the following ballot titles:

Amendment 5:	STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING
Amendment 6	STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING
Amendment 7	STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING

A voter would reasonably understand each of these amendments to impose standards for the legislature to follow when conducting the redistricting process under the Florida Constitution. But this is not the case; although Amendments 5 and 6 propose express, mandatory standards, Amendment 7 makes ambiguous suggestions regarding interests that may be considered and allows these suggestions to trump both current and future state constitutional standards. By placing Amendment 7 immediately after Amendment 5 and 6 and making its title indistinguishable from the titles of these amendments, Amendment 7 falsely entices voters into believing that all three amendments will impose standards for the legislature to follow in redistricting. This is not the case, and voters deserve to know the truth.

Worse yet, Amendment 7 uses language very similar to Amendments 5 and 6 relating to racial and language minorities, which will cause voters to think all three amendments benefit these groups when in fact Amendment 7 wholly eliminates the

protections that would be given to racial and language minorities by Amendments 5 and 6. Amendments 5 and 6 state unequivocally 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 added.) This statement is unambiguous; it creates a mandatory standard which must be complied with in order for the legislature's redistricting plan to be valid. Amendment 7, on the other hand, states:

> The state shall *take into consideration* the ability of racial and language minorities to participate in the political process and elect candidates of their choice . . . without subordination to any other provision of Article III of the State Constitution.

(Emphasis added.)

The language in Amendment 7 relating to racial and language minorities is appealingly similar to that of Amendments 5 and 6, yet its effect is fatal to Amendments 5 and 6. Under Amendment 7 the legislature need only "take into consideration" the ability of racial and language minorities to participate in the political process and elect candidates of their choice. Once considered, the legislature is free to decline to take these interests into account when drawing districts. And because this "consideration" is superior to every other standard in the constitution, including those contained in Amendments 5 and 6, the legislature would remain free to draw a redistricting plan 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." Thus even though voters will believe they are

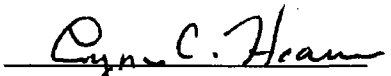
furthering the interests of racial and language minorities by voting "yes" for Amendments 5, 6, and 7, the reality is Amendment 7 destroys the very protections voters intended to create with their "yes" vote on Amendments 5 and 6. The ballot summary does not disclose this. Where a ballot summary is not written clearly enough for even the more educated voters to understand its chief purpose, the amendment must be stricken. *Smith v. Amer. Airlines*, 606 So. 2d 618, 621 (Fla. 1992).

CONCLUSION

"The voters of Florida deserve nothing less than clarity when faced with the decision of whether to amend our state constitution . . . ." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008). Because the ballot title and summary of Amendment 7 clearly and conclusively fail to adequately inform the voter of the chief purposes and effects of the amendment, and are affirmatively misleading, placement of Amendment 7 on the ballot would violate Article XI, Section 5, Florida Constitution, and Section 101.161(1), Florida Statutes.

Plaintiffs respectfully request that this Court enter final judgment declaring that Amendment 7 violates section 101.161(1), Florida Statutes, and prohibiting Defendants from placing Amendment 7 on the ballot, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by first class mail and electronic mail on this 11th day of June, 2010, to:

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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 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

Exhibit 1

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

ENROLLED
HJR 7231, Engrossed 1

2010 Legislature

House Joint Resolution

A joint resolution proposing the creation of Section 20 of Article III of the State Constitution to provide standards for establishing legislative and congressional district boundaries.

Be It Resolved by the Legislature of the State of Florida:

That the following creation of Section 20 of Article III of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE III

LEGISLATURE

SECTION 20. Standards for establishing legislative and congressional district boundaries.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

Exhibit 2

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE III, SECTION 20

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 7231 PCB SPCSEP 10-01 Method and Standards for Legislative and Congressional Redistricting and Reapportionment
SPONSOR(S): Select Policy Council on Strategic & Economic Planning; Hukill
TIED BILLS: **IDEN./SIM. BILLS:** SJR 2288

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Select Policy Council on Strategic & Economic Planning	11 Y, 5 N	Kelly	Bahl
1)	Rules & Calendar Council	12 Y, 6 N	Hassell	Birtman
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the United States Census, to apportion state legislative districts. The United States Constitution requires the reapportionment of the United States House of Representatives every ten years, which includes the distribution of the House's 435 seats between the states and the equalization of population between districts within each state.

Two citizen initiatives, related to redistricting, have secured placement on the 2010 General Election ballot. Amendments 5 and 6, promoted by FairDistrictsFlorida.org, would add standards for state legislative and congressional redistricting to the Florida Constitution. The amendments do not contain definitions for the proposed new standards, which may have the effect of restricting the range of redistricting choices available under the federal Voting Rights Act.

The proposed joint resolution would create a new Section 20 to Article III of the Florida Constitution. The new section would add new state constitutional standards for establishing legislative and congressional district boundaries. The proposed standards in the joint resolution would complement the proposed standards in Amendment 5 and 6 and provide for a balancing of the various constitutional redistricting standards.

Specifically, the proposed joint resolution would require that the state apply federal requirements in its balancing and implementing of the redistricting standards in the state constitution. Both the equal opportunity of racial and language minorities to participate in the political process and communities of interest are established as standards that are on equal footing as any other standard in the state constitution. Therefore minority access districts can be considered, and communities of interest can be respected and promoted, as matters of legislative discretion. Finally, the proposed joint resolution asserts that districts and plans are valid if the standards in the state constitution were balanced and implemented rationally and consistent with federal law.

The proposed joint resolution would require approval by 60% of the voting electorate in Florida's 2010 General Election.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The law governing the reapportionment and redistricting[1] of congressional and state legislative districts implicates the United States Constitution, the Florida Constitution, and federal statutes.

Florida Constitution

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the Census is conducted, to apportion the State into senatorial districts and representative districts. According to Article III, Section 16(a), Florida Constitution, senatorial districts must be:

1. Between 30 and 40 in numbers;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

Representative districts must be:

1. Between 80 and 120 in number;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

The joint resolution is not subject to gubernatorial approval. If the Legislature fails to make the apportionment, the Governor must reconvene the Legislature in a special apportionment session not to exceed 30 days. If the Legislature fails to adopt an apportionment plan at its regular or special apportionment session, the Attorney General must petition the Florida Supreme Court to make the apportionment.[2]

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[1] The concepts of reapportionment and redistricting are distinct. Reapportionment refers to the process of proportionally reassigning a given number of seats in a legislative body, i.e. 435 seats in the U.S. House of Representatives, to established districts, i.e. amongst the states, based on an established formula. Redistricting refers to the process of changing the boundaries of any given legislative district.

[2] Article III, Section 16(b), Florida Constitution.

Within 15 days after the Legislature adopts the joint resolution, the Attorney General must petition the Supreme Court to review the apportionment plan.[3] Judicial review is limited to:

1. Whether the plan satisfies the "one person, one vote" mandate of equal protection; and

2. Whether the districts are of contiguous, overlapping or identical territory.[4]

If the Court invalidates the apportionment plan, the Governor must reconvene the Legislature in an extraordinary apportionment session, not to exceed 15 days.[5] Within 15 days after the adjournment of the extraordinary apportionment session, the Attorney General must petition the Supreme Court to review the apportionment plan adopted by the Legislature or, if no plan was adopted, report the fact to the Court.[6] If the Court invalidates the apportionment plan adopted by the Legislature at the extraordinary apportionment session, or if the Legislature fails to adopt a plan, the Court must draft the redistricting plan.[7]

The Florida Constitution is silent with respect to congressional redistricting. Article 1 Section 4 of the United States Constitution grants to each state legislature the exclusive authority to apportion seats designated to that state by providing the legislative bodies with the authority to determine the times place and manner of holding elections for senators and representatives. Consistent therewith, Florida has adopted its congressional apportionment plans by legislation subject to gubernatorial approval.[8] Congressional apportionment plans are not subject to automatic review by the Florida Supreme Court.

U.S. Constitution

The United States Constitution requires the reapportionment of the House of Representatives every ten years to distribute each of the House of Representatives' 435 seats between the states and to equalize population between districts within each state.

Article I, Section 4 of the United States Constitution provides that "[t]he Time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." *See also* U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."). The U.S. Supreme Court has recognized that this language delegates to state legislatures the exclusive authority to create congressional districts. *See e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) ("[T]he Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress . . . .").

In addition to state specific requirements to redistrict, states are obligated to redistrict based on the principle commonly referred to as "one-person, one-vote."[9] In *Reynolds*, the United States Supreme Court held that the Fourteenth Amendment required that seats in state legislature be reapportioned on a population basis. The Supreme Court concluded:

> ..."the basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies...The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[10]

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[3] Article III, Section 16(c), Florida Constitution.
[4] *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1178 (Fla. 2003).
[5] Article III, Section 16(d), Florida Constitution.
[6] Article III, Section 16(e), Florida Constitution.
[7] Article III, Section 16(f), Florida Constitution.
[8] *See generally* Section 8.0001, et seq., Florida Statutes (2007).
[9] *Baker v. Carr*, 369 U.S. 186 (1962).
[10] *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

The Court went on to conclude that decennial reapportionment was a rational approach to readjust legislative representation to take into consideration population shifts and growth.[11]

In addition to requiring states to redistrict, the principle of one-person, one-vote, has come to generally stand for the proposition that each person's vote should count as much as anyone else's vote.

The requirement that each district be equal in population applies differently to congressional districts than to state legislative districts. The populations of congressional districts must achieve absolute mathematical equality, with no *de minimis* exception.[12] Limited population variances are permitted if they are "unavoidable despite a good faith effort" or if a valid "justification is shown."[13]

In practice, congressional districting has strictly adhered to the requirement of exact mathematical equality. In *Kirkpatrick v. Preisler* the Court rejected several justifications for violating this principle, including "a desire to avoid fragmenting either political subdivisions or areas with distinct economic and social interests, considerations of practical politics, and even an asserted preference for geographically compact districts."[14]

For state legislative districts, the courts have permitted a greater population deviation amongst districts. The populations of state legislative districts must be "substantially equal."[15] Substantial equality of population has come to generally mean that a legislative plan will not be held to violate the Equal Protection Clause if the difference between the smallest and largest district is less than ten percent.[16] Nevertheless, any significant deviation (even within the 10 percent overall deviation margin) must be "based on legitimate considerations incident to the effectuation of a rational state policy,"[17] including "the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts, or the recognition of natural or historical boundary lines."[18]

However, states should not interpret this 10 percent standard to be a safe haven.[19] Additionally, nothing in the U.S. Constitution or case law prevents States from imposing stricter standards for population equality.[20]

Compared to other states, Florida's population range ranked 13th of 49 (2.79%) for its State House districts, ranked 3rd of 50 (0.03%) for it State Senate districts, and achieved statistical perfection (0.00%) for its Congressional districts.[21]

The Voting Rights Act

Congress passed the Voting Rights Act (VRA) in 1965. The VRA protects the right to vote as guaranteed by the 15th Amendment to the United States Constitution. In addition, the VRA enforces the protections of the 14th Amendment to the United States Constitution by providing "minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination."[22]

The relevant components of the Act are contained in Section 2 and Section 5. Section 2 applies to all jurisdictions, while Section 5 applies only to covered jurisdictions (states, counties, or other jurisdictions within a state).[23] The two sections, and any analysis related to each, are considered independently of

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[11] *Reynolds v. Sims*, 377 U.S. 584 (1964).
[12] *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).
[13] *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).
[14] *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).
[15] *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).
[16] *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407, 418 (1977).
[17] *Reynolds*, 377 U.S. at 579.
[18] *Swann v. Adams*, 385 U.S. 440, 444 (1967).
[19] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 36.
[20] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 39.
[21] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 47-48.
[22] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 51.
[23] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 51.

each other, and therefore a matter considered under by one section may be treated differently by the other section.

The phraseology for types of minority districts can be confusing and often times unintentionally misspoken. It is important to understand that each phrase can have significantly different implications for the courts, depending on the nature of a legal complaint.

A "majority-minority district" is a district in which the majority of the voting-age population (VAP) of the district is African American, Hispanic, Asian or Native-American. A "minority access district" is a district in which the dominant minority community is less than a majority of the VAP, but is still large enough to elect a candidate of its choice through either crossover votes from majority voters or a coalition with another minority community.

"Minority access" though is more jargon than meaningful in a legal context. There are two types of districts that fall under the definition. A "crossover district" is a minority-access district in which the dominant minority community is less than a majority of the VAP, but is still large enough that a crossover of majority voters is adequate enough to provide that minority community with the opportunity to elect a candidate of its choice. A "coalitional district" is a minority-access district in which two or more minority groups, which individually comprise less than a majority of the VAP, can form a coalition to elect their preferred candidate of choice. A distinction is sometimes made between the two in case law. For example, the legislative discretion asserted in *Bartlett v. Strickland*—as discussed later in this document—is meant for crossover districts, not for coalitional districts.

Lastly, the courts have recognized that an "influence district" is a district in which a minority community is not sufficiently large enough to form a coalition or meaningfully solicit crossover votes and thereby elect a candidate of its choice, but is able to effect election outcomes and therefore elect a candidate who would be mindful of the minority community's needs.

Section 2 of the Voting Rights Act

The most common challenge to congressional and state legislative districts arises under Section 2 of the Voting Rights Act. Section 2 provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State...in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[24] The purpose of Section 2 is to ensure that minority voters have an equal opportunity along with other members of the electorate to influence the political process and elect representatives of their choice.[25]

In general, Section 2 challenges have been brought against districting schemes that either disperse members of minority communities into districts where they constitute an ineffective minority—known as "cracking"[26]—or which concentrate minority voters into districts where they constitute excessive majorities—known as "packing"—thus diminishing minority influence in neighboring districts. In prior decades, it was also common that Section 2 challenges would be brought against multimember districts, in which "the voting strength of a minority group can be lessened by placing it in a larger multimember or at-large district where the majority can elect a number of its preferred candidates and the minority group cannot elect any of its preferred candidates."[27]

The Supreme Court set forth the criteria of a vote-dilution claim in *Thornburg v. Gingles*.[28] A plaintiff must show:

1. A minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;

[24] 42 U.S.C. Section 1973(a) (2006).
[25] 42 U.S.C. Section 1973(b); *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993).
[26] Also frequently referred to as "fracturing."
[27] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 54.
[28] 478 U.S. 30 (1986).

2. The minority group must be politically cohesive; and

3. White voters must vote sufficiently as a bloc to enable them usually to defeat the candidate preferred by the minority group.

The three "*Gingles* factors" are necessary, but not sufficient, to show a violation of Section 2.[29] To determine whether minority voters have been denied an equal opportunity to influence the political process and elect representatives of their choice, a court must examine the totality of the circumstances.[30]

This analysis requires consideration of the so-called "Senate factors," which assess historical patterns of discrimination and the success, or lack thereof, of minorities in participating in campaigns and being elected to office. [31] Generally, these "Senate factors" were born in an attempt to distance Section 2 claims from standards that would otherwise require plaintiffs to prove "intent," which Congress viewed as an additional and largely excessive burden of proof, because "It diverts the judicial injury from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."[32]

States are obligated to balance the existence and creation of districts that provide electoral opportunities for minorities with the reasonable availability of such opportunities and other traditional redistricting principles. For example, in *Johnson v. De Grandy*, the Court decided that while states are not obligated to maximize the number of minority districts, states are also not given safe harbor if they achieve proportionality between the minority population(s) of the state and the number of minority districts.[33] Rather, the Court considers the totality of the circumstances. In "examining the totality of the circumstances, the Court found that, since Hispanics and Blacks could elect representatives of their choice in proportion to their share of the voting age population and since there was no other evidence of either minority group having less opportunity than other members of the electorate to participate in the political process, there was no violation of Section 2."[34]

In *League of United Latin American Citizens (LULAC) v. Perry*, the Court elaborated on the first *Gingles* precondition. "Although for a racial gerrymandering claim the focus should be on compactness in the district's shape, for the first *Gingles* prong in a Section 2 claim the focus should be on the compactness of the minority group."[35]

In *Shaw v. Reno*, the Court found that "state legislation that expressly distinguishes among citizens on account of race - whether it contains an explicit distinction or is "unexplainable on grounds other than race,"...must be narrowly tailored to further a compelling governmental interest. Redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny, regardless of the motivations underlying its adoption."[36]

Later, in *Shaw v. Hunt*, the Court found that the State of North Carolina made race the predominant consideration for redistricting, such that other race-neutral districting principles were subordinated, but the state failed to meet the strict scrutiny[37] test. The Court found that the district in question, "as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding liability under Section(s) 2 of the Act," and "could not remedy any potential Section(s) 2 violation, since the minority group must be shown to be "geographically compact" to establish Section(s) 2 liability."[38] Likewise, in *Bush v. Vera*,

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[29] *Johnson v. De Grandy*, 512 U.S. 997, 1011-1012 (1994).
[30] 42 U.S.C. Section 1973(b); *Thornburg vs. Gingles*, 478 U.S. 46 (1986).
[31] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 57.
[32] Senate Report Number 417, 97th Congress, Session 2 (1982).
[33] *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).
[34] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 61-62.
[35] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 62.
[36] *Shaw v. Reno*, 509 U.S. 630 (1993).
[37] "Strict scrutiny" is the most rigorous standard used in judicial review by courts that are reviewing federal law. Strict scrutiny is part of a hierarchy of standards courts employ to weigh an asserted government interest against a constitutional right or principle that conflicts with the manner in which the interest is being pursued.
[38] *Shaw v. Hunt*, 517 U.S. 899 (1996).

the Supreme Court supported the strict scrutiny approach, ruling against a Texas redistricting plan included highly irregularly shaped districts that were significantly more sensitive to racial data, and lacked any semblance to pre-existing race-neutral districts.[39]

Lastly, In *Bartlett v. Strickland*, the Supreme Court provided a "bright line" distinction between majority-minority districts and other minority "crossover" or "influence districts. The Court "concluded that §2 does not require state officials to draw election district lines to allow a racial minority that would make up less than 50 percent of the voting-age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice."[40] However, the Court made clear that States had the flexibility to implement crossover districts as a method of compliance with the Voting Rights Act, where no other prohibition exists. In the opinion of the Court, Justice Kennedy stated as follows:

> "Much like §5, §2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts...When we address the mandate of §2, however, we must note it is not concerned with maximizing minority voting strength...and, as a statutory matter, §2 does not mandate creating or preserving crossover districts. Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns...States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if §2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters."[41]

Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act of 1965, as amended, is an independent mandate separate and distinct from the requirements of Section 2. "The intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to effectively disenfranchise Black voters."[42]

Section 5 requires states that comprise or include "covered jurisdictions" to obtain federal preclearance of any new enactment of or amendment to a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."[43] This includes districting plans.

Five Florida counties—Collier, Hardee, Hendry, Hillsborough, and Monroe—have been designated as covered jurisdictions.[44]

Preclearance may be secured either by initiating a declaratory judgment action in the District Court for the District of Columbia or, as is the case in almost all instances, submitting the new enactment or amendment to the United States Attorney General (United States Department of Justice).[45] Preclearance must be granted if the qualification, prerequisite, standard, practice, or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[46]

The purpose of Section 5 is to "insure that no voting procedure changes would be made that would lead to a retrogression[47] in the position of racial minorities with respect to their effective exercise of the electoral franchise."[48] Whether a districting plan is retrogressive in effect requires an examination of

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[39] *Bush v. Vera*, 517 U.S. 952 (1996),
[40] *Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).
[41] *Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).
[42] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 78.
[43] 42 U.S.C. Section 1973c.
[44] Some states were covered in their entirety. In other states only certain counties were covered.
[45] 42 U.S.C. Section 1973c.
[46] 42 U.S.C. Section 1973c
[47] A decrease in the absolute number of representatives which a minority group has a fair chance to elect.
[48] *Beer v. United States*, 425 U.S. 130, 141 (1976).

"the entire statewide plan as a whole."[49] "And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan."[50]

The Department of Justice requires that submissions for preclearance include numerous quantitative and qualitative pieces of data to satisfy the Section 5 review. "The Department of Justice, through the U.S. Attorney General, has 60 days in which to interpose an objection to a preclearance submission. The Department of Justice can request additional information within the period of review and following receipt of the additional information, the Department of Justice has an additional 60 days to review the additional information. A change, either approved or not objected to, can be implemented by the submitting jurisdiction. Without preclearance, proposed changes are not legally enforceable and cannot be implemented."[51]

Majority-Minority and Minority Access Districts in Florida

Based on the 2002 data and subsequent state legislative and congressional maps:

- The Florida House of Representatives includes 24 majority-minority districts[52] and 10 minority access districts.[53]
- The Florida Senate includes 5 majority-minority districts[54] and 7 minority access districts.[55]
- Florida's Congressional districts include 4 majority-minority districts[56] and 2 minority access districts.[57]

Legal challenges to the Florida's 1992 state legislative and congressional redistricting plans resulted in a significant increase in elected representation for both African-Americans and Hispanics. Table 1 illustrates those increases. Prior to 1992, the Florida Congressional Delegation included only one minority member, Congresswoman Ileana Ros-Lehtinen. Since those legal challenges, the Florida Legislature created maps that balance the establishment and maintenance of majority-minority districts and minority access districts, with other legally mandated redistricting standards, and other traditional redistricting principles.

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[49] *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).
[50] *Georgia v. Ashcroft*, 539 U.S. 484 (2003).
[51] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 96.
[52] House Districts 8, 14-15, 39, 55, 59, 84, 93-94, 102-104, 107-117 and 119.
[53] House Districts 23, 27, 49, 58, 92, 101, 105-106, 118 and 120
[54] Senate Districts 29, 33, 36, 38 and 40.
[55] Senate Districts 1, 6, 18-19, 34-35 and 39.
[56] Congressional Districts 17-18, 21 and 25.
[57] Congressional Districts 3 and 23.

Table 1. Number of Elected African-American and Hispanic Members in the Florida Legislature and Florida Congressional Delegation

	Congress African-American	*Congress Hispanic*	*Senate African-American*	*Senate Hispanic*	*House African-American*	*House Hispanic*
Before 1982	*0*	*0*	*0*	*0*	*5*	*0*
1982 to 1992	*0*	*0-1*	*2*	*0-3*	*10-12*	*3-7*
1992 to 2002	*3*	*2*	*5*	*3*	*14-16*	*9-11*
2002 to Present	*3*	*3*	*7*	*3*	*17-20*	*11-15*

Prior to the legal challenges in the 1990s, the Florida Legislature established districts that generally included minority populations of less than 30 percent of the total population of the districts. For example, Table 2 illustrates that the 1982 plan for the Florida House of Representatives included 27 districts in which African-Americans comprised 20 percent of more of the total population. In the majority of those districts, 15 of 27, African-Americans represented 20 to 29 percent of the total population. None of the 15 districts elected an African-American to the Florida House of Representatives.

Table 2. 1982 House Plan
Only Districts with Greater Than 20% African-American Population[58]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	2, 12, 15, 22, 23, 25, 29, 42, 78, 81, 92, 94, 103, 118, 119	15	0
30% - 39%	8, 9	2	1
40% - 49%	55, 83, 91	3	2
50% - 59%	17, 40, 63, 108	4	4
60% - 69%	16, 106,	2	2
70% - 79%	107	1	1
TOTAL			10

Subsequent to the legal challenges in the 1990s, the Florida Legislature established districts that were compliant with provisions of federal law, and did not fracture or dilute minority voting strength. As Table 1 and Table 3 illustrate, the resulting districting plan, which allowed minority communities an equal opportunity to participate and elect its candidates of choice, doubled the number of African-American representatives in the Florida House of Representatives.

[58] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison.

Table 3. 2002 House Plan
Only Districts with Greater Than 20% African-American Population[59]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	10, 27, 36, 86	4	1
30% - 39%	3, 23, 92, 105	4	3
40% - 49%	118	1	1
50% - 59%	8, 14, 15, 55, 59, 84, 93, 94, 104, 108	10	10
60% - 69%	39, 109	2	2
70% - 79%	103	1	1
TOTAL			18

Equal Protection – Racial Gerrymandering

Racial gerrymandering is "the deliberate and arbitrary distortion of district boundaries...for (racial) purposes."[60] Racial gerrymandering claims are justiciable under equal protection.[61] In the wake of *Shaw v. Reno*, the Court rendered several opinions that attempted to harmonize the balance between "competing constitutional guarantees that: 1) no state shall purposefully discriminate against any individual on the basis of race; and 2) members of a minority group shall be free from discrimination in the electoral process."[62]

To make a *prima facie* showing of impermissible racial gerrymandering, the burden rests with the plaintiff to "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[63] Thus, the "plaintiff must prove that the legislature subordinated traditional race-neutral districting principles...to racial considerations."[64] Traditional districting principles include "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests,"[65] and even incumbency protection.[66] If the plaintiff meets this burden, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest,"[67] i.e. "narrowly tailored" to achieve that singular compelling state interest.

While compliance with federal antidiscrimination laws—specifically, the Voting Rights Act—is a "very strong interest," it is not in all cases a compelling interest sufficient to overcome strict scrutiny.[68] With respect to Section 2, traditional districting principles may be subordinated to race, and strict scrutiny will be satisfied, where (i) the state has a "strong basis in evidence" for concluding that a majority-minority district is "reasonably necessary" to comply with Section 2; (ii) the race-based districting "substantially addresses" the Section 2 violation; and (iii) the district does "not subordinate traditional districting

[59] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison
[60] *Shaw v. Reno*, 509 U.S. 630, 640 (1993)
[61] *Shaw v. Reno*, 509 U.S. 630, 642 (1993)
[62] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 72.
[63] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[64] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[65] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[66] *Bush v. Vera*, 517 U.S. 952, 964 (1996).
[67] *Miller v. Johnson*, 515 U.S. 920 (1995).
[68] *Shaw v. Reno*, 509 U.S. at 653-654 (1993).

principles to race substantially more than is 'reasonably necessary' to avoid" the Section 2 violation.[69] The Court has held that compliance with Section 5 is not a compelling interest where race-based districting is not "reasonably necessary" under a "correct reading" of the Voting Rights Act.[70]

The Use of Statistical Evidence

Political vote histories are essential tools to ensure that new districts comply with the Voting Rights Act.[71] For example, the use of racial and political data is critical for a court's consideration of the compelling interests that may be involved in a racial gerrymander. In *Bush v. Vera*, the Court stated:

> "The use of sophisticated technology and detailed information in the drawing of majority minority districts is no more objectionable than it is in the drawing of majority majority districts. But ... the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria..."

As noted previously, when the U.S. Department of Justice conducts a Section 5 preclearance review it requires that a submitting authority provide political data supporting a plan.[72] Registration and performance data must be used under Section 2 of the Voting Rights Act to determine whether geographically compact minority groups are politically cohesive, and also to determine whether the majority population votes as a block to defeat the minority's candidate of choice. That data is equally essential to prove the validity of any electoral changes under Section 5 of the Voting Rights Act.[73]

If Florida were to attempt to craft districts in areas of significant minority population without such data (or in any of the five Section 5 counties), the districts would be legally suspect and would probably invite litigation.

Traditional Redistricting Principles

There are seven general policies or goals that have been most frequently recognized by the courts as "traditional districting principles." If a state uses these principles as the primary basis for creating a district, with race factoring in simply as a consideration, then the redistricting plan will not be subject to strict scrutiny. If race is a predominant factor, particularly for a district that is oddly shaped, then the state will be subject to strict scrutiny and therefore must show that the district was narrowly tailored to serve a compelling state interest.[74]

Since 1993, the seven most common judicially recognized "traditional districting principles" are:[75]

- Compactness;
- Contiguity;
- Preservation of counties and other political subdivisions;
- Preservation of communities of interest;
- Preservation of cores of prior districts;
- Protection of incumbents; and
- Compliance with Section 2 of the Voting Rights Act

The meaning of "compactness" can vary significantly, depending on the type of redistricting-related analysis in which the court is involved.[76] Primarily, courts have used compactness to assess whether

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[69] *Bush v. Vera*, 517 U.S. 977-979 (1996).
[70] *Miller v. Johnson*, 515 U.S. 921 (1995).
[71] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[72] 28 U.S.C. § 51.27(q) & 51.28(a)(1).
[73] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[74] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 105-114.
[75] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 105-106.
[76] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 109-112.

some form of racial or political gerrymandering exists. That said, it is important to remember that gerrymandering could conversely be the necessary component of a district or plan that attempts to eliminate the dilution of the minority vote. Therefore, compactness is not by itself a dispositive factor.

"There are three generally accepted statistical measures of compactness, as noted in *Karcher*: the total perimeter test, the Reock test, and the Schwartzberg test."[77] However, courts have also found that "compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further it speaks to relationships that are facilitated by shared interests and by membership in a political community including a county or a city."[78] In a Voting Rights context, compactness "refers to the compactness of the minority population, not to the compactness of the contest district"[79] as a whole.

Overall, compactness is a functional factor in reviewing plans and districts. Albeit, compactness is not regarded as a trumping provision against the carrying out of other rationally formed districting decisions. [80] Additionally, interpretations of compactness require considerations of more than just geography. For example, the "interpretation of the *Gingles* compactness requirement has been termed 'cultural compactness' by some, because it suggests more than geographical compactness."[81] In a vote dilution context, "While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries."[82]

Moreover, it should be noted that in the context of geography, states use a number of geographical units to define the contours of their districting maps. The most common form of geography utilized is Census Blocks, followed by Voter Tabulation Districts. Several states also utilize designations such as Counties, Towns, Political Subdivisions, Precincts, and Wards. For the current districts maps, Florida used Counties, Census Tracts, Block Groups and Census Blocks, more geographical criteria than any other state.[83]

Along the lines of other race-neutral traditional redistricting principles, in *Wise v. Lipscomb*, the Court noted "that preserving the cores of prior districts" was a legitimate goal in redistricting.[84] In *Georgia v. Ashcroft*, the United States Supreme Court recognized that the positions of legislative power, influence, and leadership achieved by representatives elected from majority-minority districts are one valid measure of the minority population's opportunity to participate in the political process. [85] The Court noted that, "Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda..."[86]

Equal Protection – Partisan Gerrymandering

"Partisan (or political) gerrymandering is the drawing of electoral district lines in a manner that intentionally discriminates against a political party. Courts recognize that politics is an inherent part of any redistricting plan. The question is how much partisan gerrymandering is too much, so that it denies a citizen the equal protection of the laws in violation of the 14th Amendment."[87]

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[77] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 109.
[78] *DeWitt v. Wilson*, 856 Federal Supplement 1409, 1414 (E.D. California 1994).
[79] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 26 (2006).
[80] *Karcher v. Daggett*, 462 U.S. 725, 756 (1983).
[81] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 111.
[82] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 27 (2006).
[83] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 49.
[84] *Wise v. Lipscomb*, 437 U.S. 535 (1978).
[85] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[86] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[87] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 115.

In *Davis v. Bandemer*, the Court held that an allegation of partisan gerrymandering presents a justiciable equal protection claim.[88] It declined to articulate a standard, but a plurality concluded that a violation "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[89]

Eighteen years later, no congressional or state legislative redistricting plan had been invalidated on partisan gerrymandering grounds. Thus, in *Vieth vs. Jubelirer*, four Justices explained that "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged" and concluded as a result that such claims "are nonjusticiable and...*Bandemer* was wrongly decided."[90]

Furthermore, the *Vieth* Court rejected a standard that is "based on discerning 'fairness' from a totality of the circumstances...as unmanageable in that the plurality could conceive of "fair" districting plans that would include all of the alleged flaws inherent in the" very plan that the Court was rejecting in *Vieth*.[91]

More recently, in *League of United Latin American Citizens v. Perry*, the Court declined to "revisit the justiciability holding" but found that the plaintiffs failed to provide a "workable test for judging partisan gerrymanders." However, the case did not foreclose the possibility that such a test might be discovered.[92] Furthermore, *Davis v. Bandemer* does still offer helpful guidance of the Court's opinion on the subject, noting that:

> "The mere fact that an apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutional. A group's electoral power is not unconstitutionally diminished by the fact that an apportionment scheme makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, as here, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionally underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[93]

FairDistrictsFlorida.org

Two citizen initiatives, related to redistricting, have already secured placement on the 2010 General Election ballot. Amendments 5 and 6, often referred to as the FairDistrictsFlorida.org amendments, seek to add standards for state legislative and congressional redistricting to the Florida Constitution. Most of the standards contained within Amendments 5 and 6 are not currently referenced in the Florida Constitution, although there is some overlap with the current requirements in Article III, Section 16 for legislative apportionment. Amendments 5 and 6 would create sections 20 and 21 in Article III of the Florida Constitution.

"The FairDistrictsFlorida.org is the official sponsor of this proposed constitutional amendment. FairDistrictsFlorida.org is a registered political committee 'working to reform the way the state draws Legislative and Congressional district lines by establishing constitutionally mandated fairness standards.'"[94] "The sponsor proposes that the amendment will establish fairness standards for use in creating legislative district boundaries; protecting minority voting rights; prohibiting district lines that

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[88] *Davis v. Bandemer*, 478 U.S. 109 (1986).
[89] *Davis v. Bandemer*, 478 U.S. 132 (1986).
[90] *Vieth vs. Jubelirer*, 541 U.S. 267, 281 (2004)
[91] *Vieth vs. Jubelirer*, 541 U.S. 267, 291 (2004)
[92] *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414 (2006).
[93] *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).
[94] *Complete Financial Information Sheet.* Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.

favor or disfavor any incumbent or political party; requiring that districts are compact; and requiring that existing political and geographical boundaries be used."

While Amendment 5 relates to state legislative redistricting, and Amendment 6 relates to congressional redistricting, the standards contained within both are substantively identical. In subsection (1) of the amendments, there is a prohibition against any apportionment plan or individual district from being drawn with the intent to favor or disfavor a political party or incumbent. The amendments prohibit any district from being drawn with the intent or result of denying racial and language minorities the equal opportunity to participate in the political process or diminishing their ability to elect candidates of their choice.

According to Amendments 5 and 6, districts shall consist of contiguous territory. This requirement is similar to the current language in Article III, Section 16(a) of the Florida Constitution. However, Amendments 5 and 6 do not make any reference to the additional language in Article III, Section 16(a), regarding districts overlapping or being identical in territory (*often referred to as "multi-member districts"*).

In subsection (2), Amendments 5 and 6 further require that districts shall be compact, districts shall be as nearly equal in population as practicable, and districts shall utilize existing political and geographic boundaries where feasible. However, compliance with these standards is not required if they are in conflict with the standards in subsection (1) or federal law.

In subsection (3), Amendments 5 and 6 clarify that the standards within each subsection are not to be read as though they were establishing any priority of one standard over another within each subsection.

The ballot summary for Amendment 5 [and Amendment 6] states:

> "Legislative [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."

On January 29, 2009, the Florida Supreme Court approved the ballot summaries for the 2010 General Election ballot.[95] The Court wrote, "We conclude that 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)."

In that ruling the Court noted, "The proposed amendments do not alter the functions of the judiciary. They merely change the standard for 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."

Furthermore, the Court concluded:

- "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 that the Legislature will comply with the law at the time an apportionment plan is adopted."

- "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."

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[95] *Advisory Opinion to Attorney General re Standards for Establish Legislative District Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

- "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."

The financial impact statement on the ballot will read, "The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence."[96]

The FairDistrictsFlorida.org amendments do increase the number of state constitutional requirements for the Court to consider, and the amendments increase the number of standards by which an apportionment plan can be challenged. According to the Financial Impact Estimating Conference, "the proposed amendment(s) may result in increased costs based on the following":

- "The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards. Since the amendment(s) increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan." Such legal costs are indeterminate.

- "The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions."

- "The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. They assume that litigation will increase. The amount of increased litigation is unknown and the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate."

- "The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments."

- "Any additional cost to the Legislature to develop the plans is indeterminate."

On November 6, 2009, Congresspersons Corrine Brown (FL-3) and Mario Diaz-Balart (FL-25) sent correspondence to the House Select Policy Council on Strategic & Economic Planning, asking questions about the impact of the initiative petitions proposed by FairDistrictsFlorida.Org. In this correspondence, the congresspersons raised several significant legal issues, stating:

> "These questions seek an explanation for the Amendments, which in our initial review appear internally contradictory and to violate several constitutional and statutory provisions, especially the protections of the 14th and 15th Amendments to the United States Constitution and the Voting Rights Act, as amended. We are particularly concerned that passage of these amendments would result – however unintentionally – in a significant dilution of the voting rights of the African-Americans and Hispanics as well as significant loss in a number of representatives elected from those communities."[97]

The letter asked 18 questions including whether the several standards in the petitions can be reconciled and applied practically and legally in the Redistricting process. The 18 questions can be generally summarized into four separate areas of analysis:

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[96] *Financial Impact Statement.* Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.

[97] *Letter from Congresswoman Corrine Brown and Congressman Mario Diaz-Balart to Chairman Dean Cannon.* November 6, 2009.

- Impact of the U.S. Supreme Court case of *Bartlett v. Strickland*, and how the terms of these initiatives may affect the ability and discretion of the Legislature to create minority access or "crossover" districts;[98]

- Questions raised regarding the relationship between incumbency protection and minority voting rights;[99]

- Use of political data which is necessary to comply with federal law, and how the use of this data itself may give rise to litigation;[100] and

- The legality or constitutionality of the petitions.[101]

Overall, the congresspersons asserted that FairDistrictsFlorida.org's proposed standards lack definition, lacked a clear method for reconciling inconsistencies, and could dilute minority access seats.

Effects of the Proposed Joint Resolution

The proposed joint resolution would create a new Section 20 to Article III of the Florida Constitution. The new section would add state constitutional standards for establishing legislative and congressional district boundaries. The ballot summary is identical to the actual proposed joint resolution, and reads as follows:

> "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of interest may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law."

District Boundary Lines: The proposed joint resolution would add new state constitutional standards for state legislative redistricting. Furthermore, the proposed joint resolution would create state constitutional standards for congressional districting. The proposed joint resolution does not apply the already existing state standards for state legislative redistricting to the process of congressional redistricting.

State and Federal Redistricting Requirements: The state shall apply federal requirements for state legislative and congressional redistricting, and balance the standards for state legislative and congressional redistricting contained in the Florida Constitution. In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Racial and Language Minorities: In state legislative and congressional redistricting, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that enable the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

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[98] *Id.*.
[99] *Id.*
[100] *Id.*
[101] *Id.*

Currently, only federal law addresses the ability of racial and language minorities to participate in the political process and elect candidates of their choice. In effect, the proposed joint resolution maintains the discretion of the state to establish and maintain minority districts, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to establish and maintain minority districts.

Communities of Interest: In state legislative and congressional redistricting, the state may respect and promote communities of interest, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that respect and promote communities of interest, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

Currently, only case law addresses communities of interest. In effect, the proposed joint resolution maintains the discretion of the state to respect and promote communities of interest, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to create districts that respect and promote communities of interest.

Communities of interest in Florida's current state legislative and congressional district maps include, but are not limited to: cultural communities, agricultural communities, economic development communities, coastal communities, environmental communities, Caribbean-American communities, urban communities, rural communities, historically underserved communities, minority communities, ethnic communities, retirement communities, etc.

Validity of Districts and Plans: State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Racial and Language Minorities

Concerns have been expressed that the FairDistrictsFlorida.org initiatives do not articulate their relationship to the federal Voting Rights Act, and therefore could result in a regression of minority representation.[102] Additionally, while federal law regarding redistricting has become relatively settled in the past decade, there is a lack of precedent to guide both the Courts and the Legislature in complying with the arrangement of standards in FairDistrictsFlorida.org's initiatives. Depending on how it is that the FairDistrictsFlorida.org initiatives are interpreted, the results could range from a reduction in minority access seats to equal protection concerns.

For example, *Bartlett v. Strickland*, was decided March 9, 2009, after the FairDistrictsFlorida.org initiative petitions were crafted, and after the Florida Supreme Court completed its review of the petitions' ballot summary in January, 2009. In *Bartlett v. Strickland*, the State of North Carolina had a provision in its Constitution prohibiting dividing counties when drawing the State's legislative districts, which was known as the "Whole-County Provision." The "Whole-County Provision" in the North Carolina Constitution is somewhat analogous to the provisions in FairDistrictsFlorida.org's initiatives requiring compact districts, and use of existing political and geographical boundaries.

The U.S. Supreme Court held in favor of the "Whole-County Provision," and ruled against the creation of a minority "crossover" district that had violated the provision. According to the Court, Section 2 of the VRA allows States to choose their own methods of compliance with the VRA, and compliance may include the creation of crossover districts, where no other prohibition exists in the State's law. The only districts that could violate such a prohibition in State law would be majority-minority districts.

[102] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.

Subsection (2) of the FairDistrictsFlorida.org initiatives does preempt the requirements (compactness, contiguity, equal population, political and geographical boundary lines) in that subsection if they are in conflict with federal law or the requirements (incumbency, political parties, and equal participation for minorities) in Subsection (1). However, if federal law is interpreted to be discretionary in this matter, and the state law is interpreted to reflect federal law, the other standards in the initiatives could never be in conflict with a purely discretionary matter. Therefore, if FairDistrictsFlorida.org's provisions were interpreted to be a recapitulation of the federal Voting Rights Act, and if the Voting Rights Act does not compel the creation of minority access seats, where the minority group is less than 50 percent of the voting age population, the FairDistrictsFlorida.org's initiatives may create prohibitions to the Legislature's discretion in maintaining and creating minority access seats.

Conversely, if FairDistrictsFlorida.org's initiatives were interpreted to exceed the VRA, and allow for the creation of irregularly shaped districts under Section 1 only for racial factors, the such districts may run afoul of the Equal Protection Clause of the United States Constitution.

Additionally, one other possible view of the initiatives is that they would create a Section 5 standard with statewide application. If the initiatives create a permanent Section 5 standard which would apply to every individual district drawn in all 67 Florida counties, regardless of evidence of prior or present discrimination, there would be significant legal concerns. Federal case law holds that race-based provisions of law must be of last resort, remedial in nature, and narrowly tailored. Therefore, as written, the initiatives invite equal protection challenges and furthermore a volume of litigation which no state has experienced.

In public statements that addressed the relationship between the initiatives and the VRA, FairDistrictsFlorida.org provided three perspectives on the language.

1. "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."[103]

2. "Compactness and utilization of local boundaries only come into play to the extent that they can without conflicting with the protection of minority voters." [104] "If it is a race district, if it is a racial or language minority district it is going to be a very different calculus than it is going to be if it is a -- if it is a non minority district." [105] "So first you have to have the minority districts drawn. Once you have those districts drawn you go ahead and you make the other districts to the extent that you can, compact and utilizing existing boundaries."[106]

3. "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. That is not presently part of the Voting Rights Act, except to the extent that it might be somewhat similar to what is in Section V."[107]

The proposed joint resolution addresses these concerns in two different ways. First, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. Reflecting back on *Bartlett v. Strickland*, this proposed joint resolution prohibits other standards in Article III from being read as a prohibition against the creation of crossover districts.

Second, the proposed joint resolution requires that districts and plans be drawn in a manner that balanced and implements the standards in the Florida Constitution in a rational manner and in a

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[103] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[104] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment*. Meeting Transcript. February 11, 2010.
[105] *Id.*
[106] *Id.*
[107] *Id.*

manner that is consistent with federal law. In effect, the Legislature is required the rationally balance the plain reading of Florida Constitution with the U.S. Constitution and the federal Voting Rights Act.

As it pertains to the ability of racial and language minorities to participate in the political process and elect candidates of their choice, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Communities of Interest

Communities of interest are a well-recognized traditional redistricting principle in case law. Florida's current district maps include a number of districts that encompass communities with common priorities and interest, including agricultural communities of interest, coastal communities of interest, economic communities of interest, etc.

However, without explicit instruction, a compactness standard would not necessarily be interpreted to incorporate such communities. For instance, low income communities and historically underserved communities are frequently isolated in urban centers, and thereby not always immediately connected to communities with similar interest. Yet such communities may be well served if aligned together, in the same district, as this would increase the likelihood that the elected representatives of the district were mindful of the economic and historical needs of the district.[108] Furthermore, maintaining communities of interest can help maintain the core of existing districts, and thereby reduce voter confusion.[109]

The FairDistrictsFlorida.org initiatives are silent in regards to "traditional redistricting principles." Because they have no mention in the language of the initiatives, aesthetic issues such as compactness and maintaining political boundaries would likely supersede the interest of maintaining communities of interest. Therefore, under the plain reading of the language of the initiatives, legislative discretion to respect communities of interest may be eliminated, or at least constrained. For example, Florida's 25th Congressional District contains one of the most significant environmental communities of interest in the world, yet otherwise the boundaries of the district would be difficult to maintain under a purely mathematical or geometrical application of a compactness standard.

The proposed joint resolution addresses these concerns in a similar manner to those regarding minority districts. First, communities of interest are expressed in the language as a standard that may be respected and promoted. Second, communities of interest may not be subordinated to any other provision in Article III of the Florida Constitution, giving communities of interest an equal footing with other state redistricting standards.

As it pertains to communities of interest, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Balancing

The Florida Supreme Court presumes the constitutionality of legislative action. "[E]very reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act."[110] Also, in the specific context of determining compliance with redistricting standards in the state constitution, the court has held that the legislature's enactment is presumed constitutional. Specifically:

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[108] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.

[109] *Id.*

[110] *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 805-06 (Fla. 1972).

> "Also in contention in various comments and at oral argument is the presumptive validity of the joint resolution of apportionment and the amount of deference this Court gives to the joint resolution of apportionment. The opponents generally argue that the Legislature's joint resolution of apportionment is not presumptively valid like a statute because the joint resolution is not subject to gubernatorial veto. Our 1972 opinion addressed this issue. *See In re Apportionment Law*, 263 So. 2d at 805-6. To clarify this issue, consistent with the discussion in the 1972 case, we hold that the joint resolution of apportionment identified in article III, section 16, Florida Constitution, upon passage is presumptively valid."[111]

However, without providing much instruction, the intent provisions in the FairDistrictsFlorida.org initiatives—regarding incumbency, political parties, and equal participation for minorities—could be read to create standards for challenging or reviewing redistricting plans or districts. Proponents of FairDistrictsFlorida.org suggested that the intent standards were meant to make discoverable and scrutinize the use of political data in redistricting.[112] Furthermore, the intent standards are divined by the public and private statements of the legislators themselves. [113]

Conversely, Ellen Freidin provided some insight that would suggest FairDistrictsFlorida.org's initiatives were not intending to excessively increase public review and judicial scrutiny if districts and plans were established through reasonable processes that accounted for all the applicable standards. According to Ellen Freidin, "The answer is that in order to draw these maps you must have not only data, but you must have census information. You must have voting data, you must have census information, you must have geographical information and you have also got to have a balancing by a legislative body of all of the criteria." [114] "Well, I think that the very principal of districting and the way it has always been done in the past is to do it after public comment and with collegial collaboration among the members."[115]

The proposed joint resolution incorporates these statements and the historical position of the Florida Supreme Court in two statements. First, "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution." In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Second, "Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law. State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Requirements for Joint Resolutions by the Florida Legislature

- According to Article XI, Section 1, of the Florida Constitution, "Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature."

- According to Article XI, Section 5(a), of the Florida Constitution, "A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of revision commission,

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[111] *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002)
[112] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[113] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment.* Meeting Transcript. February 11, 2010.
[114] *Id.*
[115] *Id.*

constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records..."

- According to Article XI, Section 5(d), of the Florida Constitution, "Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published."

- According to Article XI, Section 5(e), of the Florida Constitution, "Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

- According to Section 101.161(1), Florida Statutes, "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." The substance of the amendment shall be embodied in the ballot summary of the measure. Ballot language for amendments proposed by joint resolution is not restricted by the 75 word standard that applies to other forms of constitutional amendments. In addition, joint resolutions are not required to provide a separate financial impact statement. "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."

- According to Section 101.161(2), Florida Statutes, the Department of State is responsible for furnishing each proposed constitutional amendment with a place on the ballot and corresponding number. "The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on."

B. SECTION DIRECTORY:

Not Applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Non-recurring FY 2010-2011

   The Department of State, Division of Elections would estimates the cost of this proposed amendment to the state constitution, to be considered on the November 2, 2010 General Election ballot, to be approximately $9,089.28 in non-recurring General Revenue for publication costs.

   Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election. Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is $94.68 per word. The word count for the proposed joint resolution is 96 words X $94.68 = $9,089.28.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Supervisors of Election would be required to include the ballot summary proposed amendment on printed ballots.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The joint resolution does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, the amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or at a special election held for that purpose. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

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

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, et al.,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Defendants.
_____/

SCHEDULING ORDER

THIS CAUSE came before the Court on June 8, 2010, pursuant to the Notice of Case Management Conference dated June 4, 2010. Counsel for all Parties and the Intervenors (hereafter jointly referred to as "Parties") were present and participated.

Based upon the Court's review of the file in these proceedings, the discussions and representations of counsel, and being otherwise fully advised, the Court finds and orders as follows:

1. The Parties have agreed to waive the filing of answers or further pleadings and instead to proceed to resolution of the case pursuant to the issues framed by their respective motions for summary judgment. The Court will enter a final judgment resolving the case based upon such motions;

2. The Parties have agreed that there are no factual disputes requiring resolution in this matter and therefore no discovery is needed and the parties will not submit affidavits with their motions for summary judgment. Further, the Parties have agreed to waive any timelines associated with the filing and consideration of their motions for summary judgment;

3. The Parties have agreed to the following schedule for submitting their motions for summary judgment and supporting memoranda:

June 11, 2010	Plaintiffs shall file their motion for summary judgment and supporting memorandum;
June 25, 2010	Defendants/Intervenors shall file their motion for summary judgment and response to Plaintiffs' motion for summary judgment and supporting memorandum;
June 30, 2010	Plaintiffs shall file their response to Defendants/Intervenors' motion for summary judgment; and
July 2, 2010	Defendants/Intervenors may file a reply to the Plaintiffs' response.

4. The final hearing in this matter shall take place beginning **at 9:00 a.m. on Thursday, July 8, 2010,** in Courtroom 3G of the Leon County Courthouse, 301 South Monroe Street, Tallahassee, Florida 32301. Three (3) hours have been set aside by the Court for the final hearing in this cause.

DONE and **ORDERED** this 10th day of June, 2010, at Leon County, Florida

JAMES O. SHELFER
Circuit Judge

Copies furnished Counsel of Record

FILE COPY

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

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DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Intervening Defendants.
_____/

NOTICE OF FILING AMENDED CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Notice of Appearance of Co-Counsel, filed June 7, 2010, has been furnished as indicated below this 18th day of June, 2010, to the following:

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by U.S. Mail this 18th 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

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES,

Proposed Intervening 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 Defendant, Florida House of Representatives.

CERTIFICATE OF SERVICE

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FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Defendants.

_____/

GOVERNOR CHARLIE CRIST'S UNOPPOSED MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Governor Charlie Crist, by and through undersigned counsel, respectfully asks for leave to appear as amicus curiae and file the attached Memorandum of Law as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment. The Governor has requested and obtained the consent of all parties.

1. The subject of this litigation involves three redistricting measures, proposed constitutional amendments 5, 6, and 7, set to appear on the November 2 ballot. The purpose of the attached memorandum of law is to assist the court in this matter of great importance.

2. The particular issue to be addressed is whether the placement of Amendment 7 on the November election ballot violates article XI, section 5 of the Florida Constitution and 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."

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. The Department of State's ability to faithfully execute the laws at issue has been compromised by virtue of being named one of the Defendants in this case.

4. The Governor seeks to appear as amicus curiae on behalf of the Plaintiffs in light of the paramount importance of the laws at issue to the integrity of our constitutional democracy. When the people of Florida are presented with an opportunity to amend the Florida Constitution, the most fundamental document of our state government, it is essential that they are given all the information necessary to make an informed choice.

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

RESPECTFULLY SUBMITTED this 22nd day of June, 2010.

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GOVERNOR CHARLIE CRIST'S MEMORANDUM OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Governor Charlie Crist, by and through undersigned counsel, hereby submits the following memorandum of law in support of Plaintiffs' motion for summary judgment. For the reasons stated in the Plaintiffs' motion for summary judgment and memorandum of law, and for the reasons stated herein, Governor Crist respectfully urges that this Court declare that the amendment proposed by House Joint Resolution ("HJR") 7231, hereinafter "Amendment 7," violates article XI, section 5 of the Florida Constitution and section 101.161(1), Florida Statutes, and order Defendants Dawn K. Roberts and the Department of State to remove Amendment 7 from the November 2, 2010, general election ballot.

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. In this case, the Governor seeks to ensure faithful execution of 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." Because the Department of State and the Secretary of State have been named as defendants due to their ministerial role in the ballot preparation process, their capacity for faithful execution has been compromised.

Section 101.161(1) arises from the mandate in article XI of the Florida Constitution that all amendments be submitted to the people for a vote. Art. XI §§ 1, 3, 5, Fla. Const. Both the statute and the provisions of article XI are intuitively central to the integrity of our constitutional democracy. When the people of Florida are presented with a chance to amend the Florida Constitution, the most fundamental document of our state government, it is absolutely essential that they are presented with the information they need, in terms they can understand. Anything short of that deprives them of the opportunity to make an informed choice. Without fair notice of the effect of their vote, the people's participation in self-government would be a nullity.

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. Amendment 7, passed by joint resolution of the legislature pursuant to article XI, section 1 of the Florida Constitution, relates to both legislative and congressional districts.

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. The ballot title and summary for Amendment 5 is as follows:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING – 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

[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).

population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

The ballot title and summary for Amendment 6 is almost identical to Amendment 5 except the word "Legislative" in the title and summary is replaced with "Congressional."

The ballot title and summary for Amendment 7 is as follows:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING – In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

The text of Amendment 7 itself is materially identical to the ballot summary.

Argument

When a "constitutional amendment . . . is submitted to the vote of the people," article XI, section 5 of the Florida Constitution and section 101.161, Florida Statutes, require that the ballot contain a summary conveying "the substance of a proposed amendment . . . in clear and unambiguous language " explaining "the chief purpose of the measure." § 101.161, Fla. Stat. (providing also for a ballot title "by which the measure is commonly referred to or spoken of"). This "truth in packaging" law serves an indispensible purpose in the democratic process: ensuring that the people of Florida have notice of what they must decide when they are asked whether or not to amend their constitution. *Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000) (requiring that "the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot") (quoting *Askew v. Firestone*, 421 So. 2d 151, 154–55 (1982)).

These requirements are of critical importance in Florida, because Florida is a "constitutional democracy in which sovereignty resides in the people." *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956). "It is their Constitution that [is being construed]." *Id.* Ballot clarity and integrity are essential to ensure that "each voter casts a ballot based on the *full* truth," not a partial one. *Armstrong*, 773 So. 2d at 7 (emphasis in original). When the language used in the title and summary is misleading, the law requires that the proposed amendment be removed from the ballot. *Florida Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008). While the court must generally act with caution before removing an amendment from the vote of the people, *Askew*, 421 So. 2d at 156, a court should order the removal of a proposed amendment from the ballot if it is not "accurately represented," because voter approval for such a measure is "a nullity." *Slough*, 992 So. 2d at 146 (Fla. 2008) (quoting *Armstrong*, 773 So. 2d at 12).

To satisfy the statutory and constitutional requirements, a ballot title and summary of a proposed amendment must (1) "in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment," and (2) employ language that does not "mislead[] the public." *Slough*, 992 So. 2d at 147. Amendment 7's ballot title and summary fails these requirements for a series of reasons. First, the title and summary misleadingly represent that the amendment's purpose is to provide standards for the legislature to follow in redistricting. In reality, Amendment 7 does the opposite, eliminating binding standards by relegating them to mere aspirational guidelines that the legislature *may* consider in redistricting. By failing to convey the "true effect of the amendment," the title and summary "hide the ball" and "fly under false colors," contravening the letter and spirit of article XI, section 5, and section 101.161, Florida Statutes. *See Slough*, 992 So. 2d at 147.

Amendment 7 would transform the mandatory requirements currently existing in article III, section 16(a), relating to contiguity[2] into aspirational guidelines. Yet the ballot title and summary are conspicuously devoid of any mention of its effect. Similarly, and without saying it does so, Amendment 7 changes the standards set forth in Amendments 5 and 6 from mandatory to aspirational.

Amendment 7, rather than obligating the legislature to follow existing standards, would make them optional, notwithstanding the fact that the title and summary ironically represent the amendment as *establishing* "standards." The reality is quite different. Amendment 7 provides that the legislature "may" respect and promote "communities of common interest" and must only "consider[]" minority participation in the political process. The legislature would be permitted to "balance[]" criteria that, but for Amendment 7, would constitute binding standards. Given that Amendment 7's purpose is the dilution of any directive recognizable as a *standard*, a title that purports to *provide standards* for redistricting is patently misleading.

The summary states that a redistricting plan is valid if the "balancing and implementation of the standards is rationally related to the standards contained in this constitution and is consistent with federal law." The only "standards" that are to be balanced and implemented are the "standards" in the state constitution; thus Amendment 7 requires little more than that the standards are rationally related to themselves. This tautological turn of phrase underscores how the title and summary obfuscate Amendment 7's one purpose: to render no particular requirement, guideline, or standard binding on the legislature in redistricting. The Florida Supreme Court has decried this type of "wordsmithing" that masks the true effect of a proposed

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[2] *See, e.g., In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1179 (Fla. 2003) (applying the constitution's mandatory contiguity requirement).

amendment, recognizing that deceptive wording can be used to "to enhance the chance of passage." *Slough*, 992 So. 2d at 149.

To avoid removal from the ballot, the sponsor of the amendment should instead put forth a ballot title and summary that is "straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous." *Id.* That is what article VI, section 5, and section 101.161, for obvious purposes, require.

The failure to define the phrase "community of common interests" in the ballot summary is another fatal flaw of Amendment 7. A ballot title and summary is "misleading" and "must be stricken from the ballot" where its undefined terms place its meaning "within the subjective understanding of each voter to interpret." *Advisory Op. to the Att'y Gen. re People's Prop. Rights Amendments Providing Comp. for Restricting Real Prop. Use may Cover Multiple Subjects*, 699 So. 2d 1304, 1308–1309 (Fla. 1997) (concluding that the definitions of terms "owner," "in fairness," "loss in fair market value," and "common law nuisance" in ballot summary were necessary for clarity), *overruled on other grounds in Advisory Op. to the Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968 (Fla. 2009). There is no plain meaning of the phrase "community of common interests," a term that is not frequently used by the common voter.

Voters cannot be adequately informed of the legal ramifications for voting for Amendment 7 when "community of common interests" is not defined. *See Advisory Op. to the Att'y Gen. to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 898–99 (Fla. 2000) (holding that lack of definitions for an "otherwise unlawful classification" or "bona fide qualification based on sex" did not fairly inform voters of full effect

of proposed amendment). The people will be unable to know the full effect of Amendment 7 when they are left to ascribe any meaning to the phrase.

Intervenors rely on an unfounded interpretation of the ballot clarity requirement: that a title and summary must state the amendment's chief purpose *unless that purpose is to weaken or subvert the effect of other amendments on the ballot*—in this case, Amendments 5 and 6. Neither the constitution, nor the statute, nor case law carves out such an exception to the unqualified requirement that, *whatever* the proposed amendment's chief purpose may be, *that purpose must be clearly stated.* Accepting Intervenors' argument would give future legislatures carte blanche to sabotage any proposed amendment by nullifying its effect with another amendment, all the while obfuscating this purpose with impunity.

The *raison d'être* of the title and summary requirement is to ensure that the people of Florida have clear knowledge of what they are being asked to choose. That interest in informed democratic participation is subverted no matter what kind of ball an unclear or misleading title or summary hides. Whether it hides a proposed amendment's effect on existing constitutional provisions, or whether it hides a proposed amendment's effect on other amendments on the ballot, such a title or summary "hide[s] the ball." *Slough*, 992 So. 2d at 147. In so doing, it fails to "assure that the electorate is advised of the true meaning, and ramifications, of an amendment," thus violating article XI, section 5, and section 101.161. *Askew*, 421 So.2d at 156.

This argument also simply ignores the reality that Amendment 7 would undermine the standards *currently required* by article III, section 16. Plaintiffs are entitled to relief for that reason alone. But even if that were not the case, the Court should reject out of hand any contention that the ballot and summary cannot be invalid for concealing a conflict with the provisions of Amendments 5 and 6 because those proposed amendments do not presently *exist* in

the constitution, i.e., that the deception in the title and summary is not a legally cognizable deception. Furthermore, if all three of the amendments[3] are approved by voters, then Amendment 7 would indeed affect "existing" constitutional provisions—those that would come into existence when Amendments 5 and 6 are added simultaneously to the addition of Amendment 7. *See Advisory Op. to Att'y Gen. re Florida Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 123 (Fla. 2008). It is by no means clear that the Florida Supreme Court intended a stilted use of the words "existing provision" that would treat as inconsequential intentional deception aimed at changing the legal effect of other proposed amendments appearing on the same ballot.

Proposed amendments that directly contradict each other might, by virtue of their language and simultaneous existence on the ballot, fairly apprise voters of the choice being presented. *See, e.g., Citizens for Term Limits & Accountability, Inc. v. Lyons*, 995 So. 2d 1051, 1055 (Fla. 1st DCA 2008) (approving the presentation of "alternatives to the electorate on the same ballot" where the "statement explaining [one] proposal inform[ed] voters in no uncertain terms" of its effect on another item on the ballot).[4] On the other hand, as here, a misleading title and summary can obscure the fact that a vote for one proposed amendment would vitiate the effect of another on the same ballot. *Cf. Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988) (finding language of proposition "fatally defective" and misleading where its failure to

[3] All three have been approved by the Secretary of State for placement on the ballot.

[4] *See also Advisory Opinion re Florida Growth Management Initiative Giving Citizens the Right to Decide Local Growth Management Plan Changes*, 2 So. 3d 118 (Fla. 2009), in which the Florida Supreme Court approved a title and summary of an amendment requiring "[v]oter approval of growth management plan changes . . . if 10% of the voters in the city or county sign a petition calling for such a referendum" where a "competing proposed amendment would" make voter approval of growth management plan changes mandatory. *Id.* at 118–21.

alert voters of a conflict with another item on the ballot subjected voters to "bewildering and conflicting decision-making").

Intervenors have argued that, because the summary repeats the text of the actual amendment almost verbatim, the summary is *ipso facto* clear and valid. To the contrary, section 101.161 and the Florida Constitution require more than the literal accuracy achieved by parroting the amendment's text; they require that the "chief purpose" of the amendment be expressed in "plain and unequivocal language" and that the language is not "misleading" to the public. If the exact text of the amendment does not express its purpose plainly and unequivocally—as is the case with Amendment 7, which contains hazy, circuitous, and misleading language in parts and terms of art in others—then the summary must employ adequate language to ensure that voters have been clearly apprised of the chief purpose of the amendment. If voters are misled by the exact language of the amendment, then a title and summary employing only that language is defective. *See Askew*, 421 So. 2d at 155 ("Fair notice . . . must be actual notice consisting of a clear and unambiguous explanation of the measure's chief purpose.").

The chief purpose of Amendment 7 is to eliminate binding standards by making all criteria discretionary, allowing the legislature to pick and choose from among the various enumerated factors. The title's implication that Amendment 7 sets "standards" is misleading, especially when juxtaposed with two almost identically titled amendments that actually do impose standards. Combined with a summary abjectly lacking in clarity, voters are likely to be misled into believing that their legislators will be bound by mandatory, meaningful standards.

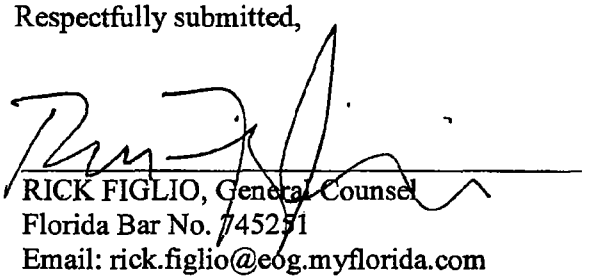
The people of Florida "deserve nothing less than clarity when faced with the decision of whether to amend [the] state constitution, for it is the foundational document that embodies the fundamental principles through which organized government functions." *Slough*, 992 So. 2d at

149. For that reason, the Governor respectfully urges that this court enter summary judgment in favor of the Plaintiffs and order removal of Amendment 7 so that voters are permitted to "cast an intelligent and informed ballot." *Advisory Op. re People's Prop. Rights Amendments*, 699 So. 2d at 1307.

Conclusion

For the foregoing reasons, Governor Crist respectfully requests this Court grant Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,



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

CASE NO. 2010 CA 1803

FLORIDA STATE CONFERENCE OF NAACP BRANCHES; ADORA OBI NWEZE; THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.; DEIRDRE MACNAB; ROBERT MILLIGAN; NATHANIEL P. REED; DEMOCRACIA AHORA; and JORGE MURSULI,

Plaintiffs,

vs.

DEPARTMENT OF STATE, an agency of the State of Florida; and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervenors.
_____/

INTERVENOR/DEFENDANT THE FLORIDA SENATE'S MOTION FOR SUMMARY JUDGMENT, RESPONSE TO PLAINTIFFS' SUMMARY JUDGMENT AND MEMORANDUM OF LAW

Intervenor/Defendant, The Florida Senate (the "Senate"), pursuant to Rule 1.510, Florida Rules of Civil Procedure, and this Court's Scheduling Order, moves for

Summary Judgment in that there are no disputed issues of material fact and Defendants are entitled to judgment as a matter of law. The Senate seeks a judgment that the ballot title and summary of Amendment 7 is valid and the Amendment should remain on the ballot. The Senate files the following Memorandum of Law in support of its Motion for Summary Judgment and in opposition to the Motion filed by Plaintiffs:

INTRODUCTION

Amendments 5, 6, and 7 relate to the reapportionment process and, if adopted, would be read in pari materia. *Advisory Opinion to the Governor – 1996 Amendment (Everglades)*, 706 So. 2d 278, 281 (Fla. 1997) (In construing constitutional provisions addressing a similar subject, the provisions "must be read in pari material to ensure a consistent and logical meaning the gives effect to each provision"). See also *Zingale v. Powell*, 885 So. 2d 277 (Fla. 2004). Amendments 5 and 6 use identical language to provide standards for establishing legislative district boundaries (Amendment 5) and congressional district boundaries (Amendment 6). Amendment 7 was adopted by the Legislature as House Joint Resolution 7231. (Attached as Appendix A). It allows the Legislature to take into consideration communities of common interest; balance and implement competing criteria; and provides a standard for judicial review.

While Plaintiffs contend that Amendments 5 and 6 offer greater protection for minorities than Amendment 7, quite the opposite may well be true. Districts which are drawn predominantly on the basis of race may violate the Equal Protection Clause of the United States Constitution. See *Miller v. Johnson*, 515 U.S. 900 (1995), and *Shaw v. Reno*, 509 U.S. 630 (1993). Districts which are drawn on the basis of race will be

subject to close scrutiny by the federal courts and will not be upheld if racial considerations predominate in the decision making process. (*Id.*) Notwithstanding the provisions of Amendments 5 and 6, which allegedly enshrine minority representation, any districts drawn on the basis of race may be subject to challenge on equal protection grounds. (*Id.*) Such a claim may be defeated by showing that the Legislature utilized "traditional race neutral districting principles." *Shaw v. Reno, supra*, 509 U.S. at 647. These traditional race neutral districting principles include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests." (*Id.*)

Amendment 7 provides for consideration of communities of interest together with the contiguity, compactness and respect for political boundaries principles, which are codified in Amendments 5 and 6. These criteria are not new and have historically been utilized by the Florida Legislature in redistricting. The 2002 redistricting plan provided greater opportunities for racial and language minorities than any previous redistricting plan in Florida. (See House of Representative Staff Analysis, p. 9, attached hereto as Appendix B). The 2002 redistricting plan was approved by the federal courts because it was based upon a balanced consideration of all of the traditional redistricting principles. *Martinez v. Bush*, 234 F. Supp. 2d 1275 (U.S. Dist. Ct. S.D. Fla. 2002).

The United States Supreme Court decided *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), after Amendments 5 and 6 were written and reviewed by the Florida Supreme Court. North Carolina had a requirement in its Constitution which provided that county boundaries must be respected when drawing legislative districts. This provision was not

strictly complied with in order to create a minority access district. The United States Supreme Court ruled that Section 2 of the Federal Voting Rights Act offers no protection to the creation of minority access districts when faced with a state constitutional mandate to respect county boundaries. Amendment 7, which provides for the balancing of all the redistricting criteria in the constitution, may well prevent the use of any of Amendments 5 and 6 criteria to defeat the creation of minority access districts.

While the language of Amendments 5 and 6 may sound impressive in its protection of minority voting rights, that language alone may not save a minority district from an equal protection challenge or a minority access district from a *Bartlett v. Strickland* argument. As instructed by *Miller v. Johnson*, *Shaw v. Reno*, and *Martinez v. Bush*, it is only through a balanced consideration of all traditional redistricting principles that minority representation is truly protected. It is Amendment 7's balancing of all the criteria and the addition of communities of interest as an equal criteria that will allow the promise of Amendments 5 and 6 to become a reality.

ARGUMENT

I. The Ballot Title and Summary for Amendment 7 are not Misleading.

Article XI, Section 5 of the Florida Constitution and Section 101.161, Florida Statutes, require that the ballot title and summary state "in clear and unambiguous language the chief purpose of the measure." *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982). All that is required is that the "ballot advise the voter sufficiently to enable him intelligently to cast his ballot." *Askew, supra*, 421 So. 2d at 155. The Court in *Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982), approved a legislative initiative placing an

amendment to the Constitution on the ballot stating that "[t]here are no hidden meanings and no deceptive phrases. The summary says just what the amendment purports to do. It gives the public fair notice of the meaning and effect of the proposed amendment. Inclusion of all possible effects, however, is not required in the ballot summary." Indeed, courts have approved ballot language while admitting that certain ramifications were omitted or could have been better explained. In *Advisory Opinion to the Attorney General re: Right to Treatment and Rehabilitation for Non Violent Drug Offenses*, 818 So. 2d 491 (Fla. 2002), the Court noted that it was up to the voter to acquaint himself with the pros and cons of an amendment and "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." quoting from *Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1976).

A. A Summary Identical to the Proposed Constitutional Language is not Misleading.

The ballot summary for Amendment 7 is almost identical to the actual language proposed for placement in the Constitution. Only contextual changes were made to enhance its understanding by the voter, i.e. "this Constitution" was changed to "the State Constitution" and "this Article" to "Article III of the State Constitution."

There can be no "hidden meanings" when the proposed constitutional language and the summary are identical. The summary, of necessity, must "say just what the amendment purports to do." See *Grose v. Firestone, supra.* The Court in *Advisory Opinion to the Attorney General re: Florida Marriage Protection Amendment*, 926 So. 2d

1229 (Fla. 2006), approved language in a citizen initiative for placement on the ballot because the summary was "essentially identical to that found in the text of the actual amendment." See also *Advisory Opinion to the Attorney General re: Medical Liability Claimants Compensation Amendment*, 880 So. 2d 675 (Fla. 2004) (In approving the ballot language the Court noted with approval that the summary "came very close to reiterating the briefly worded amendment.")

Plaintiffs provide a list of "what ifs" in hopes of persuading this Court that the chief purpose of Amendment 7 is not as alleged in the ballot summary. There is no requirement that the ballot summary include all possible effects or "explain in detail what the proponents hope to accomplish." *Advisory Opinion to the Attorney General re: Tax Limitations*, 673 So. 2d 864, 868 (Fla. 1996). See also *Advisory Opinion to the Attorney General re: Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 889 (Fla. 2000). ("[A]n exhaustive explanation of the interpretation and future possible effects of the amendment is not required.") Indeed, if a "ballot title and summary were required to include all possible ramifications, it is arguable that no proposed amendment would ever be approved." *Advisory Opinion to the Attorney General re: Physicians Shall Charge the Same Fee for the Same Health Care Service to Every Patient*, 880 So. 2d 659 (Fla. 2004).

Not only does the ballot summary comply with the law, it only makes sense that a ballot summary which is nearly identical to the actual proposed constitutional language cannot mislead the voter. The summary sets out verbatim the purpose of the proposed constitutional amendment: In redistricting, the state shall apply federal

standards, balance and implement the standards in the Constitution and give respect to communities of interest. It also provides that districts drawn in accordance with the standards in the Constitution will not be overturned if the implementation of the constitutional standards is rational. There is no "hiding the ball" here. The language of the proposed amendment is straight forward and easily understood. There are no terms which are not readily understandable to the voter. See *Florida Marriage Protection Amendment, supra,* 926 So. 2d at 1237.

The cases cited by Plaintiffs in support of their argument that verbatim recitation of the constitutional language in the ballot summary is not sufficient are inapposite.[1] In those cases the courts determined that recitation of the entire language of a change to an organic document was not sufficient to inform the voter because the amendment changed existing provisions and failed to inform the voter that the proposals would change existing law. Those cases offer no guidance to this Court in deciding this case. Amendment 7 does not change any existing provision of the Florida Constitution. Since Amendment 7 does not change existing organic law and the ballot summary is nearly identical to the language of the Amendment, the title and summary of Amendment 7 accurately portrays the substance of the Amendment.

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[1] *Wadham v. Board of County Commissioners of Sarasota County,* 567 So. 2d 414 (Fla. 1990); *Evans v. Bell,* 651 So. 2d 162 (Fla. 1995), and *Kobrin v. Leahy,* 528 So. 2d 392 (Fla. 1986).

B. Amendment 7 Creates Standards for Redistricting.

A ballot title should not be read in isolation. Section 101.161, Fla. Stat., requires that the ballot summary and title be read together. *Advisory Opinion to the Attorney General re: Limited Casinos*, 644 So. 2d 71, 75 (Fla. 1994). ("This Court has always interpreted section 101.161(1) to mean that the ballot title and summary must be read together in determining if the ballot information properly informs the voter.")

Plaintiffs apparently argue that the title of Amendment 7 is misleading because it is the same as the titles for Amendments 5 and 6 and apparently Amendments 5 and 6 create standards and Amendment 7 does not. To the contrary, all of the Amendments create standards for redistricting in Florida. It defies common sense to say that: "unless conflicting" with federal law "districts shall be nearly equal in population as is practicable" and "where feasible utilize existing political and geographic boundaries" are standards in Amendments 5 and 6, but that Amendment 7's direction to "balance and implement the standards" in the Constitution and to respect "communities of common interest without subordination" are not. The ballot title to Amendment 7 accurately reflects the substance of the Amendment.

C. Amendment 7 does not Eliminate the Requirement that Districts must be Contiguous

The applicable requirement enunciated by the Florida Supreme Court is that ballot summaries must inform voters of the Amendment's effect on existing sections of the Constitution. *Tax Limitations, supra*, 644 So. 2d at 494. Amendment 7 cannot be fairly read to effect, let alone nullify, the existing requirement that districts be contiguous. In support of their argument that Amendment 7 does nullify contiguity,

Plaintiffs point to the language in Amendment 7 which provides for minority participation and respect for "communities of common interest" "both without subordination to any other provision of Article III of the State Constitution."

First, Plaintiffs mistakenly equate "without subordination" with "elimination." "Without subordination" does not mean "nullification" or "elimination." "Subordinate" is defined as "belonging to a lower class or rank; secondary." The American Heritage Dictionary of the English Language, 4th Edition (2002). Conversely, "without subordination" simply means that communities of interest will not be secondary to any other provisions in Article III of the Constitution, but rather it will be equal. "Nullify", on the other hand, means "to declare invalid and "eliminate" means to "remove" or "eradicate." (*Id.*) Subordination and nullification are clearly not the same concepts. Subordination cannot be equated with nullification or elimination.

Second, Amendment 7 instructs the Legislature to balance and implement all the criteria in Section III of the Florida Constitution. It does not instruct that certain criteria have greater authority or that any one criteria can be eliminated. Under Amendment 7, the requirement that districts be contiguous must be implemented. Contiguity is an objective standard. It is not a standard that can be balanced. It is one that is to be implemented under the language of Amendment 7.

Lastly, the requirement for contiguous districts is not only in the existing Constitution, but is provided for in Amendments 5 and 6. Assuming, arguendo, some validity to Plaintiffs' argument in this regard, there would be no elimination of the requirement for contiguous districts if Amendments 5 and 6 are enacted. There is no

requirement that a ballot summary recite the effect of a proposed amendment on other proposed amendments. See *Advisory Opinion to Attorney General re: Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes*, 2 So. 3d 118 (Fla. 2008), wherein the Court refused to invalidate a competing constitutional amendment which would appear on the ballot in the same election.

D. The Terms, "Communities of Common Interest" and "Rationally Related" are not Required to be Defined.

1. Communities of Common Interest

The term, "communities of common interest" is readily understood and is of common usage. It is also accepted by courts as a traditional districting principle, *Martinez v. Bush, supra.* The courts have recognized that "the average voter has a certain amount of common understanding and knowledge" with which to ascertain the meaning of commonly understood terms. *Advisory Opinion to the Attorney General re: Local Trustees*, 819 So. 2d 725, 732 (Fla. 2002). See also *Florida Marriage Protection, supra.* 926 So. 2d at 1237. ("The terminology here...is frequently used and understood by the common voter, and...does not require special training in the legal profession to comprehend its meaning.")

The Court has invalidated ballot language only where the ballot language used undefined legal terms, such as "common law nuisance." See *Advisory Opinion to the Attorney General re: People Property Rights Amendment Providing Compensation for Restricting Real Property Use*, 699 So. 2d 1304 (Fla. 1997), receded from on different grounds in *Advisory Opinion to Attorney General re: 1.35% Property Tax Cap Unless Voter Approved*, 2 So. 3d 968 (Fla. 2009).

The phrase "communities of common interest" is not a term which requires a definition in the context of Amendment 7. It is not such an arcane legal term that an ordinary voter cannot ascertain its meaning. Moreover, the Court has held that the lack of definitions for terms used in proposed constitutional amendments are not fatal to the inclusion on the ballot. In *Advisory Opinion to the Attorney General re: The Medical Liability Claimants Compensation Amendment*, 880 So. 2d 675 (Fla. 2004), the Court held that the lack of a definition for the term "medical liability" was not "fatal because the issue as to the precise meaning of this term is better left to subsequent litigation, should the amendment pass."

2. Rationally Related

Similarly, the term "rationally related" is an easily understood and commonly used term. Amendment 7 provides that a district or plan drawn in accordance with the criteria in Section III of the Constitution will be upheld if the decisions of the Legislature in balancing and implementing the criteria are rational. The voter is not misled by the use of that phrase and it is not a legal term which meaning is unknown to the average voter. See *Florida Marriage Protection Amendment, supra,* 926 So. 2d at 1237.

Plaintiffs suggest that the term "rationally related" is used to import the rational basis test for equal protection cases into the constitutional analysis of districting plans. There is nothing in the language proposed in Amendment 7 that would suggest such a conclusion. The standard of review set out in Amendment 7 provides that a district or plan should be valid if the Legislature's balancing and implementing is rationally related

to the standard in the Constitution. That standard requires a review of the district or plan in accordance with the standards in the Constitution – nothing more nor less.

Plaintiffs also argue that the ballot summary is misleading because it does not disclose how Amendment 7's review standard differs from the existing standard. There is no existing standard for judicial review in the Constitution, so the imposition of a standard does not require disclosure of the existing standard in the ballot summary. *Tax Limitation, supra*, 644 So. 2d at 494.

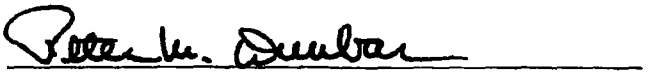
The terms "communities of common interest" and "rationally related" are common understandable phrases which do not require definition in the ballot summary.

CONCLUSION

The Supreme Court has cautioned restraint in removing a proposed constitutional amendment from the ballot, regardless of whether it is a citizens' initiative or a joint resolution of the Legislature. "The Court must act with extreme care, caution and restraint before it removes a constitutional amendment from the vote of the people." *Askew v. Firestone, supra.* Judicial review of proposed constitutional amendments in the face of a challenge to remove the amendment from the ballot is "the most sanctified area in which a court can exercise power. Sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of this State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of the law." *Right to Treatment and Rehabilitation for Non-Violent Drug Offenses*, supra, 818 So. 2d at 494, citing *Pope v. Gray*, 104 So. 2d 841, 842 (Fla. 1958). Plaintiffs have not met their burden to

demonstrate that Amendment 7 is "clearly and conclusively defective." See *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 339 (Fla. 1978). Defendants Motion for Summary Judgment should be granted and Amendment 7 should be retained on the ballot.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Electronic Mail and U. S. Mail, to MARK HERRON, ESQUIRE (mherron@lawfla.com), and ROBERT J. TELFER, III, ESQUIRE (rtelfer@lawfla.com), of Messer, Caparello & Self, P.A., Post Office Box 15579, Tallahassee, Florida 32317-5579; RICK FIGLIO, ESQUIRE (rick.figlio@eog.myflorida.com), General Counsel, Office of the Governor, The Capitol, 400 South Monroe Street, Tallahassee, Florida 32399-0100; JON GLOGAU, ESQUIRE (Jon.Glogau@myfloridalegal.com), Assistant Attorney General, Department of Legal Affairs, The Capitol, PL-01, 400 South Monroe Street, Tallahassee, Florida 32399-1050; RONALD G. MEYER, ESQUIRE (rmeyer@meyerbrookslaw.com), JENNIFER S. BLOHM, ESQUIRE (jblohm@meyerbrookslaw.com), and LYNN C. HEARN, ESQUIRE (lhearn@meyerbrookslaw.com), of Meyer, Brooks, Demma and Blohm, P.A., Post Office Box 1547, Tallahassee, Florida 32302; CHARLES B. UPTON, ESQUIRE (UBUpton@dos.state.fl.us), General Counsel, Florida Department of State, R. A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250, and GEORGE MEROS, JR., ESQUIRE (George.Meros@gray-robinson.com), and ANDY BARDOS, ESQUIRE (Andy.Bardos@gray-robinson.com), of GrayRobinson, P.A., Post Office Box 11189, Tallahassee, Florida 32302-3189, this 25th day of June, 2010.

Peter M. Dunbar

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APPENDIX

ENROLLED
HJR 7231, Engrossed 1 2010 Legislature

House Joint Resolution

A joint resolution proposing the creation of Section 20 of Article III of the State Constitution to provide standards for establishing legislative and congressional district boundaries.

Be It Resolved by the Legislature of the State of Florida:

That the following creation of Section 20 of Article III of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE III

LEGISLATURE

SECTION 20. Standards for establishing legislative and congressional district boundaries.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

APPENDIX A

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE III, SECTION 20

STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 7231 PCB SPCSEP 10-01 Method and Standards for Legislative and Congressional Redistricting and Reapportionment
SPONSOR(S): Select Policy Council on Strategic & Economic Planning; Hukill
TIED BILLS: **IDEN./SIM. BILLS:** SJR 2288

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Select Policy Council on Strategic & Economic Planning	11 Y, 5 N	Kelly	Bahl
1)	Rules & Calendar Council	12 Y, 6 N	Hassell	Birtman
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the United States Census, to apportion state legislative districts. The United States Constitution requires the reapportionment of the United States House of Representatives every ten years, which includes the distribution of the House's 435 seats between the states and the equalization of population between districts within each state.

Two citizen initiatives, related to redistricting, have secured placement on the 2010 General Election ballot. Amendments 5 and 6, promoted by FairDistrictsFlorida.org, would add standards for state legislative and congressional redistricting to the Florida Constitution. The amendments do not contain definitions for the proposed new standards, which may have the effect of restricting the range of redistricting choices available under the federal Voting Rights Act.

The proposed joint resolution would create a new Section 20 to Article III of the Florida Constitution. The new section would add new state constitutional standards for establishing legislative and congressional district boundaries. The proposed standards in the joint resolution would complement the proposed standards in Amendment 5 and 6 and provide for a balancing of the various constitutional redistricting standards.

Specifically, the proposed joint resolution would require that the state apply federal requirements in its balancing and implementing of the redistricting standards in the state constitution. Both the equal opportunity of racial and language minorities to participate in the political process and communities of interest are established as standards that are on equal footing as any other standard in the state constitution. Therefore minority access districts can be considered, and communities of interest can be respected and promoted, as matters of legislative discretion. Finally, the proposed joint resolution asserts that districts and plans are valid if the standards in the state constitution were balanced and implemented rationally and consistent with federal law.

The proposed joint resolution would require approval by 60% of the voting electorate in Florida's 2010 General Election.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The law governing the reapportionment and redistricting[1] of congressional and state legislative districts implicates the United States Constitution, the Florida Constitution, and federal statutes.

Florida Constitution

The Florida Constitution requires the Legislature, by joint resolution at its regular session in the second year after the Census is conducted, to apportion the State into senatorial districts and representative districts. According to Article III, Section 16(a), Florida Constitution, senatorial districts must be:

1. Between 30 and 40 in numbers;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

Representative districts must be:

1. Between 80 and 120 in number;

2. Consecutively numbered; and

3. Of contiguous, overlapping, or identical territory.

The joint resolution is not subject to gubernatorial approval. If the Legislature fails to make the apportionment, the Governor must reconvene the Legislature in a special apportionment session not to exceed 30 days. If the Legislature fails to adopt an apportionment plan at its regular or special apportionment session, the Attorney General must petition the Florida Supreme Court to make the apportionment.[2]

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[1] The concepts of reapportionment and redistricting are distinct. Reapportionment refers to the process of proportionally reassigning a given number of seats in a legislative body, i.e. 435 seats in the U.S. House of Representatives, to established districts, i.e. amongst the states, based on an established formula. Redistricting refers to the process of changing the boundaries of any given legislative district.

[2] Article III, Section 16(b), Florida Constitution.

Within 15 days after the Legislature adopts the joint resolution, the Attorney General must petition the Supreme Court to review the apportionment plan.[3] Judicial review is limited to:

1. Whether the plan satisfies the "one person, one vote" mandate of equal protection; and

2. Whether the districts are of contiguous, overlapping or identical territory.[4]

If the Court invalidates the apportionment plan, the Governor must reconvene the Legislature in an extraordinary apportionment session, not to exceed 15 days.[5] Within 15 days after the adjournment of the extraordinary apportionment session, the Attorney General must petition the Supreme Court to review the apportionment plan adopted by the Legislature or, if no plan was adopted, report the fact to the Court.[6] If the Court invalidates the apportionment plan adopted by the Legislature at the extraordinary apportionment session, or if the Legislature fails to adopt a plan, the Court must draft the redistricting plan.[7]

The Florida Constitution is silent with respect to congressional redistricting. Article 1 Section 4 of the United States Constitution grants to each state legislature the exclusive authority to apportion seats designated to that state by providing the legislative bodies with the authority to determine the times place and manner of holding elections for senators and representatives. Consistent therewith, Florida has adopted its congressional apportionment plans by legislation subject to gubernatorial approval.[8] Congressional apportionment plans are not subject to automatic review by the Florida Supreme Court.

U.S. Constitution

The United States Constitution requires the reapportionment of the House of Representatives every ten years to distribute each of the House of Representatives' 435 seats between the states and to equalize population between districts within each state.

Article I, Section 4 of the United States Constitution provides that "[t]he Time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." *See also* U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."). The U.S. Supreme Court has recognized that this language delegates to state legislatures the exclusive authority to create congressional districts. *See e.g., Growe v. Emison*, 507 U.S. 25, 34 (1993); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) ("[T]he Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress . . . .").

In addition to state specific requirements to redistrict, states are obligated to redistrict based on the principle commonly referred to as "one-person, one-vote."[9] In *Reynolds*, the United States Supreme Court held that the Fourteenth Amendment required that seats in state legislature be reapportioned on a population basis. The Supreme Court concluded:

> ..."the basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies...The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[10]

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[3] Article III, Section 16(c), Florida Constitution.
[4] *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1178 (Fla. 2003).
[5] Article III, Section 16(d), Florida Constitution.
[6] Article III, Section 16(e), Florida Constitution.
[7] Article III, Section 16(f), Florida Constitution.
[8] *See generally* Section 8.0001, et seq., Florida Statutes (2007).
[9] *Baker v. Carr*, 369 U.S. 186 (1962).
[10] *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

The Court went on to conclude that decennial reapportionment was a rational approach to readjust legislative representation to take into consideration population shifts and growth.[11]

In addition to requiring states to redistrict, the principle of one-person, one-vote, has come to generally stand for the proposition that each person's vote should count as much as anyone else's vote.

The requirement that each district be equal in population applies differently to congressional districts than to state legislative districts. The populations of congressional districts must achieve absolute mathematical equality, with no *de minimis* exception.[12] Limited population variances are permitted if they are "unavoidable despite a good faith effort" or if a valid "justification is shown."[13]

In practice, congressional districting has strictly adhered to the requirement of exact mathematical equality. In *Kirkpatrick v. Preisler* the Court rejected several justifications for violating this principle, including "a desire to avoid fragmenting either political subdivisions or areas with distinct economic and social interests, considerations of practical politics, and even an asserted preference for geographically compact districts."[14]

For state legislative districts, the courts have permitted a greater population deviation amongst districts. The populations of state legislative districts must be "substantially equal."[15] Substantial equality of population has come to generally mean that a legislative plan will not be held to violate the Equal Protection Clause if the difference between the smallest and largest district is less than ten percent.[16] Nevertheless, any significant deviation (even within the 10 percent overall deviation margin) must be "based on legitimate considerations incident to the effectuation of a rational state policy,"[17] including "the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts, or the recognition of natural or historical boundary lines."[18]

However, states should not interpret this 10 percent standard to be a safe haven.[19] Additionally, nothing in the U.S. Constitution or case law prevents States from imposing stricter standards for population equality.[20]

Compared to other states, Florida's population range ranked 13th of 49 (2.79%) for its State House districts, ranked 3rd of 50 (0.03%) for it State Senate districts, and achieved statistical perfection (0.00%) for its Congressional districts.[21]

The Voting Rights Act

Congress passed the Voting Rights Act (VRA) in 1965. The VRA protects the right to vote as guaranteed by the 15th Amendment to the United States Constitution. In addition, the VRA enforces the protections of the 14th Amendment to the United States Constitution by providing "minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination."[22]

The relevant components of the Act are contained in Section 2 and Section 5. Section 2 applies to all jurisdictions, while Section 5 applies only to covered jurisdictions (states, counties, or other jurisdictions within a state).[23] The two sections, and any analysis related to each, are considered independently of

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[11] *Reynolds v. Sims*, 377 U.S. 584 (1964).
[12] *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).
[13] *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).
[14] *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).
[15] *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).
[16] *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407, 418 (1977).
[17] *Reynolds*, 377 U.S. at 579.
[18] *Swann v. Adams*, 385 U.S. 440, 444 (1967).
[19] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 36.
[20] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 39.
[21] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 47-48.
[22] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 51.
[23] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 51.

each other, and therefore a matter considered under by one section may be treated differently by the other section.

The phraseology for types of minority districts can be confusing and often times unintentionally misspoken. It is important to understand that each phrase can have significantly different implications for the courts, depending on the nature of a legal complaint.

A "majority-minority district" is a district in which the majority of the voting-age population (VAP) of the district is African American, Hispanic, Asian or Native-American. A "minority access district" is a district in which the dominant minority community is less than a majority of the VAP, but is still large enough to elect a candidate of its choice through either crossover votes from majority voters or a coalition with another minority community.

"Minority access" though is more jargon than meaningful in a legal context. There are two types of districts that fall under the definition. A "crossover district" is a minority-access district in which the dominant minority community is less than a majority of the VAP, but is still large enough that a crossover of majority voters is adequate enough to provide that minority community with the opportunity to elect a candidate of its choice. A "coalitional district" is a minority-access district in which two or more minority groups, which individually comprise less than a majority of the VAP, can form a coalition to elect their preferred candidate of choice. A distinction is sometimes made between the two in case law. For example, the legislative discretion asserted in *Bartlett v. Strickland*—as discussed later in this document—is meant for crossover districts, not for coalitional districts.

Lastly, the courts have recognized that an "influence district" is a district in which a minority community is not sufficiently large enough to form a coalition or meaningfully solicit crossover votes and thereby elect a candidate of its choice, but is able to effect election outcomes and therefore elect a candidate who would be mindful of the minority community's needs.

Section 2 of the Voting Rights Act

The most common challenge to congressional and state legislative districts arises under Section 2 of the Voting Rights Act. Section 2 provides: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State...in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[24] The purpose of Section 2 is to ensure that minority voters have an equal opportunity along with other members of the electorate to influence the political process and elect representatives of their choice.[25]

In general, Section 2 challenges have been brought against districting schemes that either disperse members of minority communities into districts where they constitute an ineffective minority—known as "cracking"[26]—or which concentrate minority voters into districts where they constitute excessive majorities—known as "packing"—thus diminishing minority influence in neighboring districts. In prior decades, it was also common that Section 2 challenges would be brought against multimember districts, in which "the voting strength of a minority group can be lessened by placing it in a larger multimember or at-large district where the majority can elect a number of its preferred candidates and the minority group cannot elect any of its preferred candidates."[27]

The Supreme Court set forth the criteria of a vote-dilution claim in *Thornburg v. Gingles*.[28] A plaintiff must show:

1. A minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;

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[24] 42 U.S.C. Section 1973(a) (2006).
[25] 42 U.S.C. Section 1973(b); *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993).
[26] Also frequently referred to as "fracturing."
[27] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 54.
[28] 478 U.S. 30 (1986).

2. The minority group must be politically cohesive; and

3. White voters must vote sufficiently as a bloc to enable them usually to defeat the candidate preferred by the minority group.

The three "*Gingles* factors" are necessary, but not sufficient, to show a violation of Section 2.[29] To determine whether minority voters have been denied an equal opportunity to influence the political process and elect representatives of their choice, a court must examine the totality of the circumstances.[30]

This analysis requires consideration of the so-called "Senate factors," which assess historical patterns of discrimination and the success, or lack thereof, of minorities in participating in campaigns and being elected to office. [31] Generally, these "Senate factors" were born in an attempt to distance Section 2 claims from standards that would otherwise require plaintiffs to prove "intent," which Congress viewed as an additional and largely excessive burden of proof, because "It diverts the judicial injury from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."[32]

States are obligated to balance the existence and creation of districts that provide electoral opportunities for minorities with the reasonable availability of such opportunities and other traditional redistricting principles. For example, in *Johnson v. De Grandy*, the Court decided that while states are not obligated to maximize the number of minority districts, states are also not given safe harbor if they achieve proportionality between the minority population(s) of the state and the number of minority districts.[33] Rather, the Court considers the totality of the circumstances. In "examining the totality of the circumstances, the Court found that, since Hispanics and Blacks could elect representatives of their choice in proportion to their share of the voting age population and since there was no other evidence of either minority group having less opportunity than other members of the electorate to participate in the political process, there was no violation of Section 2."[34]

In *League of United Latin American Citizens (LULAC) v. Perry*, the Court elaborated on the first *Gingles* precondition. "Although for a racial gerrymandering claim the focus should be on compactness in the district's shape, for the first *Gingles* prong in a Section 2 claim the focus should be on the compactness of the minority group."[35]

In *Shaw v. Reno*, the Court found that "state legislation that expressly distinguishes among citizens on account of race - whether it contains an explicit distinction or is "unexplainable on grounds other than race,"...must be narrowly tailored to further a compelling governmental interest. Redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny, regardless of the motivations underlying its adoption."[36]

Later, in *Shaw v. Hunt*, the Court found that the State of North Carolina made race the predominant consideration for redistricting, such that other race-neutral districting principles were subordinated, but the state failed to meet the strict scrutiny[37] test. The Court found that the district in question, "as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding liability under Section(s) 2 of the Act," and "could not remedy any potential Section(s) 2 violation, since the minority group must be shown to be "geographically compact" to establish Section(s) 2 liability."[38] Likewise, in *Bush v. Vera*,

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[29] *Johnson v. De Grandy*, 512 U.S. 997, 1011-1012 (1994).
[30] 42 U.S.C. Section 1973(b); *Thornburg vs. Gingles*, 478 U.S. 46 (1986).
[31] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 57.
[32] Senate Report Number 417, 97th Congress, Session 2 (1982).
[33] *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).
[34] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 61-62.
[35] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 62.
[36] *Shaw v. Reno*, 509 U.S. 630 (1993).
[37] "Strict scrutiny" is the most rigorous standard used in judicial review by courts that are reviewing federal law. Strict scrutiny is part of a hierarchy of standards courts employ to weigh an asserted government interest against a constitutional right or principle that conflicts with the manner in which the interest is being pursued.
[38] *Shaw v. Hunt*, 517 U.S. 899 (1996).

the Supreme Court supported the strict scrutiny approach, ruling against a Texas redistricting plan included highly irregularly shaped districts that were significantly more sensitive to racial data, and lacked any semblance to pre-existing race-neutral districts.[39]

Lastly, In *Bartlett v. Strickland*, the Supreme Court provided a "bright line" distinction between majority-minority districts and other minority "crossover" or "influence districts. The Court "concluded that §2 does not require state officials to draw election district lines to allow a racial minority that would make up less than 50 percent of the voting-age population in the redrawn district to join with crossover voters to elect the minority's candidate of choice."[40] However, the Court made clear that States had the flexibility to implement crossover districts as a method of compliance with the Voting Rights Act, where no other prohibition exists. In the opinion of the Court, Justice Kennedy stated as follows:

> "Much like §5, §2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts...When we address the mandate of §2, however, we must note it is not concerned with maximizing minority voting strength...and, as a statutory matter, §2 does not mandate creating or preserving crossover districts. Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns...States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if §2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters."[41]

Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act of 1965, as amended, is an independent mandate separate and distinct from the requirements of Section 2. "The intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to effectively disenfranchise Black voters."[42]

Section 5 requires states that comprise or include "covered jurisdictions" to obtain federal preclearance of any new enactment of or amendment to a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."[43] This includes districting plans.

Five Florida counties—Collier, Hardee, Hendry, Hillsborough, and Monroe—have been designated as covered jurisdictions.[44]

Preclearance may be secured either by initiating a declaratory judgment action in the District Court for the District of Columbia or, as is the case in almost all instances, submitting the new enactment or amendment to the United States Attorney General (United States Department of Justice).[45] Preclearance must be granted if the qualification, prerequisite, standard, practice, or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[46]

The purpose of Section 5 is to "insure that no voting procedure changes would be made that would lead to a retrogression[47] in the position of racial minorities with respect to their effective exercise of the electoral franchise."[48] Whether a districting plan is retrogressive in effect requires an examination of

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[39] *Bush v. Vera*, 517 U.S. 952 (1996),
[40] *Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).
[41] *Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).
[42] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 78.
[43] 42 U.S.C. Section 1973c.
[44] Some states were covered in their entirety. In other states only certain counties were covered.
[45] 42 U.S.C. Section 1973c.
[46] 42 U.S.C. Section 1973c
[47] A decrease in the absolute number of representatives which a minority group has a fair chance to elect.
[48] *Beer v. United States*, 425 U.S. 130, 141 (1976).

"the entire statewide plan as a whole."[49] "And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan."[50]

The Department of Justice requires that submissions for preclearance include numerous quantitative and qualitative pieces of data to satisfy the Section 5 review. "The Department of Justice, through the U.S. Attorney General, has 60 days in which to interpose an objection to a preclearance submission. The Department of Justice can request additional information within the period of review and following receipt of the additional information, the Department of Justice has an additional 60 days to review the additional information. A change, either approved or not objected to, can be implemented by the submitting jurisdiction. Without preclearance, proposed changes are not legally enforceable and cannot be implemented."[51]

Majority-Minority and Minority Access Districts in Florida

Based on the 2002 data and subsequent state legislative and congressional maps:

- The Florida House of Representatives includes 24 majority-minority districts[52] and 10 minority access districts.[53]
- The Florida Senate includes 5 majority-minority districts[54] and 7 minority access districts.[55]
- Florida's Congressional districts include 4 majority-minority districts[56] and 2 minority access districts.[57]

Legal challenges to the Florida's 1992 state legislative and congressional redistricting plans resulted in a significant increase in elected representation for both African-Americans and Hispanics. Table 1 illustrates those increases. Prior to 1992, the Florida Congressional Delegation included only one minority member, Congresswoman Ileana Ros-Lehtinen. Since those legal challenges, the Florida Legislature created maps that balance the establishment and maintenance of majority-minority districts and minority access districts, with other legally mandated redistricting standards, and other traditional redistricting principles.

[49] *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003).
[50] *Georgia v. Ashcroft*, 539 U.S. 484 (2003).
[51] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 96.
[52] House Districts 8, 14-15, 39, 55, 59, 84, 93-94, 102-104, 107-117 and 119.
[53] House Districts 23, 27, 49, 58, 92, 101, 105-106, 118 and 120
[54] Senate Districts 29, 33, 36, 38 and 40.
[55] Senate Districts 1, 6, 18-19, 34-35 and 39.
[56] Congressional Districts 17-18, 21 and 25.
[57] Congressional Districts 3 and 23.

Table 1. Number of Elected African-American and Hispanic Members in the Florida Legislature and Florida Congressional Delegation

	Congress African-American	*Congress Hispanic*	*Senate African-American*	*Senate Hispanic*	*House African-American*	*House Hispanic*
Before 1982	*0*	*0*	*0*	*0*	*5*	*0*
1982 to 1992	*0*	*0-1*	*2*	*0-3*	*10-12*	*3-7*
1992 to 2002	*3*	*2*	*5*	*3*	*14-16*	*9-11*
2002 to Present	*3*	*3*	*7*	*3*	*17-20*	*11-15*

Prior to the legal challenges in the 1990s, the Florida Legislature established districts that generally included minority populations of less than 30 percent of the total population of the districts. For example, Table 2 illustrates that the 1982 plan for the Florida House of Representatives included 27 districts in which African-Americans comprised 20 percent of more of the total population. In the majority of those districts, 15 of 27, African-Americans represented 20 to 29 percent of the total population. None of the 15 districts elected an African-American to the Florida House of Representatives.

Table 2. 1982 House Plan
Only Districts with Greater Than 20% African-American Population[58]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	2, 12, 15, 22, 23, 25, 29, 42, 78, 81, 92, 94, 103, 118, 119	15	0
30% - 39%	8, 9	2	1
40% - 49%	55, 83, 91	3	2
50% - 59%	17, 40, 63, 108	4	4
60% - 69%	16, 106,	2	2
70% - 79%	107	1	1
TOTAL			10

Subsequent to the legal challenges in the 1990s, the Florida Legislature established districts that were compliant with provisions of federal law, and did not fracture or dilute minority voting strength. As Table 1 and Table 3 illustrate, the resulting districting plan, which allowed minority communities an equal opportunity to participate and elect its candidates of choice, doubled the number of African-American representatives in the Florida House of Representatives.

[58] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison.

Table 3. 2002 House Plan
Only Districts with Greater Than 20% African-American Population[59]

Total African-American Population	House District Number	Total Districts	African-American Representatives Elected
20% - 29%	10, 27, 36, 86	4	1
30% - 39%	3, 23, 92, 105	4	3
40% - 49%	118	1	1
50% - 59%	8, 14, 15, 55, 59, 84, 93, 94, 104, 108	10	10
60% - 69%	39, 109	2	2
70% - 79%	103	1	1
TOTAL			18

Equal Protection – Racial Gerrymandering

Racial gerrymandering is "the deliberate and arbitrary distortion of district boundaries...for (racial) purposes."[60] Racial gerrymandering claims are justiciable under equal protection.[61] In the wake of *Shaw v. Reno*, the Court rendered several opinions that attempted to harmonize the balance between "competing constitutional guarantees that: 1) no state shall purposefully discriminate against any individual on the basis of race; and 2) members of a minority group shall be free from discrimination in the electoral process."[62]

To make a *prima facie* showing of impermissible racial gerrymandering, the burden rests with the plaintiff to "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[63] Thus, the "plaintiff must prove that the legislature subordinated traditional race-neutral districting principles...to racial considerations."[64] Traditional districting principles include "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests,"[65] and even incumbency protection.[66] If the plaintiff meets this burden, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest,"[67] i.e. "narrowly tailored" to achieve that singular compelling state interest.

While compliance with federal antidiscrimination laws—specifically, the Voting Rights Act—is a "very strong interest," it is not in all cases a compelling interest sufficient to overcome strict scrutiny.[68] With respect to Section 2, traditional districting principles may be subordinated to race, and strict scrutiny will be satisfied, where (i) the state has a "strong basis in evidence" for concluding that a majority-minority district is "reasonably necessary" to comply with Section 2; (ii) the race-based districting "substantially addresses" the Section 2 violation; and (iii) the district does "not subordinate traditional districting

[59] It is preferred to use voting age population, rather than total population, for this analysis, but the 1982 voting age population data is not available. Therefore total population is used for the sake of comparison
[60] *Shaw v. Reno*, 509 U.S. 630, 640 (1993)
[61] *Shaw v. Reno*, 509 U.S. 630, 642 (1993)
[62] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Page 72.
[63] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[64] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[65] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).
[66] *Bush v. Vera*, 517 U.S. 952, 964 (1996).
[67] *Miller v. Johnson*, 515 U.S. 920 (1995).
[68] *Shaw v. Reno*, 509 U.S. at 653-654 (1993).

principles to race substantially more than is 'reasonably necessary' to avoid" the Section 2 violation.[69] The Court has held that compliance with Section 5 is not a compelling interest where race-based districting is not "reasonably necessary" under a "correct reading" of the Voting Rights Act.[70]

The Use of Statistical Evidence

Political vote histories are essential tools to ensure that new districts comply with the Voting Rights Act.[71] For example, the use of racial and political data is critical for a court's consideration of the compelling interests that may be involved in a racial gerrymander. In *Bush v. Vera*, the Court stated:

> "The use of sophisticated technology and detailed information in the drawing of majority minority districts is no more objectionable than it is in the drawing of majority majority districts. But ... the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria..."

As noted previously, when the U.S. Department of Justice conducts a Section 5 preclearance review it requires that a submitting authority provide political data supporting a plan.[72] Registration and performance data must be used under Section 2 of the Voting Rights Act to determine whether geographically compact minority groups are politically cohesive, and also to determine whether the majority population votes as a block to defeat the minority's candidate of choice. That data is equally essential to prove the validity of any electoral changes under Section 5 of the Voting Rights Act.[73]

If Florida were to attempt to craft districts in areas of significant minority population without such data (or in any of the five Section 5 counties), the districts would be legally suspect and would probably invite litigation.

Traditional Redistricting Principles

There are seven general policies or goals that have been most frequently recognized by the courts as "traditional districting principles." If a state uses these principles as the primary basis for creating a district, with race factoring in simply as a consideration, then the redistricting plan will not be subject to strict scrutiny. If race is a predominant factor, particularly for a district that is oddly shaped, then the state will be subject to strict scrutiny and therefore must show that the district was narrowly tailored to serve a compelling state interest.[74]

Since 1993, the seven most common judicially recognized "traditional districting principles" are:[75]

- Compactness;
- Contiguity;
- Preservation of counties and other political subdivisions;
- Preservation of communities of interest;
- Preservation of cores of prior districts;
- Protection of incumbents; and
- Compliance with Section 2 of the Voting Rights Act

The meaning of "compactness" can vary significantly, depending on the type of redistricting-related analysis in which the court is involved.[76] Primarily, courts have used compactness to assess whether

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[69] *Bush v. Vera*, 517 U.S. 977-979 (1996).
[70] *Miller v. Johnson*, 515 U.S. 921 (1995).
[71] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[72] 28 U.S.C. § 51.27(q) & 51.28(a)(1).
[73] *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 48-49 (1986).
[74] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 105-114.
[75] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 105-106.
[76] *Redistricting Law 2010*. National Conference of State Legislators. November 2009. Pages 109-112.

some form of racial or political gerrymandering exists. That said, it is important to remember that gerrymandering could conversely be the necessary component of a district or plan that attempts to eliminate the dilution of the minority vote. Therefore, compactness is not by itself a dispositive factor.

"There are three generally accepted statistical measures of compactness, as noted in *Karcher*: the total perimeter test, the Reock test, and the Schwartzberg test."[77] However, courts have also found that "compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further it speaks to relationships that are facilitated by shared interests and by membership in a political community including a county or a city."[78] In a Voting Rights context, compactness "refers to the compactness of the minority population, not to the compactness of the contest district"[79] as a whole.

Overall, compactness is a functional factor in reviewing plans and districts. Albeit, compactness is not regarded as a trumping provision against the carrying out of other rationally formed districting decisions. [80] Additionally, interpretations of compactness require considerations of more than just geography. For example, the "interpretation of the *Gingles* compactness requirement has been termed 'cultural compactness' by some, because it suggests more than geographical compactness."[81] In a vote dilution context, "While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries."[82]

Moreover, it should be noted that in the context of geography, states use a number of geographical units to define the contours of their districting maps. The most common form of geography utilized is Census Blocks, followed by Voter Tabulation Districts. Several states also utilize designations such as Counties, Towns, Political Subdivisions, Precincts, and Wards. For the current districts maps, Florida used Counties, Census Tracts, Block Groups and Census Blocks, more geographical criteria than any other state.[83]

Along the lines of other race-neutral traditional redistricting principles, in *Wise v. Lipscomb*, the Court noted "that preserving the cores of prior districts" was a legitimate goal in redistricting.[84] In *Georgia v. Ashcroft*, the United States Supreme Court recognized that the positions of legislative power, influence, and leadership achieved by representatives elected from majority-minority districts are one valid measure of the minority population's opportunity to participate in the political process. [85] The Court noted that, "Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda..."[86]

Equal Protection – Partisan Gerrymandering

"Partisan (or political) gerrymandering is the drawing of electoral district lines in a manner that intentionally discriminates against a political party. Courts recognize that politics is an inherent part of any redistricting plan. The question is how much partisan gerrymandering is too much, so that it denies a citizen the equal protection of the laws in violation of the 14th Amendment."[87]

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[77] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 109.
[78] *DeWitt v. Wilson*, 856 Federal Supplement 1409, 1414 (E.D. California 1994).
[79] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 26 (2006).
[80] *Karcher v. Daggett*, 462 U.S. 725, 756 (1983).
[81] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 111.
[82] *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 27 (2006).
[83] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 49.
[84] *Wise v. Lipscomb*, 437 U.S. 535 (1978).
[85] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[86] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[87] *Redistricting Law 2010.* National Conference of State Legislators. November 2009. Page 115.

In *Davis v. Bandemer*, the Court held that an allegation of partisan gerrymandering presents a justiciable equal protection claim.[88] It declined to articulate a standard, but a plurality concluded that a violation "occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[89]

Eighteen years later, no congressional or state legislative redistricting plan had been invalidated on partisan gerrymandering grounds. Thus, in *Vieth vs. Jubelirer*, four Justices explained that "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged" and concluded as a result that such claims "are nonjusticiable and...*Bandemer* was wrongly decided."[90]

Furthermore, the *Vieth* Court rejected a standard that is "based on discerning 'fairness' from a totality of the circumstances...as unmanageable in that the plurality could conceive of "fair" districting plans that would include all of the alleged flaws inherent in the" very plan that the Court was rejecting in *Vieth*.[91]

More recently, in *League of United Latin American Citizens v. Perry*, the Court declined to "revisit the justiciability holding" but found that the plaintiffs failed to provide a "workable test for judging partisan gerrymanders." However, the case did not foreclose the possibility that such a test might be discovered.[92] Furthermore, *Davis v. Bandemer* does still offer helpful guidance of the Court's opinion on the subject, noting that:

> "The mere fact that an apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme unconstitutional. A group's electoral power is not unconstitutionally diminished by the fact that an apportionment scheme makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause. As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, as here, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionally underrepresented group. Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[93]

FairDistrictsFlorida.org

Two citizen initiatives, related to redistricting, have already secured placement on the 2010 General Election ballot. Amendments 5 and 6, often referred to as the FairDistrictsFlorida.org amendments, seek to add standards for state legislative and congressional redistricting to the Florida Constitution. Most of the standards contained within Amendments 5 and 6 are not currently referenced in the Florida Constitution, although there is some overlap with the current requirements in Article III, Section 16 for legislative apportionment. Amendments 5 and 6 would create sections 20 and 21 in Article III of the Florida Constitution.

"The FairDistrictsFlorida.org is the official sponsor of this proposed constitutional amendment. FairDistrictsFlorida.org is a registered political committee 'working to reform the way the state draws Legislative and Congressional district lines by establishing constitutionally mandated fairness standards.'"[94] "The sponsor proposes that the amendment will establish fairness standards for use in creating legislative district boundaries; protecting minority voting rights; prohibiting district lines that

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[88] *Davis v. Bandemer*, 478 U.S. 109 (1986).
[89] *Davis v. Bandemer*, 478 U.S. 132 (1986).
[90] *Vieth vs. Jubelirer*, 541 U.S. 267, 281 (2004)
[91] *Vieth vs. Jubelirer*, 541 U.S. 267, 291 (2004)
[92] *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414 (2006).
[93] *Davis v. Bandemer*, 478 U.S. 109, 132 (1986).
[94] *Complete Financial Information Sheet.* Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.

favor or disfavor any incumbent or political party; requiring that districts are compact; and requiring that existing political and geographical boundaries be used."

While Amendment 5 relates to state legislative redistricting, and Amendment 6 relates to congressional redistricting, the standards contained within both are substantively identical. In subsection (1) of the amendments, there is a prohibition against any apportionment plan or individual district from being drawn with the intent to favor or disfavor a political party or incumbent. The amendments prohibit any district from being drawn with the intent or result of denying racial and language minorities the equal opportunity to participate in the political process or diminishing their ability to elect candidates of their choice.

According to Amendments 5 and 6, districts shall consist of contiguous territory. This requirement is similar to the current language in Article III, Section 16(a) of the Florida Constitution. However, Amendments 5 and 6 do not make any reference to the additional language in Article III, Section 16(a), regarding districts overlapping or being identical in territory (*often referred to as "multi-member districts"*).

In subsection (2), Amendments 5 and 6 further require that districts shall be compact, districts shall be as nearly equal in population as practicable, and districts shall utilize existing political and geographic boundaries where feasible. However, compliance with these standards is not required if they are in conflict with the standards in subsection (1) or federal law.

In subsection (3), Amendments 5 and 6 clarify that the standards within each subsection are not to be read as though they were establishing any priority of one standard over another within each subsection.

The ballot summary for Amendment 5 [and Amendment 6] states:

> "Legislative [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."

On January 29, 2009, the Florida Supreme Court approved the ballot summaries for the 2010 General Election ballot.[95] The Court wrote, "We conclude that 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)."

In that ruling the Court noted, "The proposed amendments do not alter the functions of the judiciary. They merely change the standard for 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."

Furthermore, the Court concluded:

- "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 that the Legislature will comply with the law at the time an apportionment plan is adopted."

- "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."

[95] *Advisory Opinion to Attorney General re Standards for Establish Legislative District Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

- "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."

The financial impact statement on the ballot will read, "The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence."[96]

The FairDistrictsFlorida.org amendments do increase the number of state constitutional requirements for the Court to consider, and the amendments increase the number of standards by which an apportionment plan can be challenged. According to the Financial Impact Estimating Conference, "the proposed amendment(s) may result in increased costs based on the following":

- "The State may incur additional legal costs to litigate the redistricting plans developed under the proposed constitutional standards. Since the amendment(s) increases the number of factors that could be litigated, the districting initiative may expand the scope and complexity of litigation to determine the validity of each new apportionment plan." Such legal costs are indeterminate.

- "The Department of Legal Affairs concurs that there may be increased litigation costs, and that they may experience increased costs if they are asked to litigate these actions."

- "The Office of the State Courts Administrator believes there will be an impact at the trial court and appellate level. They assume that litigation will increase. The amount of increased litigation is unknown and the estimated impact on the trial court, the judicial workload, and the appellate workload is indeterminate."

- "The amendment does not substantially alter the current responsibilities or costs of the Department of State, the supervisors of elections, or local governments."

- "Any additional cost to the Legislature to develop the plans is indeterminate."

On November 6, 2009, Congresspersons Corrine Brown (FL-3) and Mario Diaz-Balart (FL-25) sent correspondence to the House Select Policy Council on Strategic & Economic Planning, asking questions about the impact of the initiative petitions proposed by FairDistrictsFlorida.Org. In this correspondence, the congresspersons raised several significant legal issues, stating:

> "These questions seek an explanation for the Amendments, which in our initial review appear internally contradictory and to violate several constitutional and statutory provisions, especially the protections of the 14th and 15th Amendments to the United States Constitution and the Voting Rights Act, as amended. We are particularly concerned that passage of these amendments would result – however unintentionally – in a significant dilution of the voting rights of the African-Americans and Hispanics as well as significant loss in a number of representatives elected from those communities."[97]

The letter asked 18 questions including whether the several standards in the petitions can be reconciled and applied practically and legally in the Redistricting process. The 18 questions can be generally summarized into four separate areas of analysis:

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[96] *Financial Impact Statement.* Financial Impact Estimating Conference. Standards for Legislature to Follow in Congressional Redistricting, #07-15, and Standards for Legislature to Follow in Legislative Redistricting, #07-16.

[97] *Letter from Congresswoman Corrine Brown and Congressman Mario Diaz-Balart to Chairman Dean Cannon.* November 6, 2009.

- Impact of the U.S. Supreme Court case of *Bartlett v. Strickland*, and how the terms of these initiatives may affect the ability and discretion of the Legislature to create minority access or "crossover" districts;[98]

- Questions raised regarding the relationship between incumbency protection and minority voting rights;[99]

- Use of political data which is necessary to comply with federal law, and how the use of this data itself may give rise to litigation;[100] and

- The legality or constitutionality of the petitions.[101]

Overall, the congresspersons asserted that FairDistrictsFlorida.org's proposed standards lack definition, lacked a clear method for reconciling inconsistencies, and could dilute minority access seats.

Effects of the Proposed Joint Resolution

The proposed joint resolution would create a new Section 20 to Article III of the Florida Constitution. The new section would add state constitutional standards for establishing legislative and congressional district boundaries. The ballot summary is identical to the actual proposed joint resolution, and reads as follows:

> "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of interest may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law."

District Boundary Lines: The proposed joint resolution would add new state constitutional standards for state legislative redistricting. Furthermore, the proposed joint resolution would create state constitutional standards for congressional districting. The proposed joint resolution does not apply the already existing state standards for state legislative redistricting to the process of congressional redistricting.

State and Federal Redistricting Requirements: The state shall apply federal requirements for state legislative and congressional redistricting, and balance the standards for state legislative and congressional redistricting contained in the Florida Constitution. In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Racial and Language Minorities: In state legislative and congressional redistricting, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that enable the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

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[98] *Id.*.
[99] *Id.*
[100] *Id.*
[101] *Id.*

Currently, only federal law addresses the ability of racial and language minorities to participate in the political process and elect candidates of their choice. In effect, the proposed joint resolution maintains the discretion of the state to establish and maintain minority districts, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to establish and maintain minority districts.

Communities of Interest: In state legislative and congressional redistricting, the state may respect and promote communities of interest, without being subordinated to any other provision in Article III of the Florida Constitution. This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that respect and promote communities of interest, without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion.

Currently, only case law addresses communities of interest. In effect, the proposed joint resolution maintains the discretion of the state to respect and promote communities of interest, and ensures that other redistricting standards in Article III do not limit or prohibit the state's discretion to create districts that respect and promote communities of interest.

Communities of interest in Florida's current state legislative and congressional district maps include, but are not limited to: cultural communities, agricultural communities, economic development communities, coastal communities, environmental communities, Caribbean-American communities, urban communities, rural communities, historically underserved communities, minority communities, ethnic communities, retirement communities, etc.

Validity of Districts and Plans: State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Racial and Language Minorities

Concerns have been expressed that the FairDistrictsFlorida.org initiatives do not articulate their relationship to the federal Voting Rights Act, and therefore could result in a regression of minority representation.[102] Additionally, while federal law regarding redistricting has become relatively settled in the past decade, there is a lack of precedent to guide both the Courts and the Legislature in complying with the arrangement of standards in FairDistrictsFlorida.org's initiatives. Depending on how it is that the FairDistrictsFlorida.org initiatives are interpreted, the results could range from a reduction in minority access seats to equal protection concerns.

For example, *Bartlett v. Strickland*, was decided March 9, 2009, after the FairDistrictsFlorida.org initiative petitions were crafted, and after the Florida Supreme Court completed its review of the petitions' ballot summary in January, 2009. In *Bartlett v. Strickland*, the State of North Carolina had a provision in its Constitution prohibiting dividing counties when drawing the State's legislative districts, which was known as the "Whole-County Provision." The "Whole-County Provision" in the North Carolina Constitution is somewhat analogous to the provisions in FairDistrictsFlorida.org's initiatives requiring compact districts, and use of existing political and geographical boundaries.

The U.S. Supreme Court held in favor of the "Whole-County Provision," and ruled against the creation of a minority "crossover" district that had violated the provision. According to the Court, Section 2 of the VRA allows States to choose their own methods of compliance with the VRA, and compliance may include the creation of crossover districts, where no other prohibition exists in the State's law. The only districts that could violate such a prohibition in State law would be majority-minority districts.

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[102] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.

Subsection (2) of the FairDistrictsFlorida.org initiatives does preempt the requirements (compactness, contiguity, equal population, political and geographical boundary lines) in that subsection if they are in conflict with federal law or the requirements (incumbency, political parties, and equal participation for minorities) in Subsection (1). However, if federal law is interpreted to be discretionary in this matter, and the state law is interpreted to reflect federal law, the other standards in the initiatives could never be in conflict with a purely discretionary matter. Therefore, if FairDistrictsFlorida.org's provisions were interpreted to be a recapitulation of the federal Voting Rights Act, and if the Voting Rights Act does not compel the creation of minority access seats, where the minority group is less than 50 percent of the voting age population, the FairDistrictsFlorida.org's initiatives may create prohibitions to the Legislature's discretion in maintaining and creating minority access seats.

Conversely, if FairDistrictsFlorida.org's initiatives were interpreted to exceed the VRA, and allow for the creation of irregularly shaped districts under Section 1 only for racial factors, the such districts may run afoul of the Equal Protection Clause of the United States Constitution.

Additionally, one other possible view of the initiatives is that they would create a Section 5 standard with statewide application. If the initiatives create a permanent Section 5 standard which would apply to every individual district drawn in all 67 Florida counties, regardless of evidence of prior or present discrimination, there would be significant legal concerns. Federal case law holds that race-based provisions of law must be of last resort, remedial in nature, and narrowly tailored. Therefore, as written, the initiatives invite equal protection challenges and furthermore a volume of litigation which no state has experienced.

In public statements that addressed the relationship between the initiatives and the VRA, FairDistrictsFlorida.org provided three perspectives on the language.

1. "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."[103]

2. "Compactness and utilization of local boundaries only come into play to the extent that they can without conflicting with the protection of minority voters." [104] "If it is a race district, if it is a racial or language minority district it is going to be a very different calculus than it is going to be if it is a -- if it is a non minority district." [105] "So first you have to have the minority districts drawn. Once you have those districts drawn you go ahead and you make the other districts to the extent that you can, compact and utilizing existing boundaries."[106]

3. "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. That is not presently part of the Voting Rights Act, except to the extent that it might be somewhat similar to what is in Section V."[107]

The proposed joint resolution addresses these concerns in two different ways. First, the state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, without being subordinated to any other provision in Article III of the Florida Constitution. Reflecting back on *Bartlett v. Strickland*, this proposed joint resolution prohibits other standards in Article III from being read as a prohibition against the creation of crossover districts.

Second, the proposed joint resolution requires that districts and plans be drawn in a manner that balanced and implements the standards in the Florida Constitution in a rational manner and in a

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[103] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[104] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment.* Meeting Transcript. February 11, 2010.
[105] *Id.*
[106] *Id.*
[107] *Id.*

manner that is consistent with federal law. In effect, the Legislature is required the rationally balance the plain reading of Florida Constitution with the U.S. Constitution and the federal Voting Rights Act.

As it pertains to the ability of racial and language minorities to participate in the political process and elect candidates of their choice, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Communities of Interest

Communities of interest are a well-recognized traditional redistricting principle in case law. Florida's current district maps include a number of districts that encompass communities with common priorities and interest, including agricultural communities of interest, coastal communities of interest, economic communities of interest, etc.

However, without explicit instruction, a compactness standard would not necessarily be interpreted to incorporate such communities. For instance, low income communities and historically underserved communities are frequently isolated in urban centers, and thereby not always immediately connected to communities with similar interest. Yet such communities may be well served if aligned together, in the same district, as this would increase the likelihood that the elected representatives of the district were mindful of the economic and historical needs of the district.[108] Furthermore, maintaining communities of interest can help maintain the core of existing districts, and thereby reduce voter confusion.[109]

The FairDistrictsFlorida.org initiatives are silent in regards to "traditional redistricting principles." Because they have no mention in the language of the initiatives, aesthetic issues such as compactness and maintaining political boundaries would likely supersede the interest of maintaining communities of interest. Therefore, under the plain reading of the language of the initiatives, legislative discretion to respect communities of interest may be eliminated, or at least constrained. For example, Florida's 25th Congressional District contains one of the most significant environmental communities of interest in the world, yet otherwise the boundaries of the district would be difficult to maintain under a purely mathematical or geometrical application of a compactness standard.

The proposed joint resolution addresses these concerns in a similar manner to those regarding minority districts. First, communities of interest are expressed in the language as a standard that may be respected and promoted. Second, communities of interest may not be subordinated to any other provision in Article III of the Florida Constitution, giving communities of interest an equal footing with other state redistricting standards.

As it pertains to communities of interest, because the standards contained in this amendment are not subordinate to any other provision of Article III, they would be of at least equal dignity with the standards contained in Subsection (1) of the FairDistrictsFlorida.org amendments, and would be superior to the standards contained in Subsection (2) of the FairDistrictsFlorida.org amendments.

Balancing

The Florida Supreme Court presumes the constitutionality of legislative action. "[E]very reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act."[110] Also, in the specific context of determining compliance with redistricting standards in the state constitution, the court has held that the legislature's enactment is presumed constitutional. Specifically:

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[108] Brown, Congresswoman Corrine and Congressman Mario Diaz-Balart. *Select Policy Council on Strategic & Economic Planning Part 2 of 2.* http://www.myfloridahouse.gov/Sections/PodCasts/PodCasts.aspx. January 11, 2010.
[109] *Id.*
[110] *In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session*, 263 So. 2d 797, 805-06 (Fla. 1972).

> "Also in contention in various comments and at oral argument is the presumptive validity of the joint resolution of apportionment and the amount of deference this Court gives to the joint resolution of apportionment. The opponents generally argue that the Legislature's joint resolution of apportionment is not presumptively valid like a statute because the joint resolution is not subject to gubernatorial veto. Our 1972 opinion addressed this issue. *See In re Apportionment Law*, 263 So. 2d at 805-6. To clarify this issue, consistent with the discussion in the 1972 case, we hold that the joint resolution of apportionment identified in article III, section 16, Florida Constitution, upon passage is presumptively valid."[111]

However, without providing much instruction, the intent provisions in the FairDistrictsFlorida.org initiatives—regarding incumbency, political parties, and equal participation for minorities—could be read to create standards for challenging or reviewing redistricting plans or districts. Proponents of FairDistrictsFlorida.org suggested that the intent standards were meant to make discoverable and scrutinize the use of political data in redistricting.[112] Furthermore, the intent standards are divined by the public and private statements of the legislators themselves. [113]

Conversely, Ellen Freidin provided some insight that would suggest FairDistrictsFlorida.org's initiatives were not intending to excessively increase public review and judicial scrutiny if districts and plans were established through reasonable processes that accounted for all the applicable standards. According to Ellen Freidin, "The answer is that in order to draw these maps you must have not only data, but you must have census information. You must have voting data, you must have census information, you must have geographical information and you have also got to have a balancing by a legislative body of all of the criteria." [114] "Well, I think that the very principal of districting and the way it has always been done in the past is to do it after public comment and with collegial collaboration among the members."[115]

The proposed joint resolution incorporates these statements and the historical position of the Florida Supreme Court in two statements. First, "In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution." In effect, this balancing requirement acknowledges an already existing body of case law, and requires the state to incorporate those standards in how it is that the state reads the state and congressional redistricting standards in the Florida Constitution.

Second, "Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law. State legislative and congressional districting plans and individual districts are considered to be valid, provided that the balancing and implementation of state legislative and congressional redistricting standards is both rationally related to the standards for state legislative and congressional redistricting contained in the Florida Constitution, and is consistent with federal law for state legislative and congressional redistricting.

Requirements for Joint Resolutions by the Florida Legislature

- According to Article XI, Section 1, of the Florida Constitution, "Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature."

- According to Article XI, Section 5(a), of the Florida Constitution, "A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general election held more than ninety days after the joint resolution or report of revision commission,

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[111] *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002)
[112] Mills, Jon. *How will the FairDistrictsFlorida.org Amendments Work?* March, 2009.
[113] Freidin, Ellen. *Select Policy Council on Strategic & Economic Planning & Senate Reapportionment*. Meeting Transcript. February 11, 2010.
[114] *Id.*
[115] *Id.*

constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records..."

- According to Article XI, Section 5(d), of the Florida Constitution, "Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, shall be published in one newspaper of general circulation in each county in which a newspaper is published."

- According to Article XI, Section 5(e), of the Florida Constitution, "Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

- According to Section 101.161(1), Florida Statutes, "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." The substance of the amendment shall be embodied in the ballot summary of the measure. Ballot language for amendments proposed by joint resolution is not restricted by the 75 word standard that applies to other forms of constitutional amendments. In addition, joint resolutions are not required to provide a separate financial impact statement. "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."

- According to Section 101.161(2), Florida Statutes, the Department of State is responsible for furnishing each proposed constitutional amendment with a place on the ballot and corresponding number. "The Department of State shall furnish the designating number, the ballot title, and the substance of each amendment to the supervisor of elections of each county in which such amendment is to be voted on."

B. SECTION DIRECTORY:

Not Applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Non-recurring FY 2010-2011

   The Department of State, Division of Elections would estimates the cost of this proposed amendment to the state constitution, to be considered on the November 2, 2010 General Election ballot, to be approximately $9,089.28 in non-recurring General Revenue for publication costs.

   Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election. Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is $94.68 per word. The word count for the proposed joint resolution is 96 words X $94.68 = $9,089.28.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Supervisors of Election would be required to include the ballot summary proposed amendment on printed ballots.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The joint resolution does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, the amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or at a special election held for that purpose. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

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

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Defendants.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Florida Rule of Civil Procedure 1.510(b), Intervening Defendant, the Florida House of Representatives, moves for summary judgment and requests that the Court deny Plaintiffs' Motion for Summary Judgment, dated June 11, 2009.

Introduction

Plaintiffs' sole claim is that the ballot summary for Amendment 7 is misleading. But the summary is substantially identical to the actual language of the proposed amendment, and, not surprisingly, the Florida Supreme Court has routinely upheld ballot summaries that closely track the language of a briefly worded amendment.

Plaintiffs base their attack on a fundamental mischaracterization of Amendment 7. Plaintiffs argue that Amendment 7 "nullifies" or "eliminates" all redistricting standards in the Florida Constitution, clearing a path for the unfettered exercise of legislative discretion. Not one word suggests that Amendment 7 tears up, root and branch, all existing or future redistricting standards. In fact, the exact opposite is true. Amendment 7 expressly commands the Legislature to implement all redistricting standards—and to balance them in a rational way.

Background

Since 1968, the Florida Constitution has imposed two fundamental requirements on the creation of state legislative districts. The first relates to the number of districts. Senate districts must number between 30 and 40, and Representative districts must number between 80 and 120. Art. III, § 16(a), Fla. Const. The second requires that districts consist of contiguous territory. *Id.* In other words, all territory within each district must be in actual, physical contact. *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 279 (Fla. 1992).

As required by the Constitution, the Florida Supreme Court conducts automatic reviews of state legislative redistricting plans to verify their compliance with the contiguity requirement, and with the Federal Constitution's "one person, one vote" requirement of population equality. Art. III, § 16(c), Fla. Const.; *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002). Because these requirements are clear, absolute, and objective, the Court's evaluation consists of a simple, facial review of the redistricting map and data. *Id.* at 824-25.

In January 2010, the Florida Department of State certified two proposed constitutional amendments for placement on the 2010 general election ballot. These proposed amendments, sponsored and promoted through the initiative process by a political committee, and designated

Amendment 5 (state legislative districts) and Amendment 6 (congressional districts), would add new, complex, and fact-intensive redistricting requirements to the Florida Constitution.

Amendments 5 and 6 would require all districts (once certain minimum protections for minority voters were satisfied) to be "compact" and, wherever "feasible," to follow political and geographical boundaries—regardless of their effect on minority communities that do not benefit from the minimum protections of Amendments 5 and 6. The same rigid requirements threaten to divide communities of interest, such as coastal and agricultural communities, whose preservation has long been recognized as a legitimate objective, *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The Legislature proposed Amendment 7 to enable voters to mitigate the unintended consequences of such rigid mandates for racial minorities and communities of common interest. At its outset, Amendment 7 commands the Legislature to "balance and implement" all standards in the State Constitution. It empowers the Legislature, in the balancing process, to advance the rights of minorities and preserve communities of interest, and provides that these interests must be balanced alongside—not subordinated to—the other constitutional standards. This balancing of race-neutral redistricting principles (such as communities of common interest) is essential to the advancement of minorities because districts motivated predominantly by race violate Equal Protection. *Id.* Finally, Amendment 7 directs courts to uphold redistricting plans if they comply with federal law and rationally balance and implement all standards in the Florida Constitution.

Memorandum of Law

The Legislature is vested with constitutional authority to propose amendments to the Florida Constitution upon approval of three-fifths of each chamber. Art. XI, § 1, Fla. Const. Any such proposal is then submitted to the people for approval. Art. XI, § 5(a), Fla. Const.

I. Standard of Review.

A proposed constitutional amendment must be accompanied by a title and summary. § 101.161(1), Fla. Stat. (2009). The title and summary, which alone appear on the ballot, must be clear and unambiguous. *Id.* Ballot language is clear and unambiguous if it fairly describes the chief purpose of the amendment and does not mislead. *Adv. Opinion to the Att'y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1236 (Fla. 2006). The ballot summary must "accurately describe the scope of the text of the amendment." *Adv. Opinion to the Att'y Gen. re the Med. Liability Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004).

The Court's role in review of amendments proposed by the Legislature is especially limited. "The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done." *Smathers v. Smith*, 338 So. 2d 825, 826-27 (Fla. 1976) (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). "This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment . . . ." *Id.* at 827.

II. Because the Summary Is Substantially Identical to the Amendment Text, It Clearly and Unambiguously Describes the Proposed Amendment.

As a matter of law (and plain common sense), a ballot summary that is identical in all material respects to the amendment language is clear and unambiguous. Plaintiffs' effort to find deception in a summary that faithfully echoes the language of the proposed amendment ignores common sense. Worse, it disregards recent, binding Florida Supreme Court precedent.

The ballot summary attacked as misleading is a nearly verbatim restatement of the amendment language. In fact, the only discrepancies between the text and summary actually

enhance the clarity of the summary. These editorial changes—the *only* changes—are depicted in the following strikethrough comparison of the amendment text and summary:[1]

> In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in ~~this constitution~~the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of ~~this article~~Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in ~~this constitution~~the State Constitution and is consistent with federal law.

In such circumstances, the Florida Supreme Court has, with little difficulty, approved proposed ballot language. In *Advisory Opinion to the Attorney General re the Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. 2004), the Court upheld a measure to limit attorney compensation in medical malpractice cases. In finding the title and summary clear and unambiguous, the Court identified no "material or misleading discrepancies between the summary and the amendment." *Id.* at 679. "In fact, the summary . . . [came] very close to reiterating the briefly worded amendment." *Id.* Thus, the Court concluded that "the wording of the title and summary was sufficient to communicate the chief purpose of the measure." *Id.*

In *ACLU of Florida, Inc. v. Hood*, 881 So. 2d 664 (Fla. 1st DCA 2004), the plaintiffs challenged a legislatively proposed amendment authorizing the Legislature to require parental notification prior to the termination of a minor's pregnancy. While the text of the amendment authorized the Legislature to require parental notification "[n]otwithstanding" the minor's right of privacy under Article I, Section 23 of the Florida Constitution, the summary did not make the same disclosure. In a unanimous decision, the Florida Supreme Court ordered that the language

[1] Underscored words appear in the summary, but not the amendment text. Stricken words appear in the text, but not the summary. All other words are identical in both.

of the amendment—including the reference to the constitutional right of privacy—appear on the ballot verbatim. *ACLU of Fla., Inc. v. Hood*, Case No. SC04-1671 (Fla. Sep. 2, 2004).[2]

In *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229 (Fla. 2006), the Court reviewed a proposal to define marriage. The differences between the summary and amendment text were minimal. In upholding the amendment, the Court explained that the "ballot title and summary do not impermissibly employ terminology divergent from that contained in the text of the actual proposed amendment," and that "the language submitted for placement on the ballot contains language that is essentially identical to that found in the text of the actual amendment." *Id.* at 1237.

In *Advisory Opinion to Attorney General re Funding of Embryonic Stem Cell Research*, 959 So. 2d 195 (Fla. 2007), the Court approved a proposed amendment to fund embryonic stem-cell research. The Court explained that, while the summary omitted some details of the proposal, its "language . . . closely tracks that which is used in the amendment itself." *Id.* at 201. And, in *Advisory Opinion to the Attorney General Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 488, 491 (Fla. 2007), the Court approved a summary that "closely follow[ed] the language of the full initiative," and that portion of a second summary that "follow[ed] the proposed constitutional amendment very closely."

The amendment text and ballot summary of Amendment 7 are substantially identical. As these multiple Florida Supreme Court precedents recognize, it is hardly possible to convey

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[2] Because the election was fast approaching, the Court acted quickly in issuing its order. It stated it would later publish an opinion. *ACLU of Fla., Inc.*, Case No. SC04-1671 (Fla. Sep. 2, 2004). Later, the Court determined that, with "the election . . . having been held on November 2, 2004, [the Court] has now determined that no opinion shall be issued." *Id.* (Fla. Dec. 22, 2004). The same case demonstrates that, in the case of a legislatively proposed amendment, the proper remedy for defective ballot language is to correct it—not to strike the proposal from the ballot.

the substance of a proposal more clearly and unambiguously than by a verbatim recitation. Voters presented with the actual words of the proposed amendment will not be misled.

III. Amendment 7 Does Not Eliminate the Contiguity Requirement.

Plaintiffs argue that Amendment 7 nullifies the existing requirement that districts consist of contiguous territory.[3] Plaintiffs point to the provision that enables the Legislature to promote minority rights and communities of common interest "without subordination" to other standards. According to Plaintiffs, the phrase "without subordination" elevates these standards above—and permits the Legislature to ignore—other standards. Plaintiffs are wrong.

A. No Fair Reading Supports Plaintiffs' Interpretation of Amendment 7.

Amendment 7 does not repeal any standards, explicitly or implicitly. On the contrary, it directs the Legislature to "balance and implement" all standards in the Florida Constitution. This is a clear command to the Legislature to reconcile and implement all standards. Because the contiguity requirement will remain in the Constitution, the Legislature must implement it.

When read in its proper context, the phrase "without subordination" is clear. *Cf. Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008) ("A constitutional provision should be 'construed as a whole in order to ascertain the general purpose and meaning of each part . . . .'" (quoting *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996))). The standards in Amendment 7

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[3] The Supreme Court has required ballot summaries to inform voters of the proposal's substantial effect "on existing sections of the constitution." *Adv. Opinion to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994). Thus, in *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), the Court invalidated a proposed amendment to *conditionally* bar legislators from lobbying within two years after vacating office. Because the summary did not indicate that the proposal would supersede an *unconditional*, two-year ban already contained in the Constitution, it created the false impression that the proposed amendment enacted a new prohibition, while in fact it relaxed an existing prohibition. And in *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the Court disapproved a proposal to conform the prohibition against "cruel or unusual punishment" to the federal prohibition against "cruel and unusual punishment," because the summary did not inform voters that the amendment would weaken the Florida Constitution's existing protection.

must be weighed and balanced *alongside*—not subordinated to—other standards. To support any other result, Plaintiffs must wholly ignore the first and third sentences of Amendment 7.

It is telling that the Legislature chose the phrase "without subordination," rather than the familiar word "notwithstanding." The word "notwithstanding" would clearly have denoted primacy, or superiority. But the Legislature provided only that the standards in Amendment 7 are not subordinate—not *inferior*—to other redistricting standards. Had the Legislature intended to supersede existing standards, it would have employed more suitable language.[4]

The balancing of equal and coordinate standards would not permit the Legislature to disregard contiguity. To balance, harmonize, and implement *all* standards in a rational way, the Legislature must strictly observe—not ignore—such absolute, objective standards as contiguity.

Contiguity is an objective concept. A district is either contiguous or not contiguous. It either consists of one territory or multiple, unconnected territories. Were the Legislature to disregard such black-and-white standards, its implementation would not be upheld as rational.

The existing constitutional limit on the number of state legislative districts is also an absolute. Art. III, § 16(a), Fla. Const. On Plaintiffs' theory, the Legislature might create any number of districts—say, four hundred Senate districts—if it determined that smaller districts would promote communities of common interest. But if it did so, the Legislature would fail to "implement" all standards. This example clearly illustrates the fallacy of Plaintiffs' argument.

Other standards are not absolute, but relative, and leave room for compromise. A compactness requirement does not require perfect circles or squares, but only some acceptable degree of compactness. A district that loses some compactness to promote communities of

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[4] Because "the Legislature is presumed to know the meaning of the words it chooses," *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 14 (Fla. 2004), its choice of words must be presumed deliberate and meaningful.

interest—or deviates from a geographical boundary to enhance the ability of minorities to elect their preferred candidates—might reflect a sensible compromise or rational harmonization of standards. This is what Amendment 7 demands. But a district cannot be *somewhat* contiguous. Contiguity is absolute, and strict compliance is essential. A different reading would contravene Amendment 7's express command to balance and implement all standards in the Constitution.

If Amendment 7 nullifies contiguity, so do the proposals supported by Plaintiffs. Both Amendments 5 and 6 contain a contiguity requirement and place various standards on an equal footing with contiguity. For example, Amendments 5 and 6 do not subordinate to contiguity the requirement that districts not diminish the ability of minorities to elect representatives of their choice. Under Plaintiffs' interpretation, the equal status of these requirements in Amendments 5 and 6 would allow the Legislature to create non-contiguous districts in order to ensure that the ability of minorities to elect representatives of their choice remains undiminished.

B. Legislative History Opposes Plaintiffs' Position.

Amendment 7 had nothing to do with contiguity. Plaintiffs cannot cite a single passage in the legislative Staff Analysis[5]—or even a lone utterance in legislative debate—that indicates the slightest intent to repeal the contiguity requirement. Rather, the Staff Analysis demonstrates that Amendment 7 was prompted by the potential new standards in Amendments 5 and 6.

The Staff Analysis describes the Legislature's chief concern that under Amendments 5 and 6 "aesthetic issues such as compactness and maintaining political boundaries would likely supersede the interest of maintaining communities of interest." *See* Staff Analysis at 19. For example, the compactness requirement—unless balanced with communities of interest—might

[5] The Staff Analysis prepared by the House Select Policy Council and Strategic Economic Planning is attached to Plaintiffs' Motion for Summary Judgment as Exhibit 3.

preclude the preservation of Congressional District 25, which now encompasses the Everglades, one of the "most significant environmental communities of interest in the world." *Id.*

Amendment 7 was designed to place the Legislature's discretion to promote the rights of minorities and communities of interest on "an equal footing with other state redistricting standards." *Id.* The Legislature ensured that the standards in Amendment 7 will not be second-class standards, demoted beneath the new, expressly hierarchical standards in Amendments 5 and 6. The lengthy Staff Analysis contains no indication that Amendment 7 was intended to bulldoze existing, tried-and-true requirements such as contiguity out of the Constitution.

C. Canons of Construction Oppose Plaintiffs' Interpretation.

In addition to the legislative history, well-established rules of construction discredit Plaintiffs' interpretation. "In construing the Constitution every section should be considered so that the Constitution will be given effect as a harmonious whole. A construction which would leave without effect any part of the Constitution should be rejected." *Askew v. Game & Fresh Water Fish Comm'n*, 336 So. 2d 556, 560 (Fla. 1976); *accord Chiles v. Phelps*, 714 So. 2d 453, 459 (Fla. 1998) ("We are precluded from construing one constitutional provision in a manner which would render another superfluous, meaningless, or inoperative.").

Plaintiffs' extreme and implausible interpretation would exterminate the existing requirement of contiguity. This approach ignores accepted canons of interpretation. "Where a constitutional provision will bear two constructions, one of which is consistent and the other which is inconsistent with another section of the constitution, the former must be adopted so that both provisions may stand and have effect." *Broward County v. City of Fort Lauderdale*, 480 So. 2d 631, 633 (Fla. 1985) (quoting *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13, 16 (Fla.

1974)). "A construction that nullifies a specific clause will not be given to a constitution unless absolutely required by the context." *Gray v. Bryant*, 125 So. 2d 846, 858 (Fla. 1960).

The Florida Supreme Court recently explained that a new constitutional provision will prevail over prior provisions of the Constitution only if it "specifically repeals them" or "cannot be harmonized with them." *Adv. Opinion to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 190 (Fla. 2009) (plurality opinion) (quoting *Jackson v. City of Jacksonville*, 225 So. 2d 497, 500-01 (Fla. 1969)). An implied repeal is "not favored, and every reasonable effort will be made to give effect to both provisions." *Id.*; *accord Wilson v. Crews*, 34 So. 2d 114, 118 (Fla. 1948) ("Implied repeals . . . of organic provisions occur only when the provisions as adopted are positively and irreconcilably repugnant to each other, and then only to the extent of the repugnancy." (quoting *State v. Butler*, 69 So. 771, 779 (Fla. 1915))).

Amendment 7 does not expressly repeal—and can easily be harmonized with—the contiguity provision. Amendment 7 requires all standards to be balanced and implemented. An objectively determinable mandate such as contiguity must be respected—not ignored—in that balancing process. Plaintiffs' interpretation does violence to the Constitution, and is unnecessary to boot. *Cf. Brown v. Griffin*, 229 So. 2d 225, 226 (Fla. 1969) ("But if the statute is reasonably susceptible to a construction which renders it valid, that construction should be adopted.").

D. Amendment 7 Identifies the Specific Article of the Constitution It Affects.

Even if Amendment 7 eliminates the contiguity requirement (which it does not), its summary would not be misleading. The summary must "*identify the articles* or sections of the constitution substantially affected." *Adv. Opinion to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009) (quoting *Fine v. Firestone*, 448 So. 2d 984, 989

(Fla. 1984)) (emphasis added). The function of a summary is to "put a voter on notice" that an existing provision will be substantially affected, *id.*—not to describe that effect in detail.

Here, the ballot summary identifies the only affected article of the Constitution. The summary squarely discloses that the new standards will not be subordinate to other provisions in Article III. This is sufficient to afford a voter "fair notice of that which he must decide." *In re Adv. Opinion to Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient*, 880 So. 2d 659, 664 (Fla. 2004) (quoting *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)). Voters must "do their homework and educate themselves about the details of a proposal," *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992)—even "before [they] enter[] the voting booth," *In re Adv. Opinion to Att'y Gen. re Phys. Shall Charge the Same Fee for Same Health Care Serv. to Every Patient*, 880 So. 2d at 665 (quoting *Adv. Opinion to Att'y Gen. re Right to Treat. & Rehab. for Non-Viol. Drug Offenses*, 818 So. 2d 491, 498 (Fla. 2002)).

IV. The Ballot Title Is Not Misleading.

Persisting in their misinterpretation of Amendment 7, Plaintiffs argue that the word "standards" in the ballot title is misleading. According to Plaintiffs, Amendment 7 creates no standards and in fact eliminates all standards. This wild interpretation cannot be sustained.

Under any rational understanding, Amendment 7 creates standards. Amendment 7 authorizes the Legislature to take into consideration the ability of racial and language minorities to participate in the political process and elect representatives of their choice. It also authorizes the Legislature to respect and promote communities of common interest.

Plaintiffs deride these standards as mere "suggestions," but *discretionary* standards are "standards" nonetheless. A "standard" is any "criterion for measuring acceptability." Black's

Law Dictionary (8th ed. 2004). Clearly, if adopted, the provisions of Amendment 7 will serve as criteria for measuring the acceptability of state legislative districts.

Amendment 7 does not eliminate standards. Quite the reverse. Its fundamental command is to "balance and implement" all constitutional standards in a rational way. In this process, the Legislature must harmonize and effectuate all standards. Plaintiffs' suggestion that Amendment 7 obliterates existing standards is directly opposite to its plain words.

"Finally, the ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Adv. Opinion to the Att'y Gen. re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002). In *Advisory Opinion to Attorney General re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996), the Attorney General argued that the title's reference to "constitutionally imposed" taxes might mean either (i) taxes imposed by the Constitution itself; or (ii) taxes constitutionally imposed by the Legislature. The Court rejected the argument, concluding that the title was clear when "read with common sense and in context with the summary." *Id.* The same is true here. As in most cases, the brief ballot title derives clarity from the summary of the amendment.

V. The Absence of Definitions in the Ballot Summary Is Not Misleading.

Plaintiffs argue that the failure to define a "legal phrase" that appears in the ballot summary is fatal. There is no such absolute rule. As in all cases, the dispositive question is whether the summary will mislead the public. In this case, the public will easily comprehend the common-sense terminology to which Plaintiffs object.

A. The Phrase "Communities of Common Interest" Is Not Misleading.

"Communities of common interest" is a common-sense term. It is not legal jargon, but plain English. It means what it says. Consulting a dictionary—or common usage—voters

will easily understand, from the literal meaning of these familiar words, that the proposal would permit the Legislature to tailor districts that suit communities with shared interests.

The Florida Supreme Court has not required ballot summaries to define all words or phrases with legal significance. In *In re Adv. Opinion to the Att'y Gen. re Med. Liability Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004), the Court did not insist on a definition of the legal phrase "medical liability" in the ballot summary of a proposed amendment to limit attorney's fees in medical malpractice litigation. The Court concluded that "the precise meaning of his term is better left to subsequent litigation, should the amendment pass." *Id.*

Still more recently, in *Advisory Opinion to Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1237-38 (Fla. 2006), the Court rejected the argument that the summary of a proposed amendment designed to define marriage and prohibit any other legal union treated as marriage or its "substantial equivalent" was required to define "substantial equivalent." The Court held that "substantial equivalent" is "not within the field of undefined legal phrases" that might mislead the voters. *Id.* at 1237. The phrase is "is frequently used and understood by the common voter, and . . . does not require special training in the legal profession to comprehend its meaning." *Id.* The Court concluded that the "plain meaning of these words, according to dictionary definition," was sufficiently clear and unambiguous. *Id.*

The two cases in which the Supreme Court disapproved summaries for their failure to provide definitions involved inscrutable legal terminology. In *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, 1309 (Fla. 1997), the Court struck a proposal that would have permitted future initiatives regarding compensation for restrictions on

property use (other than common law nuisances) to embrace multiple subjects. The Court found that the phrase "common law nuisance"—a phrase known *only* to the law—required definition.

Similarly, in *Advisory Opinion to Attorney General ex rel. Amendments to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (Fla. 2000), the Court reviewed a proposed amendment to prohibit public discrimination on several bases, including gender. The ballot summary explained that the proposed amendment exempted from the prohibition "bona fide qualifications based on sex." *Id.* at 890. The Court explained that, without definition, this impenetrable phrase would leave voters guessing.

By contrast, the phrase "communities of common interest" is best defined by the plain meaning of the individual words that compose it. Though used in the law, it has not developed an all-encompassing technical definition that is preferable to its literal interpretation. *See* Joshua Drew, Snapshots From the Jurisprudential Wilderness, 5 Va. J. Soc. Pol'y & L. 373, 408 n.207 (2008); Stephen J. Malone, Recognizing Communities of Interest in a Legislative Apportionment Plan, 83 Va. L. Rev. 461, 465-67 (1997); *cf. Matter of Legislative Districting of State*, 475 A.2d 428, 442 n.21 (Md. 1982) (unhelpfully defining "communities of interest" to mean "identifiable concentrations of population which share one or more common interests"). Indeed, it would be futile to attempt to list or categorize all communities of interest in Florida—now or in the future.[6]

[6] The summaries of the proposed amendments that Plaintiffs support contain many undefined phrases similar to "communities of common interest." The summaries do not define "compact." The meaning of "compact" can "vary significantly," and courts generally rely on at least three different statistical measures to evaluate compactness. *See* Staff Analysis at 11-12. At other times, courts have defined compactness as a function of cultural homogeneity rather than geographical proximity. *Id.* at 12. The summaries also do not define the "opportunity of racial or language minorities to participate in the political process" and the "ability to elect representatives of their choice," though these legal phrases have technical meanings, *see Georgia v. Ashcroft*, 539 U.S. 461, 480-84 (2003). And the Supreme Court rejected the argument that the ballot summaries must define the legal phrase "language minorities." *Adv. Opinion to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

"Communities of common interest" is both easily understandable and perhaps a redundant effort to inform the electorate. "Community" is defined as a "group of people having common interests," *see* American Heritage Dictionary (4th ed. 2009), or a "group of people with a common characteristic or interest living together within a larger society," *see* Merriam-Webster Dictionary. Amendment 7 may be overly explanatory, but the voter is clearly informed.

"The voter must be presumed to have a certain amount of common sense and knowledge." *Adv. Opinion to Att'y Gen. re Protect People From the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002) (quoting *Adv. Opinion to the Att'y Gen. re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996)); *accord In re Adv. Opinion to Att'y Gen. ex rel. Local Trs.*, 819 So. 2d 725, 732 (Fla. 2002). Countless public hearings in former redistricting cycles clearly prove that voters have a perfect awareness of the interests relevant to them, and of the communities affected by those interests. A common-sense definition is the best definition.

B. The Phrase "Rationally Related" Is Not Misleading.

Like "communities of common interest," the phrase "rationally related" means what the well-known dictionary definitions of the words import—nothing more, nothing less. Nothing in Amendment 7 suggests that any other definition than the usual dictionary definition of the words was intended. And, while Plaintiffs speculate that this phrase "appears to" refer to rational-basis review under the Equal Protection Clause, nothing in Amendment 7 makes the same connection.

The meaning of this phrase is unambiguous: the Legislature's plan must be upheld if it rationally balances and implements state constitutional standards. The Staff Analysis confirms this common-sense understanding. It explains that, under Amendment 7, "districts and plans are valid if the standards in the state constitution were balanced and implemented rationally," Staff Analysis at 1, and that Amendment 7 "requires that districts and plans be drawn in a manner that

balanced and implements the standards in the Florida Constitution in a rational manner," *id.* at 18-19. There is no mystery in these words. Voters will easily discern their ordinary meaning.

The words "rational," "rationally" and "relate" are words that people use every day. They bear no analogy to the phrase "common law nuisance," which has no meaning outside the law, *see Adv. Opinion to the Att'y Gen. re People's Prop. Rights Amendments Providing Comp. for Restricting Real Prop. Use May Cover Multiple Subjects*, 699 So. 2d 1304, or to the phrase "bona fide qualifications based on sex," which is indecipherable jargon, *see Adv. Opinion to Att'y Gen. ex rel. Amendments to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888. Even in the law, these words are not tethered to a single, technical meaning. The Legislature commonly uses them in different contexts. *See, e.g.*, § 171.093(4)(c), Fla. Stat. (2009) ("During the 4-year period, . . . district service and capital expenditures within the annexed area shall continue to be rationally related to the annexed area's service needs."); *id.* § 468.621(2)(d) ("Such fine must be rationally related to the gravity of the violation.").

According to Plaintiffs, the ballot summary must disclose that the proposed amendment "differs from the current constitutional standard." (Plaintiffs' Motion for Summary Judgment at 15.) The Constitution, however, does *not* currently contain a standard of judicial review. Thus, the standard of judicial review in Amendment 7 does not substantially affect existing provisions of the Constitution. In *Advisory Opinion to Attorney General–Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991), the Court approved a proposal to impose term limits on certain elective offices. Opponents argued that the summary was defective because it did not disclose that the terms of office were then unlimited. The Court disagreed: "This is not a situation in which the ballot summary conceals a conflict with an existing provision. There is no existing constitutional provision imposing a different limitation on the terms of office." *Id.*

Here, there is no existing constitutional provision that prescribes a different standard of judicial review. In this respect, Amendment 7 does not change constitutional law, but writes on a clean constitutional slate. *Id.* (concluding that term-limits proposal "writes on a clean slate").

Plaintiffs contend that the summary must describe the standard of judicial review as the "lowest level of constitutional review." This derogatory characterization is based on Plaintiffs' erroneous comparison of the new standard to rational-basis review under Equal Protection. But Amendment 7 does not import an existing level of scrutiny from an unrelated jurisprudence. It directs the Court to ask whether the Legislature has rationally balanced and implemented all state constitutional standards. Finally, the ballot summary is not required to compare and contrast constitutional standards. It is enough if the summary clearly sets forth the standard—as it does.

VI. The Ballot Title and Summary Need Not Explain the Proposed Amendment's Effect on Other Proposed Amendments.

Plaintiffs complain that, while the summary restates the text, it must also explain the possible effects of the proposed amendment on *other* proposed amendments—amendments the people might never adopt. The Florida Supreme Court recently dismissed the same argument.

In *Advisory Opinion to Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court approved for ballot placement a proposed amendment sponsored by Florida Hometown Democracy, Inc., requiring voter approval of all amendments to comprehensive land-use plans.

Before voters could adopt the amendment, the Court approved a "competing proposed amendment" designed—as the preamble of the amendment text expressly stated—to "pre-empt or supersede" the earlier proposal. *Adv. Opinion to Att'y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 119, 121 (Fla. 2008). Florida Hometown Democracy, Inc., argued that the "proposal is intended to pre-empt or

supersede the Florida Hometown Democracy proposed initiative" and that the "summary does not advise that the proposal would 'pre-empt or supersede' other proposals." Answer Brief of Interested Person Florida Hometown Democracy, Inc., at 21, *Adv. Opinion to Att'y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118 (Fla. 2008) (*available at* 2008 WL 5373017). But the Court was unconcerned with the new proposal's effect upon—and even preemption of—the earlier, still pending proposal.

Two Justices dissented. They argued that the proposal's title and summary were misleading because they were "*completely silent* with regard to the fact that one of the chief purposes of this amendment is to vitiate or overrule the effects of" the earlier proposal. *Id.* at 130 (Lewis, J., dissenting) (emphasis in original). The dissenters were unable to "agree with the majority that a ballot summary that . . . is silent with regard to the fact that the proposed amendment has the potential to destroy rights that would be created by a separate constitutional amendment does not 'hide the ball' and is not misleading." *Id.* at 131 (Lewis, J., dissenting).

The majority was unpersuaded. In approving the "competing" amendment for ballot placement, three Justices[7] noted that the proposed amendment would not substantially affect unidentified provisions of the Florida Constitution. *Id.* at 120-21. The Justices took no specific notice of the dissent, but tellingly noted that the proposed amendment "will not conflict with or restrict any *existing* rights to subject local growth management plans to local referenda." *Id.* at

[7] Justices Wells, Canady, and Polston joined in the plurality opinion, while Justice Anstead concurred in the result. One of three dissenters (Justice Quince) did not join in the argument made by Justices Lewis and Pariente that the ballot summary was defective for its failure to disclose the proposed amendment's effect on a second proposed amendment.

123 (emphasis added).[8] The silence of the ballot summary with respect to *potential* rights—rights that might or might not come into existence—did not invalidate the proposed amendment.

In light of *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes*, Plaintiff's position that the summary must describe the proposed amendment's effect on other proposed amendments rings hollow. The Supreme Court confronted this question, and only two Justices concurred in the position urged by Plaintiffs. There, the text of the proposal even declared its purpose to supersede another proposed amendment, while its ballot summary remained silent.

No Florida court, however, has ever invalidated one proposed amendment because its ballot summary did not explain its effect on, or interaction with, another proposed amendment. Ballot summaries must explain proposed changes to *existing* constitutional law, but not *potential* constitutional law. A mere proposal to amend the Constitution has not attained the dignity of an existing constitutional provision formally adopted by the people. Furthermore, the electorate can easily compare and contrast the summaries of various proposals simultaneously presented on one ballot,[9] but the voting booth permits no ready access to the Constitution itself. *Cf. Fla. Dep't of*

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[8] Even without this clear indication that the Court rejected the dissent's position, that position would be deemed rejected. An argument addressed in dissent, though not explicitly rejected, is rejected implicitly. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 11 (Fla. 5th DCA 2009).

[9] Unlike the proposals discussed in *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes*, Amendments 5, 6, and 7 will appear on the same ballot, allowing easy comparison. Further, voters are not absolutely dependent on ballot language alone. Proposed amendments must be published twice in a general-circulation newspaper in each county prior to the election, Art. XI, § 5(d), Fla. Const., and a copy of the amendment itself must be conspicuously posted or made available to voters on election day at every voting location, § 101.171, Fla. Stat. (2009). The Supreme Court has recognized that the availability of the amendment to the voters at voting locations affords valuable, additional notice. *In re Adv. Opinion to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient*, 880 So. 2d 659, 665 (Fla. 2004); *Ray v. Mortham*, 742 So. 2d 1276, 1283 (Fla. 1999).

State v. Slough, 992 So. 2d 142, 149 (Fla. 2008) (noting that accuracy is important because the "title and summary will be the only information that is available to voters" in the voting booth).[10]

In a footnote, Plaintiffs suggest that *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes* has no relevance where an amendment proposed by the Legislature affects a petition initiative. All amendments, however, are subject to the very same accuracy requirement. Art. XI, § 5, Fla. Const.; § 101.161(1), Fla. Stat. (2009); *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) ("This accuracy requirement . . . applies to all proposed constitutional amendments . . . .").

Conclusion

Policy disagreements are central to Plaintiffs' quarrel with Amendment 7. Plaintiffs oppose legislative discretion to protect communities of common interest, and seek a robust—if not preponderant—role for the courts in redistricting. Plaintiffs' recourse, however, must be to the forum of public opinion—not the courts. It is "important to stress that the wisdom or merits of the proposed amendment are not issues before the Court." *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008). Because the summary discloses the legal impact of Amendment 7, this Court should enter summary judgment in favor of Defendants and deny Plaintiffs' Motion to Dismiss.

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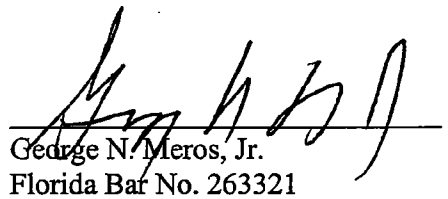
[10] Plaintiffs' claim is illogical and would invite gamesmanship. Because proposed amendments have not acquired an established meaning, any attempt to determine the potential effect of one proposal on another is highly speculative. *See Adv. Opinion to the Att'y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d at 1238 (concluding that the interpretation of a proposed amendment is "better left to subsequent litigation"). Further, on Plaintiffs' hypothesis, multiple proposals that affect one another—even unintentionally—would all be liable to mutual invalidation. Amendments 5 and 6 would themselves be invalid for failure of their summaries to explain their interaction with Amendment 7. And the amendment process could even degenerate into constitutional gamesmanship, as competitors attempt to invalidate proposed amendments by proposing *other* amendments that would be affected by the earlier proposals. Wisely, the Florida Supreme Court closed the door on the argument urged by Plaintiffs.

Respectfully submitted,



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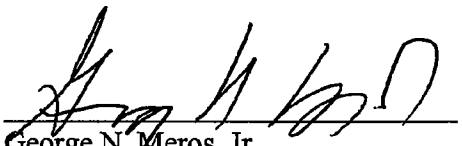

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

CASE NO. 2010 CA 1803

FLORIDA STATE CONFERENCE OF NAACP BRANCHIES; ADORA OBI NWEZE; THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.; DEIRDRE MACNAB; ROBERT MILLIGAN; NATHANIEL P. REED; DEMOCRACIA AHORA; and JORGE MURSULI,

Plaintiffs,

vs.

DEPARTMENT OF STATE, an agency of the State of Florida; and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervenors.
_____/

DEFENDANTS, DEPARTMENT OF STATE and DAWN K. ROBERTS, MOTION FOR SUMMARY JUDGMENT, RESPONSE TO PLAINTIFF'S SUMMARY JUDGMENT AND MEMORANDUM OF LAW

DEFENDANTS, DEPARTMENT OF STATE and DAWN K. ROBERTS, pursuant to Rule 1.510, Florida Rules of Civil Procedure, and this Court's Scheduling Order, move for Summary Judgment in that there are no disputed issues of material fact and Defendants are entitled to judgment as a matter of law. Defendants seek a judgment that the ballot title and summary of Amendment 7 are valid and the Amendment should remain on the ballot. The Defendants file the following Memorandum of Law in support

of their Motion for Summary Judgment and in opposition to the Motion filed by Plaintiffs.

MEMORANDUM

Defendants respectfully adopt the arguments presented by the Intervenors, the Florida House of Representatives and the Florida Senate in opposition to Plaintiffs' Motion for Summary Judgment and in support of their Motion for Summary Judgment. Plaintiffs have not met their burden to demonstrate that Amendment 7 is "clearly and conclusively defective." See *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 339 (Fla. 1978). Defendants Motion for Summary Judgment should be granted and Amendment 7 should be retained on the ballot.

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

FLORIDA STATE CONFERENCE
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VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
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DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs. CASE NO.: 2010 CA 1803

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

_____/

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

Plaintiffs, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure and this Court's Scheduling Order, dated June 10, 2010, submit this reply to the responses by Defendants Department of State and Dawn K. Roberts, Secretary of State, and

Intervening Defendants the Florida House of Representatives and Florida Senate (collectively, "Defendants") to Plaintiffs' Motion for Summary Judgment and Incorporated Memorandum of Law, and response to the Defendants' motions for summary judgment. Plaintiffs respectfully submit that the filings demonstrate there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law.

ARGUMENT

I. A BALLOT SUMMARY IS NOT EXEMPT FROM THE ACCURACY REQUIREMENT SIMPLY BECAUSE IT QUOTES THE AMENDMENT TEXT.

Instead of immediately responding to Plaintiffs' substantive allegations of defects in Amendment 7's ballot title and summary, Defendants lead their responses to Plaintiffs' motion for summary judgment with several pages of argument asserting the court need not even evaluate the accuracy of the ballot summary because the summary is materially identical to the amendment text. Defendants proclaim, without citation, that a ballot summary identical in all material respects to the amendment language is clear and unambiguous "as a matter of law." (House Response at 4; *see also* Senate Response at 5-6). Not only is this an incorrect statement of law, it demonstrates Defendants' lack of understanding of the purpose of the accuracy requirement and the legislature's obligation to provide voters sufficient information to make their vote to change the organic law of this state a meaningful one.

The extent to which a summary accurately portrays an amendment is certainly an appropriate consideration in measuring compliance with Article XI, Section 5 of the

Florida Constitution and section 101.161, Florida Statutes. Thus, it is unsurprising that the Florida Supreme Court has examined and commented upon the similarity between a summary and the underlying text in finding that a summary meets the constitutional and statutory requirements. (*See* cases cited in House Response at 5-6; Senate Response at 5-6).

But Defendants' arguments fail to recognize that the ultimate question is always whether the summary fairly informs the voter of the chief purpose of the amendment and is not misleading, *see, e.g., Advisory Opinion to the Attorney Gen. re Extending Existing Sales Tax to Non-Taxed Servs. Where Exclusion Fails to Serve Pub. Purpose,* 953 So. 2d 471, 482 (Fla. 2007). Thus, the court's finding of similarity between the summary language and text is not an end in and of itself but rather a component of the overall evaluation of whether the summary meets these goals. *Id.* at 488 ("We do not believe that this argument makes the summary misleading . . . ."); *Advisory Opinion to the Attorney Gen. re The Medical Liability Claimant's Compensation Amendment,* 880 So. 2d 675, 679 (Fla. 2004) ("we find the wording of the title and summary sufficient to communicate the chief purpose of the measure"); *Advisory Opinion to the Attorney Gen. re Fla. Marriage Protection Amendment,* 926 So. 2d 1229, 1240 (Fla. 2006) ("we hold that the ballot summary and title in the instant proposal are not impermissibly misleading").

It is therefore entirely possible for a ballot summary to be substantively identical to the amendment text and yet still fail to inform voters of the amendment's chief purpose or be misleading. *Wadhams v. Bd. of County Comm'rs,* 567 So. 2d 414, 416 (Fla. 1990) (invalidating amendment to county charter where full text of amendment was

placed on ballot); *Evans v. Bell*, 651 So. 2d 162, 166 (Fla. 1st DCA 1995) (same). This is precisely the scenario in the present case.

It would make a mockery of the accuracy requirement to hold that it is automatically satisfied by a ballot summary that simply parrots the amendment text verbatim. Such a rule would allow an amendment that is by all accounts indecipherable to be placed on the ballot simply because the summary matches the amendment text, word for word, in its indecipherability. Those who ask the voters of this state to vote to amend their constitution have a higher duty than this. *E.g., Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) ("the proposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation") (internal quotations and citation omitted).

II. AMENDMENT 7'S BALLOT TITLE AND SUMMARY ARE CLEARLY AND CONCLUSIVELY DEFECTIVE BECAUSE THEY FAIL TO INFORM VOTERS OF THE CHIEF PURPOSE AND EFFECT OF THE AMENDMENT.

A. Misleading Ballot Title

Amendment 7's ballot title, "Standards for the Legislature to Follow in Legislative and Congressional Redistricting," erroneously leads voters to believe the amendment will create articulable standards against which redistricting plans can be measured. It does not.

The discretionary consideration of the interests of racial and language minorities and communities of common interest do not remotely satisfy the Defendants' own definition of a standard, *i.e.*, "criterion for measuring acceptability." (House Response at 12) (citing Black's Law Dictionary (8th ed. 2004)). Once the legislature has "taken into consideration" the interests of racial and language minorities to participate in the political process and elect candidates of their choice, it may choose to take these interests into account when drawing districts, or it may choose not to; both results, although directly opposite, are permissible under the amendment. Also discretionary is the legislature's consideration of communities of common interest; it may choose to "respect and promote" such communities in drawing districts, or it may choose not to; both results, though directly opposite, are permissible under the amendment. Because these factors have no bearing upon the validity or invalidity of a redistricting plan, they cannot possibly constitute "[criteria] for measuring acceptability."

Nor does Amendment 7 provide a standard by stating that "[d]istricts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law." This phrase is not even internally consistent; although "implementation" of standards suggests that each standard is to be adhered to, "balancing" of standards suggests that something less than full compliance with one standard may be acceptable if the deficiency is offset by compliance with another. Furthermore, the requirement that the balancing and implementation be only "rationally related" to the standards contained in the State Constitution can hardly be considered a "standard." This statement means

that only an "irrational" plan will not be deemed valid, but sheds no light whatsoever on the criteria for measuring acceptability of a redistricting plan.

B. Contiguity

The ballot summary fails to disclose that a chief purpose and effect of the amendment is to permit the defeat of the existing constitutional requirement that districts be contiguous by discretionary considerations relating to racial and language minorities and communities of common interest. Although Defendants urge the court to interpret the phrase "without subordination to" to mean "alongside" (House Response at 7-8) or "equal" (Senate Response at 9),[1] this phrase simply does not support such an interpretation. As Defendants acknowledge, "subordinate" means inferior, or of a lower class or rank. (House Response at 8; Senate Response at 9). Thus, the discretionary considerations of racial and language minorities and communities of common interest may not be assigned a *lower* ranking or value than "any other provision of Article III of the State Constitution." But *not lower* does not mean *equal.* Indeed, *not lower* may mean *higher.* Thus, Amendment 7 would permit the legislature to justify a non-contiguous district by, for example, finding it is necessary to do so in order to respect and promote a certain community of common interest.

Amendment 7's instruction that districts and plans are valid if the "balancing and implementation of standards is rationally related to the standards contained in the

[1] This position is inconsistent with the House's earlier interpretation of Amendment 7's relationship to the mandatory standards in Amendments 5 and 6. The House staff analysis for Amendment 7 asserts that consideration of the interests in Amendment 7 would be "of *at least* equal dignity" with the standards contained in Subsection (1) of Amendments 5 and 6. *House of Representatives Staff Analysis for HJR 7231* at 17-19 (April 20, 2010) (emphasis added). "At least equal" is not the same as "equal."

State Constitution" would not bar such a non-contiguous district drawn for the purpose of respecting and promoting a community of common interest. A balancing test, by its very nature, does not require compliance with every factor. *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (stating that no one factor of four-part balancing test is necessary or sufficient to find the deprivation of criminal defendant's right to a speedy trial); *State v. Jones*, 483 So. 2d 433, 438 (Fla. 1986) (stating not all factors in four-part balancing test must favor the state in order to validate a sobriety checkpoint). Thus the legislature could defend the validity of a non-contiguous district by asserting it "balanced" the interests of communities of common interest against the contiguity requirement and determined the interest in respecting and promoting such communities was sufficiently great to warrant less than full compliance with the contiguity requirement. This is a significant change from current law which must be, and is not, disclosed clearly and unambiguously in the ballot summary.

The House and Senate's assertion that they must continue to comply with the contiguity requirement in drawing districts because it is an "absolute" or "objective" factor (House Response at 8-9; Senate Response at 9) is a made-up distinction that has no support in the text of the Florida Constitution, the proposed amendment, or case law. Amendment 7 does not state that a redistricting plan must satisfy the contiguity requirement but can "balance" other constitutional standards that "are not absolute, but relative, and leave room for compromise." (House Response at 8). The extraordinary grant of discretion in Amendment 7 cuts both ways; while it permits the legislature to draw districts and plans by "balancing" constitutional standards, it also permits

displacement of any existing or future standard that purports to be mandatory. This includes the contiguity requirement.

Finally, the fact that the legislative analysis of HJR 7231 does not reflect an intention to repeal the contiguity requirement is of little import. "In evaluating an amendment's chief purpose, a court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself." *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000). Thus, the language of the amendment speaks for itself. Furthermore, during the 2010 legislative session the Senate proposed and heavily debated an alternative joint resolution which was similar to HJR 7231 but was different in that, among other things, it would have expressly required legislative and congressional districts to be contiguous. *See* CS for CS for SJR 2288, available at The Florida Senate, Session Bills, http://www.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=2288&Chamber=Senate&Year=2010&Title=%2D%3EBill%2520Info%3AS%25202288%2D%3ESession%25202010 (last visited June 30, 2010). The Legislature cannot be heard to assert that Amendment 7 somehow implicitly preserves the contiguity requirement notwithstanding its passage of a proposed amendment that made no reference to such requirement and its rejection of a proposed amendment that would have expressly preserved it.

C. Communities of Common Interest

Defendants assert Amendment 7's ballot summary need not define the term "communities of common interest" because it is not an "impenetrable" legal term but

rather can be defined according to common sense and reference to dictionaries. The problem with this approach is that a voter's "common sense" understanding of the term may not comport with its actual application by the courts. It is inappropriate to allow voters to rely upon their own conceptions to define legal terms that have a history of construction and application by the courts. *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 888, 889 (Fla. 2000) (voters should not be left to guess at the meaning of a legal term).

Defendants essentially argue that they should not be required to define the term because it is not susceptible to a clear, set definition. (Senate Response at 15) ("it has not developed an all-encompassing technical definition" and "it would be futile to attempt to list or categorize all communities of interest in Florida"). This argument directly supports Plaintiffs' argument that, contrary to its title, Amendment 7 does not provide any meaningful standards by which a plan or district can be measured. Yet because respect and promotion of "communities of interest" can be used as an excuse to trump every other redistricting standard in the constitution, both present and future, it is especially important that voters be informed of the meaning of this potentially dispositive term.

D. Balance & Implement / Rationally Related

Contrary to Defendants' assertions, the Florida Constitution does specify a standard for judicial review: it requires redistricting to be conducted "*in accordance with* the constitution of the state." Art. III, § 16, Fla. Const. (emphasis added). There is no

ambiguity in this requirement: the legislature's redistricting plans must *comply* with the constitutional standards applicable to redistricting. Accordingly, in its facial review, the Supreme Court examines whether a redistricting plan "violates" the Florida Constitution. *See In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002).

Amendment 7 provides that the state is to "balance and implement" the state constitutional standards. Although it is not clear what this means, it is at least clear that it means something less than drawing plans "in accordance with," or in *compliance* with, state constitutional standards. Meanwhile Amendment 7 also instructs the state to "apply" federal requirements. This demonstrates that "balance and implement" is not intended to mean the same as "apply"; there must be some reason the legislature chose different language for state standards than federal ones. *See Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 14 (Fla. 2004) (the Legislature is presumed to know the meaning of the words it chooses). The word "balance" implies a case-by-case weighing of considerations, which is the opposite of a strict compliance requirement or *per se* rule. *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 374 (Fla. 1984) (stating the existence of a right to disclosural privacy is determined by case-by-case balancing test rather than *per se* rule).

Similarly, it is not clear what it means that under Amendment 7 districts and plans "are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution." But "rationally related" must mean something less than the current requirement that plans be drawn "in accordance

with" the constitution. Amendment 7 also provides that districts and plans are valid if they are "consistent" with federal law. "Rationally related" must mean something less than "consistent"; the legislature cannot be presumed to have chosen different words without intending different meanings. And whether or not the "rationally related" language is intended to borrow from the well-established lowest level of constitutional review, a test which permits all but irrational plans is a substantial change in Florida law which must be revealed to the voters in clear and unambiguous terms.

E. Effect on Amendments 5 & 6

Defendants do not dispute that Amendment 7's chief purpose is to dilute the effects of Amendments 5 and 6, if they are approved by the voters. Indeed, the House acknowledges "the Legislature proposed Amendment 7 to enable voters to mitigate the unintended consequences of such rigid mandates for racial minorities and communities of common interest." (House Response at 3); *see also House of Representatives Staff Analysis for HJR 7231* at 17-19 (April 20, 2010) (noting that Amendments 5 and 6 would limit the legislature's discretion in drawing districts and that the interests in Amendment 7 would be "of at least equal dignity with the standards contained in Subsection (1) of [Amendments 5 and 6] and would be superior to the standards contained in Subsection (2)" of these amendments).[2]

[2]This interpretation of Amendment 7's relationship to the standards in Amendments 5 and 6 stands in stark contrast to the Defendants' contention that Amendment 7 does not dilute or in any way affect the Legislature's obligation to comply with the existing contiguity requirement. Nothing in the text of Amendment 7 justifies these conflicting interpretations.

Defendants' sole defense of the lack of disclosure of the effects on Amendments 5 and 6 is that they are not obligated to make such disclosure, citing *Advisory Opinion to Attorney Gen. re Florida Growth Mgmt. Initiative Giving Citizens the Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118 (2008) (approving citizens' initiative sponsored by "Floridians for Smarter Growth" relating to local growth management plan changes) (*Growth Mgmt. Initiative*). But this advisory opinion is inapplicable to the present case.

In *Growth Mgmt. Initiative*, the Court was considering a citizens' initiative that had achieved ten percent of the required signatures in one-fourth of the required congressional districts so as to trigger Supreme Court review. *Id.* at 118 (citing art. IV, § 10 and art. V, § 3(b)(10), Fla. Const.); § 15.21, Fla. Stat. This initiative would have preempted another citizens' initiative, sponsored by "Florida Hometown Democracy," *if* both initiatives successfully achieved ballot position and were approved by the voters. *Growth Mgmt. Initiative*, 2 So. 3d 118, 119 (Fla. 2009) (quoting text of Floridians for Smarter Growth's Amendment as intended to "pre-empt or supersede recent proposals to subject all comprehensive land use plans and amendments to votes").

At the time of the Court's opinion in *Growth Mgmt. Initiative*, Florida Hometown Democracy's amendment had been approved by the Supreme Court for placement on the ballot,[3] but had not yet acquired the number of petitions necessary to be *placed* on the ballot. *See* § 15.21, Fla. Stat. (Florida Supreme Court review is triggered when an initiative petition achieves ten percent of the requisite petitions in at least one-fourth of the congressional districts required by the constitution); Art. XI, § 3, Fla. Const. (ballot

[3] *See Advisory Opinion to Atty. Gen. re Referenda Required for Adoption and Amendment of Local Govt. Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006).

placement is achieved by filing petitions from one-half of the congressional districts of the state totaling eight percent of the number of votes cast in the state in the last presidential election). In fact, the Florida Hometown Democracy amendment did not achieve ballot placement until June 22, 2009, several months after the advisory opinion in *Growth Mgmt. Initiative*.[4] The "alternative" proposed amendment approved by the Court in *Growth Mgmt. Initiative* still has not achieved ballot position.[5] It is understandable that a majority of the Court did not find the Floridians for Smarter Growth amendment needed to disclose its potential effect upon the Hometown Democracy amendment in order to satisfy the accuracy requirement, because it was uncertain when—if ever—the two citizen initiatives ultimately would be placed on the ballot.

But there is no such uncertainty in this case. Amendments 5 and 6 achieved ballot placement on January 22, 2010. These amendments were certain to appear on the 2010 general election ballot, and the legislature intentionally drafted Amendment 7 to interfere with their effectiveness. As a timely filed legislatively-proposed amendment, Amendment 7 was also certain to appear on the 2010 general election ballot. Art. XI, § 5, Fla. Const. Under these specific circumstances, in order to satisfy the accuracy requirement, Amendment 7's ballot summary must inform voters that a chief purpose and effect of the amendment is to eviscerate the mandatory standards contained in

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[4] *See* Fla. Dept. of State, Div. of Elections, 2010 Proposed Constitutional Amendments, http://election.dos.state.fl.us/initiatives/initiativelist.asp?year=2010&initstatus=ALL&MadeBallot=Y&ElecType=GEN (last visited June 30, 2010).

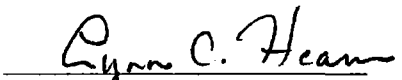
[5] *See* Fla. Dept. of State, Div. of Elections, Initiatives/Amendments/Revisions, http://election.dos.state.fl.us/initiatives/initiativelist.asp (last visited June 30, 2010).

Amendments 5 and 6. Its failure to do so renders Amendment 7 clearly and conclusively defective. *Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), *rev. denied*, 523 So. 2d 577 (Fla. 1988) ("the apparent studied omission of [reference to an inconsistent item on the ballot] and the consequent and just as obvious failure to dispel the confusion which must inevitably arise from this set of circumstances renders the language as framed fatally defective").

CONCLUSION

Because the ballot title and summary of Amendment 7 clearly and conclusively fail to adequately inform the voter of the chief purposes and effects of the amendment, and are affirmatively misleading, placement of Amendment 7 on the ballot would violate Article XI, Section 5, Florida Constitution, and Section 101.161(1), Florida Statutes. Plaintiffs respectfully request that this Court enter final judgment declaring Amendment 7 invalid and prohibiting Defendants from placing it on the ballot, 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.

FLORIDA STATE CONFERENCE OF NAACP BRANCHES; ADORA OBI NWEZE; THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.; DEIRDRE MACNAB; ROBERT MILLIGAN; NATHANIEL P. REED; DEMOCRACIA AHORA; and JORGE MURSULI,

Plaintiffs,

vs. CASE NO. 2010 CA 1803

DEPARTMENT OF STATE, an agency of the State of Florida; and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES and THE FLORIDA SENATE,

Intervenors.
_____/

INTERVENOR/DEFENDANT THE FLORIDA SENATE'S REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Intervenor/Defendant, The Florida Senate (the "Senate"), pursuant to this Court's Scheduling Order, files the following Reply Memorandum of Law:

THE BALLOT SUMMARY INFORMS THE VOTER OF THE AMENDMENT'S CHIEF PURPOSE AND IS NOT MISLEADING

A. Identical Ballot Summary Language.

The test to be applied by a court when reviewing the language of a ballot summary is: (1) whether "the ballot title and summary . . . fairly informs 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 General re Right to Treatment and Rehab for Non-Violent Drug Offenses,* 818 So. 2d 491 at 497. A ballot summary that is identical to the proposed amendment meets that test.

The cases cited by the Senate in its initial Memorandum provide that ballot summary language which is nearly identical to the amendment language is not misleading. In *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment,* 926 So. 2d 1229 (Fla. 2006), the Court distinguished the decision in *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education,* 778 So. 2d 888 (Fla. 2000). In *Treating People Differently, supra,* the Court found the ballot summary misleading because the summary and amendment language used "divergent terms." In *Marriage Protection Amendment, supra,* the Court found that the ballot summary was not misleading because "the language submitted for placement on the ballot contains language that is essentially identical to that found in the text of the actual amendment." *Id.* at 1237.

In *In Advisory Opinion to the Attorney General re Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. 2004), the Court found no material discrepancies between the summary and the amendment because the summary came close to reiterating the exact language of the amendment. Consequently, the Court held, as quoted by Plaintiffs, that "the ballot summary explains the chief purpose of the proposed amendment." *Id.* at 679.

Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-Taxed Services where Exclusion Fails to Serve Public Purpose, 953 So. 2d 471 (Fla. 2007), does not address the issue of whether a ballot summary which incorporates the entire proposed language of the amendment is misleading. The issue in that case was whether a ballot summary which provided that the "Legislature shall periodically review all sales tax exemptions except . . . health services . . ." was misleading because there was no current exemption for health services. The result in that case has no application in this proceeding.

Plaintiffs' reliance on *Wadham v. Board of County Commissioners of Sarasota County,* 567 So. 2d 414 (Fla. 1990), is also misplaced. The Court in *Wadham* found the ballot summary did not inform the voter that the purpose of the amendment was to change the existing County Charter to curtail the Charter Review Board's right to meet. It is the failure to notify the voter of the change to the existing law which is the foundation of the decision in *Wadham*. This is borne out by a subsequent decision in *Harris v. Moore*, 752 So. 2d 1241 (Fla. 4th DCA 2000), which distinguished *Wadham*. The Court in *Harris* held *Wadham, supra*, inapplicable to a Broward County referendum

because the ballot language for the referendum recognized the change to existing law and did not appear to create rights when the actual effect was to reduce or eliminate rights already in existence.

There is nothing in Amendment 7 which changes existing law or has the effect of reducing or eliminating rights already in existence.

B. Ballot Title

Plaintiffs persist in arguing that the ballot title is misleading because it uses the term "standards." No fair reading of Amendment 7 would lead to the conclusion that it does not provide standards for the Legislature to use in redistricting. It provides that the Legislature shall apply federal requirements; shall balance and implement the standards in the State Constitution; shall consider the ability of racial and language minorities to participate in the process; and that recognition of communities of interest will not be subordinate to any other provision of Article III of the State Constitution. It defies logic to say that these are not standards.

Plaintiffs also take issue with the standard of review in that it provides that districts or plans will be valid if the Legislature's balancing and implementation is rationally related to the standards contained in the State Constitution. The concept of balancing interests and criteria is not new to the law. Individual rights are always balanced with the state's protection of its citizens' health, safety and welfare. "Rationally related" is also a commonly understood term that has wide use in the law. Plaintiffs' argument on this point should not be given any credence.

C. Contiguity

Plaintiffs make the bald statement that the chief purpose of Amendment 7 is to defeat contiguous districts. This statement has no basis in the language of the Amendment or the legislative history. There is nothing in the language of Amendment 7 which suggests that it should be used to defeat any existing constitutional requirements for redistricting. To the contrary, Amendment 7 requires a balanced consideration of all provisions in the State Constitution, including existing provisions.

Furthermore, no intent can be ascribed to the fact that other versions of a redistricting amendment were introduced and amendments were offered and debated on the Senate floor. Plaintiffs offer no cases to support their conclusion that legislative intent should be gleaned from the activity of legislative members in floor debate. It is axiomatic that legislative intent should first be determined from the language itself. *Daniels v. Fla. Department of Health*, 898 So. 2d 61 (Fla. 2005). Indeed, Plaintiffs cite *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000), for that very proposition. The language of Amendment 7 indicates only an intent to consider all provisions of the Article III of the Florida Constitution when redistricting.

D. Communities of Common Interest

Plaintiffs contend that Amendment 7 should be stricken because its ballot summary does not define "communities of interest." It is telling that Plaintiffs have not offered an acceptable definition of the phrase that would cure this alleged defect. In fact, the accepted definitions of the term are no more descriptive than the term itself. As the House of Representatives noted in its memorandum, "communities of interest"

has been defined as "identifiable concentrations of population which share one or more common interests" and the word "community" is defined in dictionaries as "a group of people having common interests" or a "group of people with a common characteristic or interest living together within a larger society." (House of Representatives' Response at 15, 16). These definitions provide no more information about the term to the layperson that the term itself and demonstrate that "communities of interest" is readily understandable to the voter.

Also telling is Plaintiffs' failure to explain how the failure to define "communities of interest" is fatal to Amendment 7 while the competing amendments fail to define other terms such as "compact" and "contiguous." Although these terms also have a common meaning, their proper application can be the subject of considerable debate in redistricting litigation.

For example, in *Kilbury v. Franklin County*, 90 P. 3d 1071 (Wash. 2004), the Court was faced with resolving the appropriate application of the term "compact" in a county redistricting challenge. The Court ultimately determined that "compact" means "as regular in shape as possible." *Id.* at 564. In so holding, the Court stated:

> Second, as the county argued in its opening brief, cases from other jurisdictions establish that the compactness inquiry does not focus on the relative size of all districts but on the shape of individual districts. See Br. of Appellant at 10 (citing *Schrage v. State Bd. of Elections*, 88 Ill. 2d 87, 58 Ill. Dec. 451, 430 N.E. 2d 483, 487 (1981) (describing non-compact district as having "tortured, extremely elongated form"); and *In re Livingston*, 96 Misc. 341, 160 N.Y.S. 462, 469-70 (1916) (defining non-compact as "really grotesque" or "absurd in shape")). A survey of the definitions of compactness applied in the decisions of other states substantiates that the compactness inquiry is directed at the

> shape of the individual district. See *In re Legislative Districting of State*, 299 Md. 658, 475 A. 2d 428, 436-39 (1984).

Id. at 564.

The Florida Supreme Court in *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1179 (Fla. 2003), wrestled with the proper application of the term "contiguous" despite the common understanding of this term:

> Our final consideration with respect to the validity of HJR 25E is whether the legislative districts are either contiguous, overlapping, or identical territory. We recently explained this requirement as follows:
>
> This Court has defined "contiguous" as "being in actual contact: touching along a boundary or at a point." *In re Apportionment Law, Senate Joint Resolution 1E*, 414 So.2d 1040, 1051 (Fla.1982) (quoting Webster's New Collegiate Dictionary 245 (1973)). A district lacks contiguity "when a part is isolated from the rest by the territory of another district" or when the lands "mutually touch only at a common corner or right angle." *Id.*
>
> * * *
>
> Although a contiguous district has been defined as one in which a person can go from any point within the district to any other point without leaving the district, such definition does not impose a requirement of a paved, dry road connecting all parts of a district. Contiguity does not require convenience and ease of travel, or travel by terrestrial rather than marine forms of transportation. . . .
>
> . . . [T]he presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court's standard for determining contiguity under the Florida Constitution.

Defining "communities of interest" in the ballot summary of Amendment 7 would be of no more aid to the electorate than defining "compact" or "contiguous" in Amendments 5 and 6. Reliance upon the common usage of districting terms does not mislead the voter and does not render any of the competing amendments invalid.

E. Balance and Implement/Rationally Related

Plaintiffs contend that the ballot summary is defective because it does not inform the voter that the proposed amendment would allow courts to approve redistricting plans that violate existing provisions of the state constitution. This is absurd. The Amendment 7 ballot summary plainly states that the legislature shall "balance and implement the standards in the State Constitution..." and that "[d]istricts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution . . ." This clear language leaves no room for a court to depart from the state constitution in redistricting.

Even assuming, arguendo, that Amendment 7's language is a departure from existing constitutional standards, the operative language is there for the voter to read, and cannot be considered misleading. Amendment 7's ballot summary need not disclose all possible effects of the amendment or explain in detail what the proponents hope to accomplish. *In re Advisory Opinion to Attorney General re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient*, 880 So. 2d 659, 664 (Fla. 2004), citing *In re Advisory Opinion to the Attorney General English-The Official Language of Florida*, 520 So. 2d 11, 13 (Fla. 1988); and *Smith v. Am. Airlines,*

Inc., 606 So. 2d 618, 621 (Fla. 1992) ("the summary is not required to explain every detail or ramification of the proposed amendment").

F. Effect on Amendments 5 and 6

Plaintiffs contend that the ballot summary for Amendment 7 is invalid because it fails to disclose how it would affect Amendments 5 and 6. Plaintiffs cite *Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), for the proposition that a proposed amendment should be stricken if its ballot summary fails to inform the voter how it differs from a competing amendment on the same ballot. That is not the holding of *Kobrin* and is not the law in Florida.

In *Kobrin*, the Third District Court of Appeal struck a proposition from the referendum ballot in Dade County which provided in substance that "the Board of Dade County Commissioners shall be the governing body of the Metro-Dade Fire Rescue Service District." *Id.* The Court struck this proposition from the ballot because it failed to notify the voter of a change to *existing* law which was the elimination of the governing body of the county Fire and Rescue Service District. *Id.* In so holding, the Court stated that "[i]t would have been a simple matter to supplement the proposition to provide that "the independent governing body of the fire and rescue service district is abolished and the Board of County Commissioners shall be the governing body. . ." *Id.* at fn. 2. There was no competing proposition on the ballot.

No court in this state has ever invalidated one constitutional amendment for failing to explain its impact on a competing amendment. The Florida Supreme Court addressed this question and rejected the notion that there is such an obligation.

Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes, 2 So. 3d 118 (Fla. 2008). Although two dissenting justices were persuaded that an amendment could be misleading if it failed to notify the voter that it would eliminate rights created by a competing amendment, the majority was not so persuaded. *Id.* at 120-21, 123 and 131. Instead, the majority focused on whether the proposed amendment would "conflict with or restrict any existing rights." *Id.* at 123.

Plaintiffs attempt to distinguish the holding in *Growth Management Initiative* by claiming that the Court was uncertain whether the competing amendments would ultimately be placed on the same ballot. There is, however, no evidence of this reasoning in the opinion. Moreover, there is always some level of uncertainty as to what will appear on a ballot until the ballot has been printed. Although Plaintiffs assert that Amendments 5, 6 and 7 are "certain" to appear on the 2010 ballot, Amendments 5 and 6 (like Amendment 7) are the subject of a pending court challenge initiated to keep them off the 2010 ballot. *Brown v. Roberts*, Leon County Circuit Court, Case No. 2010 CA 1824.

Finally, if, as Plaintiffs contend, Florida law requires Amendment 7 to fully disclose its affect on Amendments 5 and 6 in its ballot summary, would not the same be required of Amendments 5 and 6? The ballot summaries for Amendments 5 and 6 make no mention of any distinction the voter should draw between Amendments 5 and 6 and Amendment 7. Plaintiffs suggest, however, that a different standard applies to Amendments 5 and 6 because they achieved the signatures necessary for ballot

placement before Amendment 7 was adopted by the Legislature. That is not the law. Florida law applies the same standards to the ballot summaries of all constitutional amendments. *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000). There is no Florida precedent placing additional disclosure requirements on proposed amendments that satisfy the conditions for ballot placement after a competing amendment.

This Court should not depart from the holding in *Growth Management Initiative* and should not impose any obligation on the ballot summary of Amendment 7 that would not apply to Amendments 5 and 6.

CONCLUSION

For the foregoing reasons and those contained in Defendant/Intervenor The Florida Senate's Motion for Summary Judgment, Response to Plaintiffs' Summary Judgment and Memorandum of Law, Defendant's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Electronic Mail and U. S. Mail, to MARK HERRON, ESQUIRE (mherron@lawfla.com), and ROBERT J. TELFER, III, ESQUIRE (rtelfer@lawfla.com), of Messer, Caparello & Self, P.A., Post Office Box 15579, Tallahassee, Florida 32317-5579; RICK FIGLIO, ESQUIRE (rick.figlio@eog.myflorida.com), General Counsel, Office of the Governor, The Capitol, 400 South Monroe Street, Tallahassee, Florida 32399-0100; JON GLOGAU, ESQUIRE (Jon.Glogau@myfloridalegal.com), Assistant Attorney General, Department of Legal Affairs, The Capitol, PL-01, 400 South Monroe Street, Tallahassee, Florida 32399-1050; RONALD G. MEYER, ESQUIRE (rmeyer@meyerbrookslaw.com), JENNIFER S. BLOHM, ESQUIRE (jblohm@meyerbrookslaw.com), and LYNN C. HEARN, ESQUIRE (lhearn@meyerbrookslaw.com), of Meyer, Brooks, Demma and Blohm, P.A., Post Office Box 1547, Tallahassee, Florida 32302; CHARLES B. UPTON, ESQUIRE (CBUpton@dos.state.fl.us), General Counsel, Florida Department of State, R. A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250, and GEORGE MEROS, JR., ESQUIRE (George.Meros@gray-robinson.com), and ANDY BARDOS, ESQUIRE (Andy.Bardos@gray-robinson.com), of GrayRobinson, P.A., Post Office Box 11189, Tallahassee, Florida 32302-3189, this 2nd day of July, 2010.

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

CASE NO. 2010 CA 1803

FLORIDA STATE CONFERENCE OF NAACP BRANCHIES; ADORA OBI NWEZE; THE LEAGUE OF WOMEN VOTERS OF FLORIDA, INC.; DEIRDRE MACNAB; ROBERT MILLIGAN; NATHANIEL P. REED; DEMOCRACIA AHORA; and JORGE MURSULI,

Plaintiffs,

vs.

DEPARTMENT OF STATE, an agency of the State of Florida; and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervenors.
_____/

DEFENDANTS, DEPARTMENT OF STATE and DAWN K. ROBERTS, REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

DEFENDANTS, DEPARTMENT OF STATE and DAWN K. ROBERTS, under Rule 1.510, Florida Rules of Civil Procedure, and this Court's Scheduling Order, submit this reply in support of Defendants' Motion for Summary Judgment. Defendants respectfully adopt the arguments presented by the Florida House of Representatives and the Florida Senate in their respective replies in support of their Motions for Summary Judgment.

7-2-10

Respectfully submitted,

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

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Plaintiffs,

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_____/

FLORIDA HOUSE OF REPRESENTATIVES' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Intervening Defendant, the Florida House of Representatives, submits this reply in support of its Motion for Summary Judgment.

The Ballot Title is Not Misleading.

Faced with the simplest of ballot titles—"Standards for the Legislature to Follow in Legislative and Congressional Redistricting"—Plaintiffs continue to insist the title misleads, arguing that Amendment 7 "sheds no light whatsoever on the criteria for measuring acceptability of a redistricting plan." But plainly, Amendment 7 relates to standards for the Legislature to follow.

Amendment 7 empowers the Legislature to enhance the ability of minorities to participate in the political process and elect representatives of their choice, it permits districts that promote

communities of common interest, and it incorporates and demands compliance with other standards by requiring the Legislature to "apply federal requirements and balance and implement the standards in this constitution." These are redistricting standards. Voters will not be misled.

Moreover, voters will have the entirety of the amendment on the ballot, and "the ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Adv. Op. to the Att'y Gen. re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002). This is not a case where "misleading 'wordsmithing' has been employed in the crafting of ballot titles and summaries." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008). Instead, the simple title could not be plainer, or more accurate. There is nothing wrong with the ballot title.[1]

Plaintiffs' Tortuous Interpretation of Amendment 7 Must Be Rejected.

Amendment 7 does not repeal the contiguity requirement. The House does not argue—as Plaintiffs suggest—"that Amendment 7 somehow *implicitly* preserves the contiguity requirement." (*Id.*) (emphasis added). Instead, the contiguity requirement remains because Amendment 7 does not *explicitly* repeal it, and it will continue to be an explicit requirement in the Constitution. What Amendment 7 explicitly does is command the Legislature to "*balance and implement the standards in this constitution.*" Plaintiffs offer no response to the unequivocal authority that a new constitutional provision prevails over existing law only when it "specifically repeals them" or "cannot be harmonized with them." *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Boundaries*, 2 So. 3d 175, 190 (Fla. 2009) (plurality opinion) (quoting *Jackson v. City of Jacksonville*, 225 So. 2d 497, 500-01 (Fla. 1969)); *see also* cases cited in

[1] Furthermore, Plaintiffs' suggestion that Amendment 7 has nothing to do with standards for the Legislature to follow is fundamentally at odds with their argument that Amendment 7 wholly invalidates the "standards" to be imposed by Amendments 5 and 6. Either Amendment 7 relates to standards for the Legislature to follow in redistricting or it does not. And it does.

House MSJ at 10-11. Nor do Plaintiffs dispute that their tortuous interpretation necessarily would apply equally to the existing requirements regarding the number of legislative districts. (*See* House MSJ at 8.) The limit of 120 districts in the House of Representatives, after all, is no more or less absolute than the contiguity requirement. Finally, Plaintiffs do not dispute that their own proposals—Amendments 5 and 6—would fail under their logic.[2] (*See* House MSJ at 9.)

Plaintiffs suggest that "balancing tests" do not require implementation of all factors to be balanced. But Amendment 7 does—and it does so explicitly. It requires the Legislature not only to balance, but also to "implement," all standards in the Florida Constitution.[3]

Amendment 7 will not remove the contiguity requirement. This Court should reject Plaintiffs' strained argument. Instead, this Court should accept the argument advanced in the Supreme Court by the proponents of Amendments 5 and 6 in their case:

> No language in the . . . Amendment expressly purports to amend or repeal the current constitutional language and the use of the term 'contiguous' alone cannot be interpreted to impliedly amend or repeal current language. Implied repeal or amendment of one constitutional provision by a subsequent one is not favored and will not be found unless the two provisions are irreconcilably repugnant to each other, and then only to the extent of the repugnancy.

(Init. Br. of Sponsor, Case No. SC08-986, at 7-8) (available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/08/08-986/Filed_07-01-2008_Sponsor_Brief.pdf.)

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[2] Amendments 5 and 6 both require districts to be contiguous, but they impose other requirements and expressly state that "[t]he order in which the standards . . . are set forth shall not be read to establish any priority of one standard over the other within that subsection." (*See* Ex. 1, 2 to Pt's MSJ.) Therefore, under Plaintiffs' logic, the existence of these other standards, which are not subordinated to contiguity, would repeal, or allow the Legislature to ignore, the absolute requirement of contiguity.

[3] Plaintiffs argue that "without subordination" might denote superiority, as well as equality. The Legislature's specific concern, however, was that the standards in Amendment 7 would be subordinated to those in Amendments 5 and 6, and it employed appropriate language to obviate that possibility. But even if Plaintiffs' view were reasonable, the Court should not adopt an interpretation that might invalidate the proposal, where other interpretations are available.

"Communities of Common Interest" Requires No Definition.

Plaintiffs next suggest that "communities of common interest" is a "legal term[with] a history of construction and application by the courts." (Pt's Reply at 9.) But in reality, it is simple, commonly understood, plain English. A community of common interest is a group of people sharing common interests. Any voter can understand that. Although Plaintiffs may have little confidence in the voters' ability to understand this simple phrase, "[t]he voter must be presumed to have a certain amount of common sense and knowledge." *Adv. Op. to Att'y Gen. re Protect People From the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002) (citation omitted).

In time, courts might define "communities of common interest," but the proposed amendment does not, and the ballot summary is not required to be clearer and more detailed than the amendment it summarizes. Where a term has no controlling legal definition, its "precise meaning . . . is better left to subsequent litigation, should the amendment pass." *Adv. Opinion to the Att'y Gen. re the Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004).

The Phrase "Rationally Related" Is Not Misleading.

No party disputes that the "legislature . . . shall apportion the state in accordance with the constitution of the state and of the United States." Art. III, § 16, Fla. Const.; (Pt's Reply at 9.) Nor can anyone credibly dispute that this will continue to be the case, regardless of the fate of Amendment 5, 6, or 7. But that is not a "standard of review," and it will not be changed by Amendment 7's mandate that redistricting plans be upheld "if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution."[4]

[4] Plaintiffs mistakenly suggest that under this standard "only an 'irrational' plan will not be deemed valid." (Pt's Reply at 6.) The inquiry is not whether a plan is "rational"—it is

Plaintiffs argue that "in accordance with the constitution of the state" is a standard of review, but Plaintiffs misunderstand. Any legislative action inconsistent with the constitution is invalid. The standard of review determines how a court *evaluates* whether legislative action is "in accordance with" the constitution. For example, under the Fourteenth Amendment, no state may "deny to any person within its jurisdiction the equal protection of the laws." That is a steadfast requirement. But it is not a standard of review. Rather, the standard of review differs based on the type of law. *See Am. Booksellers v. Webb*, 919 F.2d 1493, 1511 (11th Cir. 1990). Under the Fourteenth Amendment, some laws are subject to strict scrutiny review—others to lesser standards of review. *Id.*

Therefore, Amendment 7's requirement that plans be upheld if "rationally related to the standards contained in the constitution"—which *is* a standard of review—is not inconsistent with the requirement that plans be drawn in accordance with the state and federal constitutions—which *is not* a standard of review. Obviously the plan (and all legislative action) must be consistent with the constitution. It is telling, moreover, that the Florida Supreme Court has never described the requirement that redistricting plans be drawn in accordance with the state and federal constitutions as a standard to guide its review of redistricting plans. Plaintiffs' attempt to convert it into a standard of review must fail.

The Ballot Summary Need Not Describe Effects on Other Potential Amendments.

Next, Plaintiffs argue that the ballot summary is invalid because it does not describe its potential interaction with Amendments 5 and 6. Again, Plaintiffs demonstrate little confidence in voters, who will have all three summaries together in the voting booth for easy comparison. But worse, Plaintiffs distort the dispositive holding of a Florida Supreme Court decision refuting

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whether the plan rationally balances and implements the standards contained in the State Constitution.

their position. In *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens the Right to Decide Local Growth Management Plan Changes*, 2 So. 3d 118 (Fla. 2008) ("*Growth Management*"), the dissent adopted the approach Plaintiffs urge here. The dissent would have invalidated the summary because it was "silent with regard to the fact that the proposed amendment has the potential to destroy rights that would be created by a *separate constitutional amendment*." *Id.* at 131 (Lewis, J., dissenting) (emphasis added). The majority, not persuaded by the dissent, approved the ballot summary. *Id.* at 118.

Plaintiffs try to distinguish *Growth Management* because of its timing. Since the other proposed amendment had not attained ballot placement at the time of the *Growth Management* opinion, Plaintiffs find it "understandable" that the Supreme Court did not find the summary invalid. Thus, Plaintiffs argue, the *timing* is critical to the adequacy of a ballot summary, and this case is different than *Growth Management.*

This argument suffers two equally fatal flaws: It finds no support from the *Growth Management* decision itself, and it is fundamentally at odds with the jurisprudence surrounding the accuracy requirement.

First, Plaintiffs base their argument entirely on hopeful speculation. They point to no portion of the decision that supports their purported distinction. They instead rely on Department of State records that were not reflected in the *Growth Management* record. (Pt's Reply at 13 n.4, 5.) Nowhere in that decision—or any other decision—does the Court suggest that a ballot summary becomes more or less accurate after the sponsors of another amendment collect sufficient signatures. And nowhere in the briefs did the parties in *Growth Management* present that argument, or so much as mention the distinction advanced by Plaintiffs.

More importantly, the focus in ballot-summary cases has always been whether the voter is fairly apprised on Election Day—not whether the summary may have been accurate at some point. *See Armstrong v. Harris*, 773 So. 2d 7, 12-13 (Fla. 2000) ("Because voters will not have the actual text of the amendment before them in the voting booth when they enter their votes, the accuracy requirement is of paramount importance for the ballot title and summary."). The focus is on the *voter*—not any drafter's timing. Under Plaintiffs' flawed logic, had the Legislature proposed Amendment 7 a few months earlier—before Amendments 5 and 6 achieved ballot placement on January 22, 2010—the summary would now be sufficient. But now it is not? Obviously, the summary is no more or less accurate than it would have been if proposed earlier. The notice to the voter is the same.

The Florida Supreme Court appropriately rejected Plaintiffs' argument in *Growth Management*. To accept the argument would be to invite chaos, confusion, and gamesmanship. Sponsors would try to time their certification advantageously. Sponsors of amendments and "counter-amendments" would race to beat others to the Court to determine which amendment was invalid for not explaining the other. Wealthier sponsors, who could hire armies of paid circulators, could start later but finish sooner than others, invalidating others and further undermining the citizen initiative process. And the Legislature—unlike initiative sponsors—would be forced to explain its amendments' interaction with other proposed amendments in any election year.[5] The Court precluded all of this by wisely limiting its analysis to whether a

[5] The deadline for signature certification is February 1, which is before the ordinary Legislative session begins. § 100.371(1), Fla. Stat.; Art. III, § 3, Fla. Const. Therefore, any legislatively proposed amendment in an election year would necessarily come after each initiative amendment had been certified for placement. If, however, the Legislature had proposed Amendment 7 during its 2009 legislative session rather than its 2010 legislative session, the ballot summary would not, by Plaintiffs' logic, be required to disclose the proposal's

proposal would impact "any *existing* rights." *Growth Management*, 2 So. 3d at 123 (emphasis added).[6]

Even if the Summary Were Defective, This Court Should Not Strike the Amendment.

This ballot summary fully complies with the law, and this Court should grant judgment in Defendants' favor. But even if the summary were invalid, the Court is obligated to fix it—not strike it.

As explained in the House of Representatives' Motion for Summary Judgment, in *ACLU of Florida, Inc. v. Hood*, the Florida Supreme Court ordered the summary for a legislatively proposed amendment to be amended. It did not strike the proposal altogether, as plaintiffs hoped there, and as Plaintiffs hope here. (House MSJ at 5-6.)

This Court, if necessary, must do likewise. The Court "must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Adv. Opinion to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 971 (Fla. 2009) (citing *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). While initiative petitions with misleading ballot summaries must be removed from the ballot, in part because voters signed the petitions in reliance on misleading summaries, there is no similar reason to strike an amendment proposed by the Legislature. Indeed, there must not be. The constitution grants the Legislature direct authority to submit proposals to the electorate. Art. XI, § 1, Fla. Const.[7] Although this includes an implicit requirement that the amendment be accurately

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effects on Amendments 5 and 6. The accuracy of a ballot summary does not depend on such fortuities.

[6] Furthermore, despite Plaintiffs' assertion that Amendments 5 and 6 are "certain to appear on the 2010 general election ballot," the validity of those amendments are being challenged in this Court, with a trial scheduled before Judge Fulford later this month.

[7] Although the initiative process is also authorized in the constitution, it may be limited by legislation or administrative rules that are neutral and nondiscriminatory regulations

represented on the ballot, *Armstrong*, 773 So. 2d at 12, there is no implicit (or explicit) requirement that the Legislature draft the summary—or that the summary be drafted contemporaneously with the amendment language. Rather than undermine the Legislature's constitutional authority to propose amendments, this Court should amend the summary if necessary.[8]

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contemplated by the constitution or necessary for ballot integrity. *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1081 (Fla. 2010). Florida law requires petitions to be circulated on a form that contains the text and the ballot summary, and that the summary be prepared by the sponsor. § 101.161(2), Fla. Stat.; R. 1S-2.009(2)(d), Fla. Admin. Code.

[8] In their reply, Plaintiffs offer no objection to this procedure—or any response at all to *ACLU of Florida, Inc. v. Hood*. And if they are concerned only with a proper ballot summary and notice to voters, they could not possibly object to this Court's correcting any purported deficiency, as the Florida Supreme Court did in *ACLU*. The merits or desirability of Amendment 7 itself, of course, must have nothing to do with this. *See Advisory Op. to the Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1229, 1233 (Fla. 2006) (when reviewing a proposed amendment's ballot summary, Courts must "not address the merits or wisdom of the proposed amendment").

CONCLUSION

There is nothing wrong with Amendment 7's ballot summary or title. This Court should enter summary judgment in favor of the Defendants.

Respectfully submitted,

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I certify that a true and correct copy of the foregoing has been furnished by electronic mail and United States Mail this second 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

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, et al.,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the
State of Florida, and DAWN K. ROBERTS, in
her official capacity as the Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Defendants.

_____/

ORDER GRANTING GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This cause was considered upon review of Motion for Leave to Appear as Amicus Curiae in Support of Plaintiffs' Motion for Summary Judgment, 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 Plaintiffs' Motion for Summary Judgment is granted.

DONE AND ORDERED in Chambers in Tallahassee, Leon County, Florida this 30th day of June, 2010.

Honorable James O. Shelfer

Conformed copies furnished to:

Mark Herron
Ronald G. Meyer
Jonathan A. Glogau
C.B. Upton
George N. Meros, Jr.
Peter M. Dunbar

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

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Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.
_____/

MOTION FOR ORDER IMPOSING REMEDY

Intervening Defendant, the Florida Senate, submits this Motion for Order Imposing Remedy following the Court's ruling that the Amendment 7 ballot summary was inaccurate, and says:

1. At the conclusion of the hearing on the pending cross motions for summary judgment held on July 8, 2010, this Court ruled from the bench that the ballot summary of Amendment 7 was inaccurate. The Florida Senate disagrees with, and does not acquiesce to, this ruling. Notwithstanding, this Court must now determine the appropriate remedy in light of this ruling in order to enter a final judgment in this case. By this motion, the Florida Senate urges the

9-8-10

court to adopt the remedy of revising the ballot summary instead of imposing the drastic remedy of striking Amendment 7 from the ballot.[1]

2. During the hearing, the Court stated that:

> It would have been a simple matter just to say, the only other standard in the constitution is continuity and that's going to be affected by your vote.

And later that:

> I think it's a stretch to say that the voter must go and inform himself by reading the Florida Constitution to determine what effect the amendment would have on rights that the citizen already has that is already in the constitution.

3. The Florida Senate suggests six different corrections to the ballot summary for the Court to consider as the proper remedy in light of the foregoing concerns expressed by the Court. (See, Options 1 through 6 attached hereto). If, however, the Court does not find that these suggested revisions cure the ballot summary, the Court should fashion its own ballot summary.

WHEREFORE, Intervening Defendant, the Florida Senate, respectfully requests the Court to enter an order correcting the ballot summary of Amendment 7, as opposed to striking the amendment from the ballot, so that Final Judgment can be entered in this case.

MEMORANDUM OF LAW

The Challenge in This Case Relates to the Ballot Summary and Title Only.

Plaintiffs initiated this action, asserting that the ballot summary and title for Amendment 7 were invalid. (*See* Compl. ¶ 27) ("Because the ballot title and summary of Amendment 7 are misleading and fail to adequately inform the voter of the chief purposes of the amendment, placement of Amendment 7 on the ballot would violate Article XI, Section 5, Florida Constitution, and Section 101.161(1), Florida Statutes.").

[1] In urging this Court to adopt the least restrictive remedy available, the Florida Senate does not suggest that Amendment 7's ballot summary is defective or that correction of the ballot summary is needed to comply with Florida law, and does not waive its right to contest this Court's ruling as to the accuracy of the ballot summary on appeal.

At no time have Plaintiffs suggested—ballot title and summary issues aside—that voters should not have the opportunity to consider the merits of Amendment 7. Indeed, "[w]hether this Court [or any party] agrees with the 'merits or wisdom' of any particular proposal is irrelevant to whether the proposal may be placed on the ballot." *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 2d 1054, 1074 n.20 (Fla. 2010) (plurality); *accord Advisory Opinion to Attorney General re 1.35% Property Tax Cap, Unless Voter Approved,* 2 So. 3d 968, 971 (Fla. 2009) (in ballot summary review, "the Court will not address the merits or wisdom of the proposed amendment"). No quantity of political disagreement is sufficient to keep a proposal from the voters, so long as the proposal is accurately presented on the ballot. *See Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) ("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 . . . .") (quoting *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954).

Article XI, section 1 of the Florida Constitution gives the Legislature express authority to propose amendments.[2] The substance of those proposals is not limited in any manner. But "[i]mplicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot." *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000). Thus, voters must consider the merits of any proposal submitted by the Legislature—but they must be provided an accurate summary on the ballot. This Court has held the Legislature's proposed summary is insufficient. The Court in its oral ruling did not state, however, that Amendment 7 should be stricken from the ballot. This court has not—and cannot—invalidate the proposal on

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[2] Section 1. Proposal by legislature.-Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

Id.

its merits. The people get to decide that. And if this Court believes the proposal should be represented differently on the ballot—it should so order.

The Court Should Revise the Summary.

As explained in briefing before this Court, there is Supreme Court precedent for this procedure. In *ACLU of Florida, Inc. v. Hood*, the Florida Supreme Court did precisely what this Court should do here, having found the summary incomplete: It ordered amendments to the summary for a legislatively proposed amendment. It did not strike the proposal altogether, and it thus preserved the Legislature's express authority under Article XI, Section 1.

The Plaintiffs in *ACLU*, like the Plaintiffs here, argued "the ballot title and summary did not adequately communicate the effect of the proposed amendment." *ACLU of Fla. v. Hood*, 881 So. 2d 664, 665 (Fla. 1st DCA 2004). The amendment text authorized the Legislature to require parental notification of abortion "[n]otwithstanding" the constitutional right of privacy, but the summary did not make the same disclosure. In a unanimous decision, the Florida Supreme Court invalidated the summary proposed by the Legislature and directed that the ballot include a new summary—in that case the entire text of the amendment. *ACLU of Fla., Inc. v. Hood*, Case No. SC04-1671 (Fla. Sep. 2, 2004). The Court thus cured the deficiency and avoided a total invalidation of the proposed amendment. This procedure—employed by the Supreme Court just three elections ago—should not be rejected here.

The fact that a different result follows invalidation of initiative petition summaries is immaterial. Those petitions are treated differently out of necessity, which is precisely why the Court in ACLU did not remove the *legislatively* proposed amendment from the ballot. The Court has held that the initiative process must be regulated to be effective. That process may be limited by legislation or administrative rules that are neutral and nondiscriminatory regulations

contemplated by the constitution or necessary for ballot integrity. *See Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1081 (Fla. 2010). Florida law includes many neutral and nondiscriminatory regulations, including a requirement that petitions be circulated on a form that contains the text and the ballot summary, and that the summary be prepared by the sponsor. § 101.161(2), Fla. Stat.; R. 1S-2.009(2)(d), Fla. Admin. Code. The ballot summary issue is focused not only on the voters who will consider it in the ballot booth, but also on the electors who sign the petition. Those people too must see an accurate summary, which is why Florida law requires the petition form to include the summary. Petitions gathered with inaccurate summaries cannot provide ballot placement for initiative amendments. At any rate, it is clear from ACLU that the Court treats legislatively proposed amendments differently, as courts must.[3]

Plaintiffs can offer no good-faith objection to this procedure. If they are concerned only with a proper ballot summary and notice to voters, they could not possibly object to this Court's correcting any purported deficiency, as the Florida Supreme Court recently did in *ACLU*. The merits or desirability of Amendment 7 itself, of course, must have nothing to do with this. This Court can deliver Plaintiffs the relief they seek—the invalidation of the purportedly invalid summary—without also invalidating the Legislature's constitutional authority.

[3] *Armstrong v. Harris* is not inconsistent. The summary in that case could not be timely cured because by the time the Court ruled, the amendment had already been submitted to the voters. 773 So. 2d at 9. And voter approval is a "nullity" when the amendment is not accurately represented on the ballot. *Id.* at 12.

Respectfully submitted this 8th day of July, 2010.

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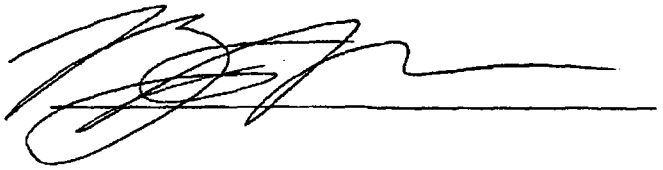
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Electronic Mail and U. S. Mail, to MARK HERRON, ESQUIRE (mherron@lawfla.com), and ROBERT J. TELFER, III, ESQUIRE (rtelfer@lawfla.com), of Messer, Caparello & Self, P.A., Post Office Box 15579, Tallahassee, Florida 32317-5579; RICK FIGLIO, ESQUIRE (rick.figlio@eog.myflorida.com), General Counsel, Office of the Governor, The Capitol, 400 South Monroe Street, Tallahassee, Florida 32399-0100; JON GLOGAU, ESQUIRE (Jon.Glogau@myfloridalegal.com), Assistant Attorney General, Department of Legal Affairs, The Capitol, PL-01, 400 South Monroe Street, Tallahassee, Florida 32399-1050; RONALD G. MEYER, ESQUIRE (rmeyer@meyerbrookslaw.com), JENNIFER S. BLOHM, ESQUIRE (jblohm@meyerbrookslaw.com), and LYNN C. HEARN, ESQUIRE (lhearn@meyerbrookslaw.com), of Meyer, Brooks, Demma and Blohm, P.A., Post Office Box 1547, Tallahassee, Florida 32302; CHARLES B. UPTON, ESQUIRE (CBUpton@dos.state.fl.us), General Counsel, Florida Department of State, R. A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250, and GEORGE MEROS, JR., ESQUIRE (George.Meros@gray-robinson.com), and ANDY BARDOS, ESQUIRE (Andy.Bardos@gray-robinson.com), of GrayRobinson, P.A., Post Office Box 11189, Tallahassee, Florida 32302-3189, this 8th day of July, 2010.



Option 1:

In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution, which currently requires that state legislative districts consist of contiguous territory. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution and is consistent with federal law.

Option 2:

In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution, including the requirement that state legislative districts consist of contiguous territory. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution and is consistent with federal law.

Option 3:

In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution, which currently requires that state legislative districts consist of "contiguous, overlapping or identical territory." Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution and is consistent with federal law.

Option 4:

In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the

standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. The existing requirement that state legislative districts consist of contiguous territory will no longer be mandatory. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution and is consistent with federal law.

Option 5:

In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution, including the existing requirement that state legislative districts be contiguous and the requirement that there be 30 to 40 senatorial districts and 80 and 120 senatorial districts. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution and is consistent with federal law.

Option 6:

In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Article III currently requires that state legislative districts be contiguous and that there be 30 to 40 senatorial districts and 80 and 120 senatorial districts. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution and is consistent with federal law.

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs. CASE NO.: 2010 CA 1803

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

_____/

**PLAINTIFFS' RESPONSE TO SENATE'S
MOTION FOR ORDER IMPOSING REMEDY**

Plaintiffs file this response to Intervening Defendant Florida Senate' Motion for Order Imposing Remedy. The motion must be denied.

The Court in its oral ruling following the hearing on July 8, 2010, granted the relief requested by Plaintiffs in this action. Plaintiffs' Complaint requested that the Department of State be enjoined from placing Amendment 7 on the 2010 general election ballot (Complaint p. 11). No defendant argued at the hearing that this would not be appropriate relief if the Court found the ballot title and summary violated the accuracy requirements of Article XI, § 5 of the Florida Constitution and Section 101.161(1), Florida Statutes. Nevertheless, the Senate now suggests that rather than enjoin Amendment 7 from being placed on the ballot, the Court should rewrite it on the legislature's behalf. The House made the same argument in its Reply in Support of Summary Judgment, at pp. 8-9

Remarkably, neither the House nor Senate cite or attempt to distinguish Florida Supreme Court precedent unambiguously holding that the Court lacks authority to do so. In *Smith v. Am. Airlines*, 606 So. 2d 618 (Fla. 1992), the Court struck from the ballot a proposed amendment to the state constitution proposed by the Taxation and Budget Reform Commission because the ballot summary failed to set forth the chief purpose of the proposed amendment. The court held it was necessary to strike the amendment, even though it prevented voters from voting on the merits of the proposal, because the Court lacked authority to revise the amendment to conform with section 101.161(1), Florida Statutes. *Id.* at 621 ("Neither party argues that this Court has the authority to independently rewrite the ballot summary to conform to the statute, and our independent research has revealed no authority to do so.") The Court then urged the legislature, "in order to prevent this problem from recurring in the future . . . to

empower this Court to fix fatal problems with ballot summaries, *at least with respect to those amendments proposed by revision commissions or the legislature." Id.* (emphasis added).

The Court's plea to the legislature in *Smith* echoed a nearly identical plea ten years earlier, when the Court was compelled to strike an amendment proposed by the legislature because it found the ballot title and summary clearly and conclusively defective. *Askew v. Firestone,* 421 So. 2d 151 (Fla. 1982). Justice Overton expressed concerns very similar to those expressed in the Senate's present motion, *i.e.,* that the public was being denied the opportunity to vote on the merits of the measure because no process existed to correct misleading ballot language in sufficient time for placement on the ballot for the upcoming election. *Id.* at 157 (Overton, J., concurring). Justice Overton suggested the legislature and court devise an expedited procedure in which challenges would be brought within 30 days of an amendment or revision being filed with the secretary of state, and the Court would be required to resolve the challenges within 30 days. *Id.* He concluded:

> This Court should do everything possible to cooperate [with the legislature] in establishing such a process so that we may eliminate the necessity for this Court to again have to deny the people a right to vote on the merits of a constitutional proposition due to faulty ballot language. The power to remove an amendment or revision from the ballot is too great to reside solely in the few members of this Court.

Id.

Despite these decades-old entreaties to the legislature to provide a mechanism for repair of legislatively-proposed amendments stricken due to inaccurate ballot

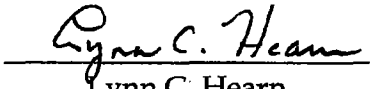
summaries, it has not done so. The legislature's present assertions that the court possesses authority to rewrite a ballot summary on the legislature's behalf is unavailing in light of the clear case law and the legislature's perpetual refusal to grant the court such authority. The Senate's motion must be denied.

The Senate's reliance upon the unpublished order of the Florida Supreme Court in *Amer. Civil Liberties Union v. Hood,* Case No. SC04-1671 (Fla. Sept. 2, 2004) (*ACLU*) (attached), is misplaced. There, the Court ordered the secretary of state to place on the ballot "the actual text of the proposed amendment itself and not the proposed ballot summary." The Court provided no analysis, no reasoning, and no authority for this relief. Although it stated an opinion would follow, the Court subsequently determined, again via unpublished order, that it would not issue an opinion in the case. *Amer. Civil Liberties Union v. Hood,* Case No. SC04-1671 (Fla. Dec. 22, 2004) (attached).

These orders do not change the Court's holding in *Smith* that it lacks authority to rewrite a ballot summary to address the deficiencies identified by the Court. *Cf. Dep't of Legal Affairs v. Dis. Ct. of Appeal, 5th Dist.,* 434 So. 2d 310, 313 (Fla. 1983) (unwritten decisions have no precedential value). In any case, what the Senate asks this Court to do is far beyond what the Florida Supreme Court did in *ACLU.* Whereas in that case the Court merely substituted the amendment text for the ballot summary, in this case the Senate literally asks this Court to rewrite the ballot summary on its behalf. Such an act is unprecedented, and would exceed the Court's authority.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order denying the Florida Senate's Motion For Order Imposing Remedy, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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Lynn C. Hearn

Supreme Court of Florida

THURSDAY, SEPTEMBER 2, 2004

CORRECTED ORDER
CASE NO.: SC04-1671
Lower Tribunal Nos.: 04-CA-1861,
1D04-3693

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., ET AL.	vs.	GLENDA E. HOOD, ETC., ET AL.
Petitioner(s)		Respondent(s)

Upon consideration of the First District Court of Appeal's opinion dated August 25, 2004, certifying the case for review pursuant to our pass through jurisdiction, see art. V, § 3(b)(5), Fla. Const., and the positions presented by the respective parties, the Secretary of State, Glenda E. Hood, is ordered and directed that the only language to be placed on the ballot in connection with the proposed constitutional amendment relating to parental notification of termination of a minor's pregnancy is the actual text of the amendment itself and not the proposed ballot summary. The only description of the proposed amendment to be placed on the ballot shall be the text of the amendment which reads as follows:

ARTICLE X
MISCELLANEOUS

Section 22. Parental notice of termination of a minor's pregnancy.--The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the

minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

Opinion to follow.

NO MOTION FOR REHEARING WILL BE ALLOWED.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

tc
Served:

HON. JON S. WHEELER, CLERK
LARRY HELM SPALDING
RANDALL MARSHALL
REBECCA H. STEELE
CHRISTOPHER MICHAEL KISE
GEORGE L. WAAS
HELENE T. KRASNOFF
HON. BOB INZER, CLERK
LOUISE MELLING
DIANA KASDAN
DONALD JAY RUBOTTOM
THOMAS R. TEDCASTLE

Supreme Court of Florida

WEDNESDAY, DECEMBER 22, 2004

CASE NO.: SC04-1671
Lower Tribunal Nos.: 04-CA-1861,
1D04-3693

AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC., ET AL.	vs.	GLENDA E. HOOD, ETC., ET AL.
Appellant(s)		Appellee(s)

The Court, having entered an order on September 2, 2004, with regard to a proposed ballot summary for a constitutional amendment, and the election on such matter having been held on November 2, 2004, has now determined that no opinion shall be issued in this case. Consistent with our order of September 2, 2004, the judgment and decision of the trial court is reversed and quashed.

It is so ordered.

PARIENTE, C.J., and WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

mc
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HELENE T. KRASNOFF
DIANA KASDAN
LOUISE MELLING
GEORGE L. WAAS

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

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Plaintiffs,

v. CASE NO. 2010 CA 1803

DEPARTMENT OF STATE, an agency of the State of Florida, and DAWN K. ROBERTS, in her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES and FLORIDA SENATE,

Intervening Defendants.
_____/

NOTICE OF FILING

Intervening Defendant, Florida Senate, hereby files excerpts from the transcript of the hearing that was held on Thursday, July 8, 2010. The excerpts are attached hereto as Exhibits A and B.

Respectfully submitted this 9th day of July, 2010.

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7-9-10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Electronic Mail and U. S. Mail, to MARK HERRON, ESQUIRE (mherron@lawfla.com), and ROBERT J. TELFER, III, ESQUIRE (rtelfer@lawfla.com), of Messer, Caparello & Self, P.A., Post Office Box 15579, Tallahassee, Florida 32317-5579; RICK FIGLIO, ESQUIRE (rick.figlio@eog.myflorida.com), General Counsel, Office of the Governor, The Capitol, 400 South Monroe Street, Tallahassee, Florida 32399-0100; JON GLOGAU, ESQUIRE (Jon.Glogau@myfloridalegal.com), Assistant Attorney General, Department of Legal Affairs, The Capitol, PL-01, 400 South Monroe Street, Tallahassee, Florida 32399-1050; RONALD G. MEYER, ESQUIRE (rmeyer@meyerbrookslaw.com), JENNIFER S. BLOHM, ESQUIRE (jblohm@meyerbrookslaw.com), and LYNN C. HEARN, ESQUIRE (lhearn@meyerbrookslaw.com), of Meyer, Brooks, Demma and Blohm, P.A., Post Office Box 1547, Tallahassee, Florida 32302; CHARLES B. UPTON, ESQUIRE (CBUpton@dos.state.fl.us), General Counsel, Florida Department of State, R. A. Gray Building, 500 South Bronough Street, Tallahassee, Florida 32399-0250, and GEORGE MEROS, JR., ESQUIRE (George.Meros@gray-robinson.com), and ANDY BARDOS, ESQUIRE (Andy.Bardos@gray-robinson.com), of GrayRobinson, P.A., Post Office Box 11189, Tallahassee, Florida 32302-3189, this 9th day of July, 2010.

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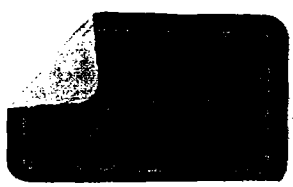
THE COURT: Well, assume that it went on a ballot and the people of Florida voted for it and it became part of the constitution and then the legislature says, we're going to make one district out of Daytona Beach and Destin because those are communities of common interest and one representative is going to represent both places. And you say, whoa, wait a minute, that violates the contiguous nature of the districts. And then the legislature comes before the Court and says, no, it's rationally related because they're both ocean communities that depend on tourism. There's community of common interest. That's at least on par with being contiguous and it's rationally related to making this one district. So that's all you can do, Court, is just see if it's rationally related, and if it is, then you have to approve it. Now, why wouldn't that be a logical outcome?

MR. MEROS: That's a misapplication of the standard. It is not whether those two communities are rationally related to each other. The standard is whether the legislature rationally balanced and implemented all of the standards. That's what the Court has to evaluate. And the Court would and

should say there is nothing here to suggest that one can take objective standards and turn off the light



and put to a superior status an aspirational standard.

A rational balancing and implementing of this would mean you can do this aspirational standard to the extent that it also permits us to implement all the other standards.

Your Honor, that's what redistricting is all about. To interpret this otherwise and to suggest that there are anything other than a limited number of clearly mandatory objective standards is just wrong. The vast majority of considerations in redistricting are judgmental, are ones that have to be accommodated to make a real picture. Otherwise you get a splotch here and a splotch there and uneven contours that never can come together.

And you take away the political stuff and the allegations here and you put it in the real context of what legislators have to do in trying to create districts, there is a huge amount of judgment to be made.

And Bush versus Martinez, the 2002 case, I urge the Court to look at that and to see that communities of interest are a fundamental notion of

whatever the people do in redistricting when they go to public hearings around the state. But that doesn't mean that they say, or that a legislature could rationally say go to 400 districts, it's going to be a lot easier to preserve communities of

interest, or to go to 20.

THE COURT: Why do you think that the legislature would not have simply said, so long as a district is contiguous, then these are the aspirational standards that need to be applied? Now, that would have been a very simple, simple answer to the whole thing. And then there's no question. It has to be contiguous. Then the aspirational standards apply equally. Now, why didn't they do that, do you think?

MR. MEROS: Your Honor, I don't know the answer to that, but I do know that there are many ways to put terms. The question -- the real question is not whether this is a perfect description. The question is whether it can reasonably be harmonized, possibly be harmonized, so that the Court can say -- so that the Court doesn't have to say, there is no possible reasonable way I can accommodate this. And that's not what it does.

The voter is entitled to look at this and to

look at the constitution and see whether there is possible conflict or what the interplay is. But to say that this means that contiguity is out the door and you can turn the light off and apply aspirational standards to do so is not only not the most reasonable interpretation, it's not -- it's not the standard that's obvious from the face of it, looking at all of the words in context.

THE COURT: But in Askew lobbying was not --

for someone leaving state employment, was not out the window either. The prohibition against lobbying for two years, they could do that if they went and complied with financial disclosure. It didn't do away with it. It just modified it.

MR. MEROS: But what the Court said was that the effect of -- and, again, there the language, the effect of this and the interplay of this was obvious. It's not one where -- you know, you could look at it and see what the interplay is. What the Court said was, they've just got this summary that says bans lobbying for two years, or whatever it said, when the exact opposite is what the impact would be.

And so it's telling the voter something that's not true, leading them away from the existing

constitutional provision. Same thing with Wadam, Judge. And they cite Wadam for the proposition that Wadam kills this. Wadam, without a summary at all, says the commission shall meet, can meet or may meet four times a year. So the voter thinks, all right, they can vote four times a year, that's great. It doesn't tell them that now they can meet 50 times a year. So it is a direct contradiction, where the summary doesn't say, by the way, look at section so and so.

And, again, there can be conflict intention in constitutional provisions if the voter is informed

and said go look. Look at Article 3. That's the first thing this does. It says Article 3, Section 20. It then goes on to say, without subordination to any other provision of Article 3 of the state constitution. And so it says go look.

If you can -- if you can go and look, that is not an obligation that the legislature or initiative petitions cannot require. That is exactly what the courts have said to do.

And just imagine, Your Honor, let's assume there were other standards in the constitution and other judgmental standards. Does the law suggest that in adding standards which also are judgmental

that have to be implemented but balanced, that the summary has to go into detail about how they might interact and maybe here there would be some conflict but in other instances you could do it? Again, that's --

THE COURT: That was the point I was making. Here, there's only one, and so it would have been a simple matter just to say, the only other standard in the constitution is continuity and that's going to be affected by your vote.

MR. MEROS: But that's -- that's exactly the question. Whether it will be affected or not and whether that is the only possible reasonable interpretation of this provision. If in fact --

THE COURT: It's certainly going to be affected because there are other standards now that are, by

your understanding of it, on at least a par with being contiguous.

MR. MEROS: Not on at least a par. On a par with contiguity. But those are black and white standards. Is the only reasonable interpretation of this that you can do -- that you can create 400 house districts or ten Senate districts, and is that the chief purpose of this.

Again, we have to get back to what is the

obligation, what is the legal standard here, to describe the chief purpose of this. And so can it be said that those objective standards, the only possible interpretation of those is that you can abandon those in a given instance because of aspirational additional standards. That is not the only interpretation of that. That is not the most reasonable interpretation of that.

If the effect is it stands next to, on a par with, sure, that's the effect. But it's not, when you say that you must implement all standards. Again, Your Honor, you can't implement a binary standard by turning it off. It's either on or off, just like 120 districts is. These others are the judgmental standards. You keep the population in Pinellas County. You can't take it to Naples and meet the objective black and white standards. That's not -- and the Court would strike that in an instant saying, I have to look at where the

legislature rationally balanced and implemented all standards. It is not a rational implementation of all standards to take a community of interest which may be promoted and to wipe out the black and white standards of 120 districts and contiguity.

Now, Your Honor, I don't want to belabor a

number of the other issues unless you have concerns about it. It seems to me -- and I think that Your Honor said it -- that this is your primary issue. If there are others, I'll be happy to discuss them. This notion of there's no existing standard of review, things like that. But I'd really like perhaps --

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THE COURT: Because I am the first stop on this journey and I have had an opportunity to read these cases, and I think I've read all of the briefs and all of the cases that were cited, I could go back and take some time to craft an order, but it might be in everyone's best interest if I go ahead and announce a ruling today. Is everybody comfortable with doing that?

MR. MEYER: Yes, Your Honor.

MR. MEROS: Yes.

THE COURT: I do agree with what Mr. Meros said, that for a court to interfere with the right of the people to vote on a proposed constitutional amendment, the record must show clearly and conclusively that the proposed amendment is legally defective. And that's a high burden, and it's a burden that it rightly should bear, because to remove it from the vote of the people should not be done without due deliberation, and it should be clear and convincing.

I agree with Mr. Meros also that everything that the legislature does, it comes here, comes here with the presumption of correctness. And if there is a way to be found in which to approve the acts of

The arguments presented in the briefs and the arguments that I've heard here today, however, convince me that the plaintiff has met its burden in this case. Accordingly, I will grant the relief that they request. To me, this case is on all fours with Askew versus Firestone and Evans versus Bell. I think that those two cases, together with Armstrong, were the lynchpins of any decision that I make here.

And just to point that out, I will quote from Askew because it is -- it sort of encapsulates everything that I understood about this case. In Askew it says, "As it stands, subsection (8)(e) precludes lobbying a former body or agency for two years after an affected person leaves office. The ballot summary neglects to advise the public that there is presently a complete two-year ban on lobbying before one's agency. And while it does require the filing of financial disclosures before anyone may appear before any agency for two years after leaving office, the amendment's chief effect is to abolish the present two-year total prohibition. Although the summary indicates that

the amendment is a restriction on one's lobbying activities, the amendment actually gives incumbent office holders, upon filing a financial disclosure, a right to immediately commence lobbying before their former agencies, which is presently precluded.

ruling
The problem therefore lies not with what the summary says but with what it does not say."

And that to me is what this case is about. "The purpose of Section 101.161 is to assure that the electorate is advised of the true meaning and ramifications of any amendment. A proposed amendment cannot fly under false colors. This one does." That I'm quoting from Askew. "The burden of informing the public should not fall only on the press and opponents of the measure. The ballot title and summary must do this."

Now, Mr. Meros argued at length that it points out that the citizen can go and read Article 5 of the Florida Constitution. And that may be true, but how many people take a copy of the constitution in the voting booth with them? I mean, how were they to know that?

I think it's a stretch to say that the voter must go and inform himself by reading the Florida Constitution to determine what effect the amendment

would have on rights that the citizen already has that is already in the constitution. And so I don't think that that is a requirement that realistically that the voter should be required to do. And I think Askew is authority for the fact that when those rights are affected, that the ballot summary should inform the voter of the rights that are being affected.

Askew goes on to say, "Nevertheless, it is

clear and convincing to us that the ballot language contained in SJR-1035 is so misleading to the public concerning material changes to an existing constitutional provision that this remedial action must be taken."

And my decision here, again, as with Askew, is as to the existing condition that districts be contiguous. I did not go into five and six and the effects on five and six. I agree with Mr. Meros that the ballot summary for seven would not necessarily have to include any consequences should five and six be on the ballot and should five and six pass voter approval.

Then Evans, as I say, is another case that I felt that was directly on point. That's the Jacksonville city charter case. And here it talks

more about section 101.161(1). Justice Grimes, he was then Judge Grimes, states, "There was nothing on the ballot to inform the voter of the changes to be accomplished by the amendment, which is the very reason why section 101.161(1) requires an explanatory statement.

And I agree with Mr. Meros' argument that citing verbatim the ballot language technically complies with the requirements of 101. I don't see how it in any way whatsoever complies with the spirit of 101, which is to clearly and in plain and simple language inform the voter what the voter is

to be voting on.

I'm not the brightest light on the Christmas tree. But it took me three days and reading all of these cases, reading all of these briefs, hearing all of your arguments, to get a handle on what this amendment did and its effect on the existing laws and the constitution. I could hardly think that an average voter going in the voting booth would be able to make an informed decision as to rights that the voter would be putting in jeopardy by approving the amendment.

Now, that's not to say that the voter, if the voter were fully informed, could not vote that way.

That certainly would be up to the voter. But I think it would have to be an informed choice.

So Amendment 7, I believe the only way to read the ten words that Mr. Meyer pointed out, would be to remove the one mandatory and all future mandatory standards that may be placed in the constitution. Currently, the only requirement in the constitution is that the districts be contiguous. Passage of Amendment 7 would make being contiguous an aspirational goal that could be balanced with other aspirational goals and reviewed for compliance only if the legislative plan were not rationally related, which would be a very weak standard for review. In effect, there would be no review.

As in Askew, Amendment 7 does comply with 101.161 because it does recite -- I guess Askew was

not for that particular purpose. I don't find that having put the ballot language in the explanation portion of it would be any -- I think the law would allow that. But I think that failure to inform the public is clearly and convincingly an attempt to hide the ball.

Amendment 7 as it stands, if it were passed, in its explanatory statement and title, flies under false colors.

So with those comments, Mr. Meyer, can you put us together a proposed order and send it by Mr. Meros so we can hurry this thing on its way?

MR. MEYER: Your Honor, we'll take care of that right away.

THE COURT: And if you can get it to me by Friday, I can sign it by Friday. As soon as you get it to me, I'll try to look over it. And send it by Mr. Meros, and if y'all agree that it comports with what I have ruled, then I'll sign it. If not, then I'll make whatever changes would need to be made and get it on to you.

MR. MEYER: Your Honor, we'll endeavor to make that happen.

THE COURT: Thank all of you for good briefs and good arguments.

MR. MEYER: Thank you, Your Honor.

ruling

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs.

CASE NO.: 2010 CA 1803

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

_____/

ORDER GRANTING SUMMARY FINAL JUDGMENT

THIS MATTER came before the Court for hearing on July 8, 2010, upon cross motions for summary judgment. Both parties, on the record and by their motions agreed that there are no genuine issues of material fact for the Court to decide and that the case should be determined by Summary Judgment.

At issue is the title and ballot summary for an amendment to the Florida Constitution that is designated as Amendment 7. Amendment 7 is a legislative proposal approved by a super-majority of the legislature for inclusion on the November 2nd ballot. The ballot summary and the proposed amendment are, for all practical purposes, identical. The ballot summary and the title to Amendment 7 read as follows:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.--In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

The cross motions ask the Court to determine if the ballot title and the ballot summary comply with the requirements of Florida Statute 101.161(1) and the various appellate decisions that interpret the requirements of the statute. Defendant's request that Amendment 7 be found in compliance and be allowed on the ballot. The Plaintiff's request the ballot summary and title be found to be in violation of F.S. 101.161(1) and that Amendment 7 not be allowed on the November 2nd ballot. Plaintiffs argue that Amendment 7's ballot summary and title fail to advise the voters of the amendment's chief purpose and true effect. Plaintiff's argue that as found by the Supreme Court in other cases, this ballot summary and title seeks to "hide the ball" and that Amendment 7 "flies under false colors".

The bar is high for the Plaintiff. To interfere with the right of the people to vote on a proposed constitutional amendment the Court must find clearly and convincingly that the proposed amendment is legally defective. Further, this Court understands and takes seriously its admonition that every act of the legislature, especially a proposal to amend our Constitution, comes before the Court with a presumption of lawfulness. Conversely, the Defendants in this case need only convince the Court that there is any possible interpretation of the ballot language and title that allow a finding that they comply with the statue and the case authority----a very low threshold.

The arguments in the written briefs and orally presented by the lawyers have convinced the Court that it must find for the Plaintiffs. The ballot summary and title do not meet the requirements of Florida Statute 101.161(1) and therefore Amendment 7 cannot be included on the November 2, 2010 ballot.

Apart from the number of districts required to be drawn, the Florida Constitution currently contains only one requirement binding on the legislature when they meet every ten years to draw districts. That one mandatory requirement is that each district be contiguous. Amendment 7, were it to pass, would make that one mandatory requirement aspirational only and would subordinate contiguity to the other aspirational goals or "standards" contained in Amendment 7.

This case is on "all fours" with *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) and *Evans v. Bell*, 651 So. 2d 162 (Fla. 1st DCA 1995) in which courts struck amendments due to defective ballot summaries. Those decisions, together with *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), serve as the lynchpin of this court's decision.

To be clear, there is nothing unlawful or improper about what the legislative proposal seeks to do. The wisdom of a proposed amendment is not a matter of concern for this Court. But to be legally entitled to a place on the ballot, the summary and title must be fair and must advise the voter sufficiently to enable the voter to intelligently vote for or against the amendment. "The purpose of section 101.161 is to assure that the electorate is advised of the true meaning , and ramifications (emphasis added) of an amendment." *Askew*. To meet the requirements of *Askew* and *Evans* and *F.S. 101.161* the ballot summary and title must inform the voter that a vote for the amendment is a vote to make the mandatory requirement of contiguity aspirational and to subordinate it to the other aspirational "standards" contained in the amendment. Requiring that all districts be contiguous is a valuable right afforded to all citizens of Florida. A citizen cannot, and should not, be asked to give up that right without being fully informed and making an intelligent decision to do so.

Amendment 7, if passed, would allow this or any future legislature, if it chose to do so, to gerrymander districts guided by no mandatory requirements or standards and subject to no effective accountability so long as its decisions were rationally related to, and balanced with, the aspirational goals set out in Amendment 7 and the subordinate goal of contiguity.

Accordingly, it is ORDERED and ADJUDGED that:

1. The Plaintiffs' Motion for Summary Judgment is GRANTED;

2. The Defendant's and Intervening Defendants' Motions for Summary Judgment are DENIED;

3. The Court ENJOINS the Defendants Department of State and Dawn K. Roberts, in her official capacity as the Secretary of State, from placing Amendment 7 on the ballot for the November 2010 general election.

DONE and **ORDERED** this 12th day of July, 2010, at Leon County, Florida.

JAMES O. SHELFER
Circuit Judge

Copies furnished to Counsel of Record

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs. CASE NO.: 2010 CA 1803

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

_____/

ORDER DENYING MOTION FOR ORDER IMPOSING REMEDY

This cause came before the Court on the Florida Senate's Motion for Order Imposing Remedy. Upon consideration of the motion and the Plaintiffs' response, and being otherwise fully advised, the Court orders as follows:

7-12-10

The Motion for Order Imposing Remedy is **DENIED** in light of *Smith v. Am. Airlines*, 606 So. 2d 618 (Fla. 1992) (holding court lacks authority to write proposed constitutional amendment struck from the ballot).

DONE and ORDERED this 12th day of July, 2010, in Leon County, Florida.

JAMES O. SHELFER
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

FLORIDA DEPARTMENT OF STATE,
an agency of the State of Florida;
DAWN ROBERTS, in her official capacity
as the Secretary of State; FLORIDA HOUSE
OF REPRESENTATIVES; and FLORIDA SENATE,

Defendants/Appellants,

v. Case No. 2010-CA-1803

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Appellees.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that the Department of State, Dawn K. Roberts, in her official capacity as Secretary of State, the Florida House of Representatives, and the Florida Senate, Appellants, appeal to the First District Court of Appeal, the Order of this Court rendered July 13, 2010 by Judge James O. Shelfer. A copy of the Order is attached hereto. The nature of the Order is an Order Granting Summary Final Judgment.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Mail this 13 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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs.

CASE NO.: 2010 CA 1803

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

_____/

ORDER GRANTING SUMMARY FINAL JUDGMENT

THIS MATTER came before the Court for hearing on July 8, 2010, upon cross motions for summary judgment. Both parties, on the record and by their motions agreed that there are no genuine issues of material fact for the Court to decide and that the case should be determined by Summary Judgment.

At issue is the title and ballot summary for an amendment to the Florida Constitution that is designated as Amendment 7. Amendment 7 is a legislative proposal approved by a super-majority of the legislature for inclusion on the November 2nd ballot. The ballot summary and the proposed amendment are, for all practical purposes, identical. The ballot summary and the title to Amendment 7 read as follows:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.--In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

The cross motions ask the Court to determine if the ballot title and the ballot summary comply with the requirements of Florida Statute 101.161(1) and the various appellate decisions that interpret the requirements of the statute. Defendant's request that Amendment 7 be found in compliance and be allowed on the ballot. The Plaintiff's request the ballot summary and title be found to be in violation of F.S. 101.161(1) and that Amendment 7 not be allowed on the November 2nd ballot. Plaintiffs argue that Amendment 7's ballot summary and title fail to advise the voters of the amendment's chief purpose and true effect. Plaintiff's argue that as found by the Supreme Court in other cases, this ballot summary and title seeks to "hide the ball" and that Amendment 7 "flies under false colors".

The bar is high for the Plaintiff. To interfere with the right of the people to vote on a proposed constitutional amendment the Court must find clearly and convincingly that the proposed amendment is legally defective. Further, this Court understands and takes seriously its admonition that every act of the legislature, especially a proposal to amend our Constitution, comes before the Court with a presumption of lawfulness. Conversely, the Defendants in this case need only convince the Court that there is any possible interpretation of the ballot language and title that allow a finding that they comply with the statue and the case authority----a very low threshold.

The arguments in the written briefs and orally presented by the lawyers have convinced the Court that it must find for the Plaintiffs. The ballot summary and title do not meet the requirements of Florida Statute 101.161(1) and therefore Amendment 7 cannot be included on the November 2, 2010 ballot.

Apart from the number of districts required to be drawn, the Florida Constitution currently contains only one requirement binding on the legislature when they meet every ten years to draw districts. That one mandatory requirement is that each district be contiguous. Amendment 7, were it to pass, would make that one mandatory requirement aspirational only and would subordinate contiguity to the other aspirational goals or "standards" contained in Amendment 7.

This case is on "all fours" with *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) and *Evans v. Bell*, 651 So. 2d 162 (Fla. 1st DCA 1995) in which courts struck amendments due to defective ballot summaries. Those decisions, together with *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), serve as the lynchpin of this court's decision.

To be clear, there is nothing unlawful or improper about what the legislative proposal seeks to do. The wisdom of a proposed amendment is not a matter of concern for this Court. But to be legally entitled to a place on the ballot, the summary and title must be fair and must advise the voter sufficiently to enable the voter to intelligently vote for or against the amendment. "The purpose of section 101.161 is to assure that the electorate is advised of the true meaning , and ramifications (emphasis added) of an amendment." *Askew*. To meet the requirements of *Askew* and *Evans* and *F.S. 101.161* the ballot summary and title must inform the voter that a vote for the amendment is a vote to make the mandatory requirement of contiguity aspirational and to subordinate it to the other aspirational "standards" contained in the amendment. Requiring that all districts be contiguous is a valuable right afforded to all citizens of Florida. A citizen cannot, and should not, be asked to give up that right without being fully informed and making an intelligent decision to do so.

Amendment 7, if passed, would allow this or any future legislature, if it chose to do so, to gerrymander districts guided by no mandatory requirements or standards and subject to no effective accountability so long as its decisions were rationally related to, and balanced with, the aspirational goals set out in Amendment 7 and the subordinate goal of contiguity.

Accordingly, it is ORDERED and ADJUDGED that:

1. The Plaintiffs' Motion for Summary Judgment is GRANTED;

2. The Defendant's and Intervening Defendants' Motions for Summary Judgment are DENIED;

3. The Court ENJOINS the Defendants Department of State and Dawn K. Roberts, in her official capacity as the Secretary of State, from placing Amendment 7 on the ballot for the November 2010 general election.

DONE and **ORDERED** this 12th day of July, 2010, at Leon County, Florida.

JAMES O. SHELFER
Circuit Judge

Copies furnished to Counsel of Record

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

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Plaintiffs,

v. Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the
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her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES,
and FLORIDA SENATE,

Intervening Defendants.
_____/

NOTICE OF FILING ORIGINAL HEARING TRANSCRIPT
TO BE INCLUDED IN RECORD ON APPEAL

The Florida House of Representatives gives notice of its filing the original transcript of the July 8, 2010 final hearing to be included in the record on appeal.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by email and U.S. Mail this 21st 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

FLORIDA STATE CONFERENCE OF
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DEPARTMENT OF STATE, an agency
of the State of Florida, and
DAWN K. ROBERTS, in her official
capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES,
and FLORIDA SENATE,

Intervening Defendants.
_____/

RE:	Hearing
BEFORE:	The Honorable James O. Shelfer
DATE:	July 8, 2010
TIME:	Commenced at 9:00 a.m. Concluded at 10:55 a.m.
LOCATION:	Leon County Courthouse Tallahassee, Florida
REPORTED BY:	JO LANGSTON Registered Professional Reporter

ACCURATE STENOTYPE REPORTERS, INC.
2894 REMINGTON GREEN LANE
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P R O C E E D I N G S

* * *

THE COURT: I know we're a little early. Is everybody here? Are we ready to go?

MR. MEYER: We are, Your Honor.

THE COURT: Mr. Meyer, are you ready?

MR. MEYER: Yes, Your Honor. May it please the Court, I'm Ron Meyer. With me is Lynn Hearn and Jennifer Blohm. Also in the courtroom is Mark Herron, who is counsel of record but won't be

appearing today in this proceeding.

Your Honor, we're here pursuant to a notice on the final hearing on cross motions for summary judgment on our petition to seek the removal of Amendment 7 from the November general election ballot.

I guess, Your Honor, I have taken heed of your admonition at our last hearing, where the Court noted that although we had requested three hours to consider this matter, Your Honor pointed out that the summary is limited to 75 words, and so perhaps the lawyers ought to limit themselves as well. And so I can assure you that my presentation in the case in chief is going to be brief or briefer than perhaps originally anticipated.

THE COURT: Well, I think the schedule permits me to give both sides all the time that they need, so don't feel rushed.

MR. MEYER: I would just simply request that I be permitted some time at the end to close, since this is my burden in this proceeding, so that I would have an opportunity to close after the State and defendants have presented their case.

THE COURT: Absolutely.

MR. MEYER: Your Honor, Amendment 7, we submit to you, is nothing if not confusing and deceptive. What the constitution amendment process requires is nothing less than absolute clarity in a ballot title, a ballot summary and indeed in the ballot amendment itself.

We cited the cases in our memorandum. I won't go through each of them. But the backdrop, I think it's important to keep in mind here, as stated in Armstrong v. Harris, the proposed amendment, in order to be sustained by this Court against challenge, must accurately represent the issue that the voters are going to have to vote on.

It must have a title that accurately and clearly apprises the voter who presents at a polling booth what the amendment purports to do. It must

have a summary that describes the chief purpose of the amendment, and indeed the amendment itself can't be indecipherable, can't be unintelligible, but is required to be clear and unambiguous.

Your Honor, this amendment fails on all counts. And I'd like to go through what we consider to be the recipe for deception that the State of Florida has engaged in in concocting Amendment 7.

Start with the ballot title. The ballot title is supposed to clearly and unambiguously apprise the voter at the polling booth of what it is the amendment does. The Courts have recognized, the constitution recognizes that very often by the time people go to vote on constitutional amendments on a general election, they have gone through a number of other election races, and by the time they get to the ballot issues, it's a sad commentary, but it's nonetheless an accurate one, they are guided largely by the words in the ballot title, what does the title say and is that something I agree with.

The title here says this is standards for establishing legislative and congressional district boundaries. That's what the title says Amendment 7 is supposed to do.

I think it's important to note that this title

was selected by the legislature after Amendments 5 and 6, which in fact do establish standards. I'll come back to that in a moment. They do establish legislative standards. This amendment, the legislature decided basically to parrot the title that was given to 5 and 6.

This can only be said to have been intended to confuse voters into believing that 5, 6 and 7 were a series of amendments, all of which would impose standards on redistricting the legislature and Congress. In fact, while 5 and 6 do create objective standards, 7 creates no standards at all.

The other thing I think is relevant to keep in mind here with Amendment 7 is the manipulation that the legislature went through to make sure that 7 immediately followed 5 and 6, in an effort to continue what we submit to you is deception. They didn't leave it hanging out and come into play in the normal order of things. They withheld other amendments that had been passed --

MR. MEROS: Your Honor, I apologize, but he's testifying here about matters totally unrelated to the issues here, totally unbriefed, editorializing about what the legislature did or didn't do. This was supposedly an issue of law for the Court.

That's what plaintiffs said. That's what we have done. We're not ready to testify, although we would be happy to testify, about what the legislature did and in what order. That's not an issue.

MR. MEYER: This is not testimony, Your Honor. This is issues that we do relate to in our memoranda, showing how this amendment came into being and its placement and part of what we consider to be the deceptive quality of this overall.

THE COURT: I don't think that that's going to help me make a decision, because whatever the legislature did or did not do, I probably don't want to know. I probably don't need to know either. And so I think Mr. Meros has a good point. This is summary judgment. We don't have affidavits. So try to confine your remarks to things that are not factual, factually what happened as far as the legislative process.

MR. MEYER: Your Honor, very well. Move on to what the constitution currently provides are standards for redistricting in the state of Florida. Article III, Section 16 provides two essential standards. One is that there have to be a certain prescribed number of legislative districts, and the second one is that those districts must be

contiguous. And contiguous -- the concept of contiguity is an important issue in why Amendment 7

fails.

Contiguous has been defined by the courts to mean contiguous within itself. That is to say, a legislative district, in order to meet constitutional scrutiny, has to be compact within itself.

THE COURT: Let me ask you a question that I have on that issue, and I'll ask Mr. Meros the same question when it's his opportunity, and it will help me better understand this. Being contiguous right now under the constitution is mandatory.

MR. MEYER: Yes, sir.

THE COURT: Say, for example, that the legislature or a future legislature determined that Destin and Daytona Beach were communities of mutual interest, which they would be in that they're coastal communities dependent on tourists, different community interests that they would have.

If Amendment 7 passed and those were communities of mutual interest and rationally related to each other, could the legislature make that one district, Daytona Beach and Destin? That's farfetched. I don't think that they would do that,

but could they?

MR. MEYER: Your Honor, it's probably not as farfetched as one might think if you look at some of the legislative districts we currently have. The answer to your question is, we submit to you that Amendment 7 very clearly would change what the current constitutional requirement of contiguity is

and would indeed permit the legislature to ignore the current mandatory standard in Article III and instead substitute consideration of communities of common interest, which can't be subordinated to any other standard in the constitution under Amendment 7. And it's a dramatic change.

THE COURT: And that subordination language is what you would interpret to allow the legislature to, in effect, make pockets out of congressional districts.

MR. MEYER: Your Honor, it can't mean anything else. If these new standards that are -- I hesitate to use the word "standards" because they're not really standards. They're these amorphous guidelines. The legislature may choose to consider and promote communities of common interest. But those considerations, should it choose to use them, may not be subordinated to any other provision in

the constitution. That would be current provision or future provisions.

THE COURT: That was my next question.

MR. MEYER: It can only mean, Your Honor, that they are writing the requirement of contiguity out of the constitution. It's simply something that they could or could not elect to follow based upon their desire to use communities of common interest or to otherwise balance -- that's another term that's used in this constitutional provision -- the standards that do exist with these guidelines which Amendment 7 would impose. The result is there's no

standard.

THE COURT: What do you think that the language of Amendment 7 would do -- you touched on it -- to future amendments to the constitution concerning districting and making it mandatory standards?

MR. MEYER: Well, unless the future redistricting standards specifically removed the language of Amendment 7 that contains this "shall not be subordinated" language, then any future constitutional amendment could not be subordinated to these amorphous considerations which Amendment 7 makes.

THE COURT: In effect, this would have to be

repealed in order for there ever to be any standard.

MR. MEYER: Yes, Your Honor, because the fact is --

THE COURT: Mandatory standard.

MR. MEYER: Yes, sir. If you read the language, the State shall take into consideration the ability of racial and language minorities to participate in the political process. It doesn't say that they have to do anything other than take into consideration racial minorities.

Then it says the State may promote the communities of common interest other than political parties. They may be promoted and respected. They don't even have to do that. And yet these amorphous requirements, whatever they mean, trump the nonobjective -- or the objective standard of contiguity which presently exists in the

constitution.

And yet there's not a whisper of that in the ballot title, in the ballot summary or in the ballot amendment itself. This is a secret repeal that's going on here, Your Honor.

THE COURT: When it refers to "both," is it your understanding that the "both" are the two standards that are in that sentence, which would be

the racial and language minorities and also the communities of common interest, those two?

MR. MEYER: Yes, sir.

THE COURT: That's what "both" refers to. Is that what --

MR. MEYER: It seems to refer -- again, this is not a model of draftsmanship, and so the whole amendment probably fails because of its lack of clarity. But assuming that you're reading, "The State shall take into consideration the ability of racial and language majorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to other provisions of this article," suggests that they may consider these issues, and if they do consider them, they shall not be subordinated to other provisions of the constitution. And we say primarily the other provision of the constitution which may not be subordinated is contiguity.

THE COURT: Which is the only other one.

MR. MEYER: Which is the only objective standard, other than how many districts you have, in the constitution today. And I suppose you could

argue that if we think we ought to have pockets of noncontiguous communities of common interest forming a legislative district, maybe they would even trump and not be subordinated to the numeric objective criteria currently in Article III.

The point here is, Your Honor, they don't define what a community of interest is. It's in the eyes of the beholder. Your Honor may have one view of what it is. I may have one view of what it is. I'm sure the defendants have a different view of what it is. But the point is, the mere fact that it's susceptible to so many views because it's not explained in the summary, it's not even explained in the ballot itself, leads one to the inescapable conclusion, Your Honor, that this amendment fails the clear and unambiguous language test that the cases have repeatedly held is the paramount test for this Court to consider whether to advance an amendment like this onto the ballot.

Here we have a repeal of the only standard which exists in the present constitution, contiguity, because contiguity can now be subordinated to whatever a community of common interest is intended to mean. It could be subordinated to whatever considerations are given to

racial and language minorities. It doesn't have to be any objective standard. That fails even the defendants -- the House says these terms are indeed standards because they provide a measure of accountability. This doesn't even meet their own test of what a standard is.

What's the standard for a community of interest? It's anything somebody wants it to be, and it repeals the contiguity requirement, without ever telling the voter who presents at the voting booth that that's what's being done here.

So, too, what does it mean to balance and implement among these different standards? Balance says you give this one some weight and you give this one some weight and you come to some balance without subordinating any of these amorphous guidelines. Implement says you implement them all.

Well, you can't do both, Your Honor. You're either balancing these considerations or you're implementing them. What this amendment does, though, is it says, you can balance contiguity against anything else. It's not a clear amendment. It's deceptive. It flies under false colors, and it does not pose notice to the voter of what he or she is actually voting on.

Let me also touch on this whole notion of changing the review standard. Currently the constitution says redistricting shall be performed in accordance with the Florida Constitution,

paraphrasing, but the constitution is what has to be abided.

Now this amendment would change that from abiding by all of the requirements of the constitution to being rationally related to some of the considerations that they have. So, as long as a plan is not irrational, it doesn't mean that it has to follow the requirements of the constitution, Your Honor. It's changing the standard of review for all future time.

And yet there's nothing in the summary that explains to a voter that that's what's happening. There's nothing certainly in the title that would give you an idea that the standard of review is being changed. Rather, what you have is you have a shift of the review standard in this amendment that is going to affect not only the current constitution but any future constitutional provisions.

It's also deceptive that this amendment fails to state that one of its chief purposes, indeed perhaps an overriding purpose on the part of the

legislature, was to undo the objective standards which Amendments 5 and 6 would create if adopted.

Now, the defendants argue that, look, the case law doesn't require you to anticipate that some other amendments might sometime be adopted and, therefore, in your ballot title and summary discuss how these will affect some hypothetical future amendment.

The problem with their argument, Your Honor, is

these were not hypothetical future amendments. Five and six were placed on the ballot in January of 2010. Seven was passed by the legislature in April of 2010. And this is not testimony. This is argument, Your Honor. The record that's before the Court shows that 7 was intended to undermine and undercut 5 and 6.

The voter needs to know that, Your Honor. The voter who is going to the ballot to vote on Amendments 5, 6 and 7 needs somehow to be apprised of the fact that voting for 7 undoes their vote on 5 and 6. This was no surprise. This was no speculation. The legislature knew full well what it was doing when it passed Amendment 7. And what it was doing was undercutting Amendments 5 and 6.

It happened to overreach beyond that and

undercut all standards in the constitution with its non-subordination language. And yet the voter who reads the title, the summary, and the ballot, which is essentially the summary, is not apprised of that.

Now, I'm sure Mr. Meros and others will argue the voter has to inform him or herself about the issues before them. That's true. I'm sure they will say 5 and 6 might not pass, so how can 7 be required to anticipate that. That's true. What they can't say, though, Your Honor, with any degree of veracity is that Amendment 7 does not subordinate the requirement of contiguity to the point of elimination.

There is no requirement post-Amendment 7 for a

legislative district to be contiguous, and that's the fatal flaw. That's the knife through the heart of Amendment 7, Your Honor. The Court really doesn't have a choice but to take it off the ballot.

I would just close here by referring to --

THE COURT: Let me ask you one question that may be fundamental, and I think I know the answer to it. But in defining the terms in the ballot, it says, "in establishing congressional and legislative district boundaries or plans." What are plans? If district boundaries are what we're talking about,

what is your understanding of plans?

MR. MEYER: My understanding of a redistricting plan is the plan of trying to balance and equate the various standards that ultimately become the legislative boundaries. So it's part of the boundary setting process.

THE COURT: The plans would be something before they were implemented, before they were approved by the legislature?

MR. MEYER: You approve a redistricting plan that then, when effective, becomes -- the plan sets the boundaries, as well as the other criteria required by the constitution.

THE COURT: "Or plan" is probably not needed in there.

MR. MEYER: If you redistrict, you redistrict. And, you know, again, you and I are wrestling with what this means. Consider the voter who presents at the voting booth to understand what it means.

THE COURT: But it's not something different. It would be just the legislature's intent to define the boundaries of the districts.

MR. MEYER: That's my understanding, Your Honor, and to plan for the relative numbers of people and plan for accommodation of language

minorities under the current statute. Now it would be to consider those things, not necessarily implement those as standards.

THE COURT: Okay.

MR. MEYER: In 2008 a case was brought before your colleague Judge Cooper relating to some amendments that had been proposed to the people of Florida by the Taxation and Budget Reform Commission. And the ballot title of one of those amendments particularly -- and the case is Ford v. Browning, and it's reported at 992 So.2d 132, Florida Supreme Court decision.

The ballot title in that case contained reference to one of the changes that was clearly being made as announced in the ballot summary and the amendment but didn't mention the other change. In that case the ballot summary at least mentioned that there were two changes. There was a change that the ballot title referred to and there was another change.

And it was argued, and I think Judge Cooper bought the argument at the trial court level, that since the summary was complete and described the two changes, the title didn't need to describe both

changes. In reversing Judge Cooper, the Florida

Supreme Court concluded otherwise. They concluded that the title, the summary, as well as the amendment all have important roles to play in this review process.

And particularly Justice Lewis wrote a separate concurring opinion, pointing out what he felt to be a significant flaw in that amendment, which I think is equally applicable here. The approach presented in this proposed amendment is to combine two or more separate, distinct and unrelated matters under a title of only one of those changes, a title which may have merit and popular support.

The voters of Florida should not be subject to slight of hand word games when they enter the voting booth. Rather, the title of a proposed amendment to the Florida Constitution should fairly apprise voters with regard to a proposed amendment. The use of a highly specific title which completely fails to mention a very major and significant aspect of the amendment causes a proposal to violate the statutory requirements of Section 101.161, which is the requirement that a ballot be clear and unambiguous.

In that case, the summary actually showed the two changes, only the title didn't. In this case the title doesn't show any impact upon contiguity,

the summary doesn't show any impact on contiguity.

And yet inescapably there is an impact upon contiguity because now it may be subordinated to these other guidelines that Amendment 7 imposes.

Your Honor, this ballot amendment hides the ball. It does something that is not readily apparent, is not noted in the summary, is not noted in the title and is not able to be sustained by this Court. We respectfully request that you enter an order pulling this from the ballot.

THE COURT: Mr. Meros.

MR. MEROS: Your Honor, may I use this?

THE COURT: Yes, sir.

MR. MEROS: Your Honor, may it please the Court, on behalf of the Florida House of Representatives. The defendant intervenor in this case and the Secretary, by agreement, will be last because he says the smart stuff, and we'll start with the light stuff first.

Your Honor, this amendment does away with contiguity if this Court doesn't read the plain words of this amendment in conjunction with all of the plain words and takes the term "without subordination" and converts it into may be or will be subordinated to. The plain reading of the

statute, the plain reading of this summary and text cannot lead to that interpretation.

I will get into this contiguity issue immediately. But let me first say, with regard to what a redistricting plan is, a redistricting plan is the map of the 120 House seats and the 40 Senate

seats once the redistricting has occurred, once the legislature has voted on the House plan and the Senate plan.

Those are the districts. They have boundaries that are literally just like a real estate closing survey boundary. It has the data along with each of the districts. And so it's not the legislature's intent. It is the actual map of each individual district within the state. That's why it says, absolutely appropriately, that in establishing congressional and legislative district boundaries and plans. So it applies to each of the districts and the boundaries in each of the districts as well as the overall plan, if you have any question about that. But that's clearly the proper understanding and application of that term.

Now, again, before I get directly to the issue of contiguity, I urge the Court to put it in context. And the context is this. The plaintiffs

are asking for something that is truly extraordinary and unprecedented, and that is to take a legislative amendment off of the ballot, saying that it's misleading, first, with a ballot summary and title that is identical to the language of the text, secondly, with a summary that tells the voter precisely where to go to look to see whether there are changes to existing law, conflicts with existing law that will be resolved by this, what is existing law and what is future law. It doesn't move them away from the existing constitution. It directs

them right there and tells the voter --

THE COURT: So is it your position, though, that a voter should go and read Article III to see what is mandatory in that before it makes a decision on how to vote on Amendment 7?

MR. MEROS: The case law is very clear that the voter needs to educate themselves with regard to whether there are changes in the law.

THE COURT: Askew doesn't say that the summary and the substance of the summary should inform the voter so that the voter doesn't have to do that, that the voter shouldn't be required to go read the constitution to decide what is taken out?

MR. MEROS: The summary requires only a clear

and unambiguous statement of the chief purpose of the amendment, and if there are changes, it needs to direct the voter where to go to assess the changes. It cannot -- and the case law is very clear. There are any number of ramifications that any initiative, any petition --

THE COURT: How is this any different than Askew or Evans? Tell me how this case differs from those two in which the Supreme Court said that you need to inform that you're taking something out of the constitution that you now have a right to that you won't have if you approve this ballot amendment.

MR. MEROS: That is exactly the point. This tells the voter that there are existing standards, that there is existing Article III that they must look at. Askew and Evans and the Wadhams case

essentially take the voter away from an existing standard and suggest there are no existing standards, and what this is doing is imposing standards, creating standards.

In Askew it was, imposes a two-year ban on lobbying, when in fact it did just the opposite. In Wadhams it says, without a summary, the commission shall meet however many times but four times a year, when in fact the voter has no way of knowing at that

point that there were unlimited opportunities for meetings before.

And it wasn't -- the Court didn't say that a voter is relieved of responsibility to determine effect. It said, if the summary is or if the language is moving the voter away or making the voter assume that existing law is not affected, then that's the problem. That's not the case here. What we're doing here is creating additional standards to go with the standards that presently exist. And let me cite --

THE COURT: You know, that may have a lot of merit if there were standards all over the constitution on redistricting, but we're only talking about one standard, one mandatory standard, that districts be contiguous. Why wouldn't the ballot summary explain to the voter that your vote for this affects, in whatever way you determine that it affects, the standard for mandatory contiguousness of districts? Why wouldn't that be a reasonable result?

MR. MEROS: Because the chief purpose of that is to add standards to the constitution, and it tells them there are other standards and you will have to balance and implement the standards. It

doesn't say -- and I would suggest the Court would have to create the most extreme interpretation -- that it writes contiguity out of the constitution.

And, in fact, Your Honor, the most rational interpretation of this -- and, again, case law is very clear, that this Court is obliged to affirm this and to let it go to the voters if there's any reasonable possibility to harmonize the provisions. It is not our burden. It is in fact the most -- the provision that has the most deference accorded by the Court.

Now, if you look at these in conjunction with the constitution, to me, it's not only a possible, reasonable possible interpretation, it is the most rational interpretation, that one must balance and implement all standards. Without subordination means not inferior to. There is no --

THE COURT: But if the contiguous standard is mandatory, if you're not affecting the mandatory nature of it, then it must be superior to these non-mandatory standards. By saying that these two standards won't be subordinate to, the only way you can interpret that is if you're knocking the contiguous nature of that standard down to something less.

MR. MEROS: No, sir. In 27 pages of legislative history about what this does, not a word to suggest that the objective standard of contiguity is affected by this.

MR. MEYER: Your Honor, I think I'm going to object to Mr. Meros now wandering off into --

THE COURT: That's all right. I asked him the question.

MR. MEROS: And the legislative history obviously is a legal issue attached to their pleadings. Second, it would be like suggesting that you can take the standard, the binary standard, it's either there or not there, of 80 to 120 House districts and make it 400 districts.

Where is there the rational interpretation to suggest that this language permits anyone to do that when the standard is the legislature must rationally balance and implement all standards?

And what you have in reality, Your Honor, is you have an existing constitution that has objective binary standards. They either are in existence or they're not. There are either 30 to 40 Senate districts and there are either 80 and 120 House districts. They are either contiguous or not. You punch a button and you know whether you can travel

to all portions of the district without crossing over another district, which is a definition of contiguity. Those are not judgment calls. Those

are clear calls.

What this does is add to standards and tells the legislature that these are two additional tools but they must be balanced on a par with the other standards in the constitution, not subordinate to, not superior. The definition of subordinate is inferior. This is not inferior to any of the other standards. But that does not mean that a rational balancing and implementation of all standards, which this provision requires, would permit you to create 400 districts.

And, again, Your Honor --

THE COURT: But in your interpretation, under the same question that I asked Mr. Meyer, assuming that a future legislature wanted to make a district out of Destin and Daytona because they were communities of common interest --

MR. MEROS: Could not do so.

THE COURT: Because it would be subordinate to the mandatory requirement for contiguity.

MR. MEROS: It would not be subordinate to. In balancing and implementing all of the standards,

here's what would happen. You have objective standards, 120 House districts, contiguity. You now have standards that are not -- that require some judgment, require some balancing.

And they're not just these two standards. Now we have -- you apply federal standards. And obviously the racial protection and the community of interest standards are related to that. But they

are not binary. They require judgment. Just like this Court has to use judgment, and there are certain bright line things that are just bright line, they're black and white. There are others where you have to use judgment.

And here what the legislature can do by virtue of this is take into consideration, say, Pinellas County and you have a substantial pocket of elderly people, and that's a group of people with common interests. You have population in Manatee County or Sarasota that are elderly and have common interests.

It would not be a rational interpretation of this to say that you could create additional districts or you would make a noncontiguous district when the voters will have said districts may be or communities of interest may be respected and promoted.

You would take the objective standards. You would apply it to Pinellas County. And you would, to the extent possible, implement the standards, if the legislature so chose, by keeping the Pinellas community of interest together in a contiguous district among 120 House districts.

It is the most fanciful, out-there interpretation to suggest that you could ignore objective, black and white standards for a standard which expressly states that the legislature may do something or may promote something.

THE COURT: But if the constitution only has one standard and that is that the districts be

contiguous, what would be the purpose of Amendment 7? Because you can do anything you wanted as long as the district was contiguous.

There's no other standard in the constitution that would require you to do anything. So if you wanted to make these -- you make a decision these are communities of common interest, and so it's going to look like a shoestring, but you could do that because there's nothing that prohibits you from doing that.

MR. MEROS: Your Honor, that's not what is suggested by this provision. To suggest that -- and

contiguity is not the only standard. You could also have overlapping districts. You have the standards of 30 to 40 Senate districts and 80 to 120 House districts. Those are standards. They're black and white standards.

When you put judgmental standards in addition to it, then you have to implement all but balance all. Neither is subordinate to another. They're on a par. It's just like any other situation where if you have some things that are absolutely totally clearly defined and others that are -- it's like a puzzle. If you have clear puzzle pieces that you have to put in there and other puzzle pieces that have to be adapted to make the picture a whole picture, you adapt it. You may not create it this big and put it in. You may put half of it in to make the whole picture.

And, again, it's not a question of whether

someone could interpret this to be the way plaintiffs say it is. The question is, to the contrary, can there be any reasonable way to interpret this in a way to accommodate those interests and to let it go on the ballot.

And that's exactly what this says. And there's more than reasonable -- there's more than a

reasonable way to accommodate a legislature's right to put something on the ballot, which took the same oath of office as this Court in supporting and implementing the constitution, to say that when you have judgmental standards, they will be on a par with, not superior to or not inferior with, to the other standards.

And to suggest that the chief purpose of this is to wipe out the contiguity requirement is the greatest stretch. And it's a stretch this Court must not take. If the Court believes that there is no reasonable way to interpret this to accommodate existing black and white standards with adding additional standards that are judgmental, then the Court must do what it must do, but what the Court --

THE COURT: Let's see if we can get to some understanding here. If Amendment 7, the effect of it is to do away with the contiguous requirement, then would you agree that it should not go on the ballot because it does not inform the people that a right that the people have to have a contiguous district is being taken away?

MR. MEROS: No, sir.

THE COURT: You would not agree?

MR. MEROS: No, sir.

THE COURT: Why is that?

MR. MEROS: The law requires that even if there is a conflict, even if other things are taken out, so long as the voter is told where it is and in what area, it's the locational standard or the identification standard, go to Article III and see how this interplays with the other standard, so long as the legislature does that, that's all the requirement that there is.

THE COURT: So you don't think that Askew and Evans and Armstrong all would make it mandatory that you explain to the voter that you're giving up this right if you approve this ballot amendment?

MR. MEROS: No, sir. Now, again, assuming the notion that you were giving up contiguity. I still -- that's your assumption.

THE COURT: I understand. That's what we're talking about, assuming that this would give up contiguity.

MR. MEROS: Absolutely not. Askew and the other cases take the voter away, affirmatively mislead, to give them language that suggests that something is being enhanced from existing law when in fact it's being taken away, and so, voter, don't look at existing law. In Armstrong v. Harris,

instead of -- it said this is basically preserving the cruel and unusual punishment protections, when in fact it was taking it away.

And that goes to the context of what is the chief purpose of the ballot summary and title. Can it be said that the only reasonable interpretation of this is that the chief purpose is to do away with contiguity? That is an extreme interpretation, I would suggest, exactly the opposite of what the Court has to do.

And those are the only -- Armstrong, Evans and the Wadhams case are the only cases where the Court has said that if you have a ballot summary and a ballot text that are identical, that you could nonetheless take something off the ballot, and that is affirmatively misleading the voter as to the purpose and effect.

That is not the case here. The voter is told, there are standards existing in the constitution in Article III. This adds standards, and it requires that all of the standards be balanced and implemented.

The ballot summary cannot and does not have to describe all of the impacts on those standards. If it's telling the voter, directly contrary to Askew

and those others, go look, you're on notice that there are impacts here, that's what the law requires.

Again, if you could assert and if you could say that the only possible interpretation of this

provision is that the contiguity standard is wiped out, that's again exactly the opposite of the Court's burden here, and that is to uphold if there's any reasonable way to do so.

THE COURT: And your position is that simply restating the amendment, as to the ballot summary, by Askew and the other cases, and the Jacksonville case, I guess, is okay.

MR. MEROS: Not only is it okay, the Court has time and again said that if you were telling the voter in the ballot summary what the text says, that is absolutely okay, that should be approved, absent one of those rare instances where there is a -- that the text itself and the summary are telling the voter the exact opposite of what the language suggests. And let me read --

THE COURT: That being the case, though, why if every ballot summary -- if every ballot matter is less than 75 words, why wouldn't they just do away with you've got to tell the voter in plain and

clear, simple language what this does, and just print the amendment that you're wanting on the ballot, that you're wanting approved? Why would you go to the expense, the chance of making a mistake by explaining to the voter in accordance with 101?

MR. MEROS: Well, the ballot summary can no better explain the text than saying what the text is unless there's an affirmative misrepresentation. The ballot summary requirement is appropriate in most instances to condense a long and detailed

constitutional amendment.

THE COURT: And to explain in clear and simple language what it means.

MR. MEROS: The chief purpose of the amendment --

THE COURT: That's why we go to law school, to pore over all of these arcane things and try to make meaning out of them, rather than in a clear, simple message to the voter, this is what you're voting on.

MR. MEROS: Right. But in doing so, think about -- Your Honor, think about the alternative. If in fact the requirement was -- and the case law just does not support it.

THE COURT: Well, I understand and I agree with you. The case law doesn't support it. I'm just

saying that that doesn't seem to be in the spirit of 101 to explain clearly to the voter what the voter is doing, because the voter can't read a constitutional amendment or a ballot summary generally and understand what they are voting on.

MR. MEROS: Your Honor, I may agree with you. But you're getting there to the notion of whether there should be any constitutional amendments in this way, or initiative petitions.

And there is no question that some voters will not -- didn't go to law school, may not understand the ramifications. But I urge the Court to remember that that's an issue with whether you have an issue with petitions. That's an issue unrelated to the standard of review and the burden that a sponsor of

the petition, whether it's an initiative petition or the legislature, has.

THE COURT: I agree with you. I do agree with that. I think the law is clear on that.

MR. MEROS: There's plenty of argument that there shouldn't be ballot summaries, you should put the whole text in there and you could have an annotation as to what it means. But that's not the law. And let me suggest one reason why it isn't. And this is really important.

When you start trying to tell the voter what this means in that sort of detail, then the next thing that's going to happen is there will be challenges because a detailed recitation of what it means is editorializing. My interpretation of it is this. Their interpretation of it is that. I say this changes the standard of review in this way. Someone else says it's -- we're all lawyers. How many provisions -- every day you sit here looking at statutes which other people look at in totally different ways, and you have to determine that.

If you go to that sort of detail, then you have more misleading, more misunderstanding than you ever would if you give the chief purpose of it and you alert the voter to the existing constitutional provision and say, it's up to you, once we tell you and inform you where it is and the chief purpose, it's up to you to determine whether you want to vote for it or not.

The alternative is worse and the suggested cure

is worse than the illness. But don't penalize the legislature for a constitutional provision and a statute that says the voter may go into a voting booth with a ballot summary only.

The question is whether this ballot summary so

affirmatively misleads that there is no possible way to interpret the text in a way to harmonize it. And that can't be. This simply cannot be the only interpretation, to say that the term "without subordination" means that these new standards which are discretionary in nature are superior to contiguity or how many districts you have in a redistricting plan.

Some judge at some period of time, and maybe this Court, ultimately would interpret this provision in that way. That's not the Court's burden here. The Court's burden is to approve it if there's any reasonable way to harmonize it.

Another thing, if you look at the Florida Supreme Court decisions in 1992 and 2002, you also understand the historical context of why these standards are additional standards. It has never been in the toolbox of the legislature the ability to consider and apply federal standards, or it's never been in the toolbox of the Supreme Court to evaluate the legislature's use of federal standards, the use of racial protections, the use of communities of interest.

That's what these are. These are additional tools in the toolbox for the legislature to consider

in that. And they are not going to be relegated to inferior status. They will be on a par. And then the Court must balance -- I mean the legislature first must balance and implement all of them. Then the Court has the opportunity to say that the legislature did not rationally balance and implement all of the standards.

And all of these hypotheticals about whether a district might not be contiguous or you can -- because you can, if possible, respect and promote communities of interest --

THE COURT: I think, in my mind anyway, it's boiling down to one issue that we have discussed here, and you're saying that these two matters that are in Amendment 7 would be on a par with the contiguous requirement that's already in the constitution.

MR. MEROS: And the 120 districts, yes, sir.

THE COURT: But how can an aspirational standard be on a par with a mandatory standard? That's where I'm having a problem.

MR. MEROS: The legislature's consideration of it is on a par. In other words, you don't put it below other standards that are in existence or may be in existence in the future. You put it on a par.

But, again, it's an aspirational standard. It's clearly a new tool. But by its very nature, it

being aspirational suggests that it's not going to trump an objective black or white standard. A reasonable interpretation --

THE COURT: If it's not going to trump it, then it can't be on par with it.

MR. MEROS: No, sir. No, sir. If it is aspirational, then you apply all of them to the extent that they meld together. If on a par meant I can do this notwithstanding black and white standards, it would have said notwithstanding. It did not say notwithstanding. It said without subordination. It is not inferior. You balance -- the first thing it says is balance and implement all the standards.

You cannot implement -- again, contiguity, is the light on or the light off. You can't implement contiguity if you turn the light off. You can implement, if you choose, a community of interest by preserving it in a contiguous district. You can implement contiguity and a community of interest if you keep it in 120 districts.

That's a rational interpretation of this. I think it's the clear intent, frankly. But even if

this Court disagrees, can it be said that what I just said is not a reasonable possibility of the interpretation of this provision?

If the Court concedes that that's a reasonable possibility of this interpretation, it must uphold this provision, not because I say so but because Supreme Court precedent for the last 50 years says

so.

THE COURT: Well, assume that it went on a ballot and the people of Florida voted for it and it became part of the constitution and then the legislature says, we're going to make one district out of Daytona Beach and Destin because those are communities of common interest, and one representative is going to represent both places.

And you say, whoa, wait a minute, that violates the contiguous nature of the districts. And then the legislature comes before the Court and says, no, it's rationally related because they're both ocean communities that depend on tourism. There's a community of common interest. That's at least on par with being contiguous and it's rationally related to making this one district. So that's all you can do, Court, is just see if it's rationally related, and if it is, then you have to approve it.

Now, why wouldn't that be a logical outcome?

MR. MEROS: That's a misapplication of the standard. It is not whether those two communities are rationally related to each other. The standard is whether the legislature rationally balanced and implemented all of the standards. That's what the Court has to evaluate. And the Court would and should say there is nothing here to suggest that one can take objective standards and turn off the light and put to a superior status an aspirational standard.

A rational balancing and implementing of this

would mean you can do this aspirational standard to the extent that it also permits us to implement all the other standards.

Your Honor, that's what redistricting is all about. To interpret this otherwise and to suggest that there are anything other than a limited number of clearly mandatory objective standards is just wrong. The vast majority of considerations in redistricting are judgmental, are ones that have to be accommodated to make a real picture. Otherwise you get a splotch here and a splotch there and uneven contours that never can come together.

And you take away the political stuff and the

allegations here and you put it in the real context of what legislators have to do in trying to create districts, there is a huge amount of judgment to be made.

And Bush v. Martinez, the 2002 case, I urge the Court to look at that and to see that communities of interest are a fundamental notion of whatever the people do in redistricting when they go to public hearings around the state. But that doesn't mean that they say or that a legislature could rationally say, go to 400 districts, it's going to be a lot easier to preserve communities of interest, or to go to 20.

THE COURT: Why do you think that the legislature would not have simply said, so long as a district is contiguous, then these are the aspirational standards that need to be applied?

Now, that would have been a very simple, simple answer to the whole thing. And then there's no question. It has to be contiguous. Then the aspirational standards apply equally. Now, why didn't they do that, do you think?

MR. MEROS: Your Honor, I don't know the answer to that, but I do know that there are many ways to put terms. The question -- the real question is not

whether this is a perfect description. The question is whether it can reasonably be harmonized, possibly be harmonized, so that the Court can say -- so that the Court doesn't have to say, there is no possible reasonable way I can accommodate this. And that's not what it does.

The voter is entitled to look at this and to look at the constitution and see whether there is possible conflict or what the interplay is. But to say that this means that contiguity is out the door and you can turn the light off and apply aspirational standards to do so is not only not the most reasonable interpretation, it's not -- it's not the standard that's obvious from the face of it, looking at all of the words in context.

THE COURT: But in Askew lobbying, for someone leaving state employment, was not out the window either. The prohibition against lobbying for two years, they could do that if they went and complied with financial disclosure. It didn't do away with it. It just modified it.

MR. MEROS: But what the Court said was that

the effect of -- and, again, there the language, the effect of this and the interplay of this was obvious. It's not one where -- you know, you could

look at it and see what the interplay is. What the Court said was, they've just got this summary that says bans lobbying for two years, or whatever it said, when the exact opposite is what the impact would be. And so it's telling the voter something that's not true, leading them away from the existing constitutional provision.

Same thing with Wadhams, Judge. And they cite Wadhams for the proposition that Wadhams kills this. Wadhams, without a summary at all, says the commission shall meet, can meet or may meet four times a year. So the voter thinks, all right, they can meet four times a year, that's great. It doesn't tell them that now they can meet 50 times a year. So it is a direct contradiction, where the summary doesn't say, by the way, look at section so and so.

And, again, there can be conflict in constitutional provisions if the voter is informed and said, go look, look at Article III. That's the first thing this does. It says Article III, Section 20. It then goes on to say, without subordination to any other provision of Article III of the State Constitution. And so it says go look.

If you can go and look, that is not an

obligation that the legislature or initiative petitions cannot require. That is exactly what the courts have said to do.

And just imagine, Your Honor, let's assume there were other standards in the constitution and other judgmental standards. Does the law suggest that in adding standards which also are judgmental, that have to be implemented but balanced, that the summary has to go into detail about how they might interact and maybe here there would be some conflict but in other instances you could do it? Again, that's --

THE COURT: That was the point I was making. Here, there's only one, and so it would have been a simple matter just to say, the only other standard in the constitution is contiguity and that's going to be affected by your vote.

MR. MEROS: But that's -- that's exactly the question, whether it will be affected or not and whether that is the only possible reasonable interpretation of this provision. If in fact --

THE COURT: It's certainly going to be affected because there are other standards now that are, by your understanding of it, on at least a par with being contiguous.

MR. MEROS: Not on at least a par. On a par with contiguity. But those are black and white standards. Is the only reasonable interpretation of this that you can do -- that you can create 400

House districts or 10 Senate districts, and is that the chief purpose of this?

Again, we have to get back to what is the obligation, what is the legal standard here, to describe the chief purpose of this. And so can it be said that those objective standards, the only possible interpretation of those is that you can abandon those in a given instance because of aspirational additional standards? That is not the only interpretation of that. That is not the most reasonable interpretation of that. If the effect is it stands next to, on a par with, sure, that's the effect. But it's not, when you say that you must implement all standards.

Again, Your Honor, you can't implement a binary standard by turning it off. It's either on or off, just like 120 districts is. These others are the judgmental standards. You keep the population in Pinellas County. You can't take it to Naples and meet the objective black and white standards. That's not -- and the Court would strike that in an

instant saying, I have to look at whether the legislature rationally balanced and implemented all standards. It is not a rational implementation of all standards to take a community of interest which may be promoted and to wipe out the black and white standards of 120 districts and contiguity.

Now, Your Honor, I don't want to belabor a number of the other issues unless you have concerns about it. It seems to me -- and I think that Your

Honor said it -- that this is your primary issue. If there are others, I'll be happy to discuss them, this notion of there's no existing standard of review, things like that. But I'd really like perhaps --

THE COURT: Just briefly tell me what you -- if you were prepared to argue that rather than somebody else, the standard of review, the rationally related, if you think that's a change that --

MR. MEROS: Sure. It absolutely is not. And there the question is does the title -- is the title misleading. The case law is, again, very clear that you look at the title and the summary in conjunction to determine whether the title is misleading.

And the standard of review, the constitution says, now, simply the legislature -- and I'll

paraphrase. This is Article III, Section 16. The legislature shall apportion the state in accordance with the constitution of the State and the United States. That's the objective. That's the absolute obligation. That's the duty.

A standard of review is what the Court uses to determine whether that duty is fulfilled. There's no standard in the constitution. That's one of the problems. How does this Court determine whether it is done in accordance with the constitution?

The standard of review is, the Court looks at whether the legislature rationally balanced and implemented all of the standards for redistricting. If it did, it met its duty. To suggest that "in

accordance with the constitution" is a standard would be to give a court absolutely no ability to assess it. There would be no standard at all. And again, Your Honor, this is praiseworthy. The legislature, in putting in aspirational standards and judgmental standards that are not black and white, is telling the Court how to do it and is imposing a burden on them to not have something that you can just punch into a computer and say it comes up this way or that way.

But in melding aspirational standards and

objective standards, is this done in a rational way? If it is, it's done in accordance with the constitution. That's the standard of review, and it's not new. Once you put in aspirational standards, you have to have some way to understand and to determine how they're accommodated.

THE COURT: Okay.

MR. MEROS: Your Honor, I'll leave it at that. Thank you very much.

THE COURT: Was there someone else that -- Mr. Meyer, do you want to respond to Mr. Meros or do you want to wait until their whole side finishes?

MR. MEYER: I'll just wait for the whole ball of wax.

THE COURT: Ms. Tunnicliff?

MS. TUNNICLIFF: Your Honor, I'm Cynthia Tunnicliff. I'm appearing here today with Peter Dunbar, my law partner, and in the courtroom is Mr. Brian Newman, another one of my law partners. We're

all appearing here today on behalf of the Florida Senate.

I don't want to belabor these points that Mr. Meros has made in order to go over ground that I think he's covered very adequately. But I just want to start out by saying that the law cautions

restraint when removing a proposed amendment from the ballot. And that is particularly true when one is placed on the ballot by a joint resolution of the legislature.

The Court's first duty is to uphold the legislature's action in proposing the constitutional amendment if there's any reasonable theory, any reasonable theory under which it can be done. And there must be an entire failure to comply with a plain and essential requirement of law to remove something from the ballot and let the people have their right to vote on that.

Now, plaintiffs have failed to meet that burden. This case is about whether this ballot title and summary is sufficient. And that test, as we know, is whether the ballot title and summary informs the voter of the chief purpose of the amendment and whether the language of the ballot's title and summary is misleading.

And the cases on ballot summaries which talk about the language being identical indicate that in those situations, when the ballot summary is identical to the actual language of the proposed amendment, that it cannot be misleading and it has

to inform the voter of what the purpose of that

amendment is.

When you talk about why we have summaries, I think you mentioned that to Mr. Meros, some of these are so long that they can't be all placed on the ballot, for just efficiency's sake. But here the Amendment 7, the entire language of Amendment 7, except for some contextual requirements to make it more understandable to the voter as opposed to where its placement is in the constitution, is before the voter, the identical language. That cannot be misleading. And the cases have held that.

The language in the marriage protection amendment, the initiative on marriage protection, said that language submitted for placement on the ballot contains language that is essentially identical to that found in the actual amendment, and therefore it was not misleading.

In Medical Liability Claimant's Compensation Amendment, the court found no material discrepancies between the summary and the amendment because the summary came almost, very close to reiterating the identical language of the amendment itself. So that's what we have here, is a summary that contains the identical language of the amendment and cannot be misleading.

I don't want to reiterate all of the argument

on contiguity and the effect of contiguity that Mr. Meros went over in great detail. But I will tell you, what the plaintiffs are really concerned about here is not the effect on existing provisions of the constitution and on contiguity. And they make the bald statement that that's the chief purpose of that. There's no indication before this Court that that's the chief purpose of this amendment.

There's not one mention of that in any of the legislative history, and certainly that cannot be gleaned from the language of the amendment itself. And the polestar of statutory or constitutional construction is to look at the language itself. And there's no indication that there's any intent on the legislature's part to change the existing constitution, and particularly contiguity.

What the plaintiffs really are concerned about here is not Amendment 7's effect on the existing constitution but its effect on the proposed Amendments 5 and 6. And there's no law that requires a ballot summary to disclose the proposed amendment's effect on other proposed amendments, even if they're going to be on the same ballot.

In Citizens Right to Decide Local Growth Management Plan Changes, which is cited, I think, in the memorandums, the Court was faced with this identical issue, how that amendment on growth management plan changes affected the other initiative, which has come to be known as Hometown

Democracy.

And that argument was made to the Court in that case, and the Court refused to go there. They didn't address that issue. They concentrated on how it was going to affect existing rights. There's nothing in the law, there is no case law that says that the effect of a proposed amendment on other proposed amendments is to be taken into consideration.

Now, plaintiffs try to distinguish that case, the Local Growth Management Plan Change, by saying that there was no indication that it was going to be on the same ballot as Hometown Democracy. But that's a distinction without a difference. There's no indication here that Amendment 7 is going to be on the same ballot with 5 and 6, as 5 and 6 is under challenge as well in this circuit. So there's no indication that they're all going to be on the same ballot either.

THE COURT: If all three went on the ballot, there would be nothing -- your understanding is there would be nothing wrong with all three being on the ballot, and in effect the people could approve all three.

MS. TUNNICLIFF: Yes, yes. And Amendment 7 is complementary to Amendments 5 and 6. And if Amendments 5 and 6 pass, then those will be criteria that will be balanced and implemented, along with contiguity and the numbers of Senate and House districts, in this legislative process of

redistricting.

The plaintiffs also cite a case called Kobrin v. Leahy as supporting the idea that two amendments or that Amendment 7 cannot be on the ballot if it doesn't refer or inform the voter about how it's going to affect the other proposed amendments on the ballot.

But Kobrin does not stand for that proposition at all. And Kobrin, like Wadhams, basically, stands for the proposition that ballot language must disclose the amendment's effect and can't hide that effect. That ballot, there was a board of -- the ballot language. It was a referendum. It wasn't a citizen's initiative, so there was no summary. But

the ballot language provided that the Board of Dade County Commissioners would be the Metro-Dade Fire Rescue Board. It did not refer to the fact that there was already a board, an elected board of the Metro-Dade Fire Rescue District. And the election of the members of the board of the Fire Rescue District was on the same ballot as this change.

THE COURT: And that's pretty much the same as the Jacksonville case, isn't it? And I don't know the name of it, but where there was an elected board and the amendment to the charter was to have an appointed board?

MS. TUNNICLIFF: Yes.

THE COURT: And it did not say you're doing away with the elected board for the appointed board?

MS. TUNNICLIFF: Yes. But I'm not familiar

with that case, though.

THE COURT: That went along with Evans and Askew.

MS. TUNNICLIFF: But here, the plaintiffs cite the Kobrin case for the proposition that you couldn't have the two, the election of the board on the same ballot as the amendment that did away with the elected board, basically, without informing the voter as to the election. But that's not what it

said. It said you can't have the amendment that does away with the elected board on the ballot without informing the voters that that's what it did.

THE COURT: And in line with that case -- and I think that's what you're saying -- if the proposed amendment is going to affect a citizen's rights in other parts of the controlling document, whether it be a city charter or a county charter or the Constitution of the State of Florida, that the ballot summary would have to inform the citizen of that, is that what your understanding would be, that your right to elect a board in Dade County will be affected by this amendment?

MS. TUNNICLIFF: And I go back to what Mr. Meros said. Yes, in the sense that it doesn't put the voter on notice at all, like Askew and like Wadhams. You can't -- that is truly hiding the ball, under the Askew case, because there there's no indication to the voter that there is any existing criteria at all. Here, that's not true in this

case.

THE COURT: But if like Mr. Meros argued, if you say, okay, but go read the charter to see how this affects it, or read Article 5 of the charter to

see how this affects it, then that would be okay. You wouldn't have to tell them you're doing away with this board. You could just say, go read Article 5.

MS. TUNNICLIFF: I think you have to say Article 5 provides for a board or something to that effect. But, yes, it indicates that you have to go look at Article 5, as this amendment says you have to -- it's an addition to Article III of the Florida Constitution.

So I would say that the plaintiffs have a tremendous burden here to show that there is no reasonable theory under which the ballot language can be upheld, and they have not met that burden, and the summary judgment should be entered for the defendant and denied as to the plaintiff. Thank you.

THE COURT: Thank you.

MR. MEROS: Your Honor, may I add one thing that I neglected to mention?

THE COURT: Yes, sir. I'm going to give all of y'all plenty of time. Mr. Dunbar, do you have anything?

MR. DUNBAR: I do not. I believe Mr. Glogau does.

MR. MEROS: And I apologize for this, Your Honor. I won't take too long. But it is important to understand and to consider the legislative history in the context of what this means and what is a reasonable interpretation of this.

And to that extent, Amendments 5 and 6 are relevant to understand why the legislature did what it did and how it did it, not whether Amendment 7 has to describe its impact on 5 and 6. Clearly it does not. But the legislature's response to 5 and 6 is extremely important to understand the legislative history behind it.

THE COURT: Let me just say this before you launch into that argument. I'm kind of in agreement with you that this amendment needs to be looked at as this amendment --

MR. MEROS: Right.

THE COURT: -- and not as to how it affects 5 and 6. By the case law, that seems to be --

MR. MEROS: Yes, sir.

THE COURT: And Mr. Meyer may have a disagreement with that, and I'll let him do that. But I'm trying to stay away from how does this affect 5 and 6 because I don't think that that's my function. And if that helps you out any --

MR. MEROS: It does. But I would ask the Court to look at the legislative history to understand what "without subordination" means. And to that

extent, 5 and 6 are relevant. And I won't put it up and go into detail because, again, I agree with Your Honor. It's a matter of what this does to existing law.

But it is so important for this Court to determine whether there's any reasonable interpretation of this that would permit it to go on the ballot. And so to that extent, it is important. And understand, in Amendment 5 --

MR. MEYER: Your Honor, I'm going to object to this. What's important is what the language says, not what other people think, what they thought, the legislative history. What's important are the words on the ballot.

THE COURT: I don't think he's going there.

MR. MEROS: And we're talking about the legislative history that they attached to their papers and cited this in their provision, Your Honor. I'm talking about how this Court must, under the case law, interpret this in any reasonable way to understand what "without subordination" means. And obviously the very legislative history that they

cite is relevant to interpretation of 7.

THE COURT: But the case authority is real clear. And, Mr. Meyer, I'm sure you're going to point that out, too. Whatever they intended is not what I've got to look at. It's what the actual words say and the consequences of those words.

MR. MEROS: But to the extent there is any ambiguity in the words, the Court must adopt an

interpretation that is reasonable and that would permit this to go on the ballot. And to that extent, how "without subordination" came to be and what was the intent of the legislature is entirely relevant unless the Court were to decide that the language is so unambiguous that there need not be any consideration of legislative history. And if the Court --

THE COURT: I'll overrule Mr. Meyer's objection. Go ahead.

MR. MEROS: All I want to say is that when you look at the legislative history and you look at Amendment 5, you have standards that are tiered. You have a first tier standard that talks about incumbency, that talks about racial protections, that talks about contiguity.

You have the second tier that talks about

compactness and complying with political boundaries. And then you have a third section that says, Court, you shall not know which of any of these standards have any priority in each tier. It tells the Court, you don't know and we will not tell you how to consider contiguity versus incumbency or how to consider incumbency versus racial protections.

And then they have a second tier that is less than the first tier. What the legislature said in the staff analysis, what the legislature did and what this Court should adopt as a reasonable interpretation is to make sure that the racial protections and preserving communities of interest

are not subordinated in any way to any other standard. They are on a par.

So if 5 and 6 and 7 are adopted all together or next year or the following year or whenever there are additional ones, the notion is that they will be on a par so that some are not inferior. That is the context. Not a word of suggestion in that that this would have any impact on contiguity or the other black and white standards, not a word in the legislative history. To the extent that this Court has -- and I would suggest that all of this argument indicates that there is some question and there is

some ambiguity as to the meaning of what "without subordination" means.

If there is ambiguity, resorting to the legislative history is more than appropriate. And that will direct the Court to a reasonable interpretation of this, to understand that it was in no way intended and does not have the effect of wiping out black and white standards.

So that's all I wanted to say, Your Honor.

THE COURT: Mr. Meyer. I'm sorry. Go ahead.

MR. GLOGAU: Thank you, Your Honor. Jon Glogau on behalf of the Secretary of State, and I will be even briefer than anyone else here today. Your Honor, the standard -- the burden that the plaintiff has in this case is to show that the amendment is clearly and conclusively defective. And we believe that they've failed to meet that standard or that burden and that you should grant summary judgment to

the defendants and allow the voters to vote on Amendment 7. Thank you.

THE COURT: Thank you, sir.

MR. MEYER: Your Honor, we've wandered all over the reservation here today in an effort, I suspect, to deflect Your Honor from what I think is your clear understanding of what the requirement for

clear and unambiguous language in a ballot title and summary is and for the fact that ballot summaries and titles, and even if the summary is the same as the amendment itself, can't hide the ball, can't fail to mention the significant impacts of an amendment.

First of all, let me address this strained notion that somehow ten words in this amendment, "both without subordination to any other provision of this article," doesn't mean what it says it says, and that is that these aspirational goals that we're now calling them in Amendment 7 cannot be subordinated to the objective standards that presently exist in Article III, contiguity, number of districts.

There is a clear change. If these ten words weren't in this amendment, maybe what Mr. Meros argues would have some merit, maybe these are just simply other aspirational issues that ought to be considered in the context of the standards that are in Article III. But you can't ignore these words, Your Honor. If anything is plain in this amendment, it's plain that these aspirational goals cannot be

subordinated to any other provision of this article.

And what's the other provision of the article

that's most heavily impacted? Contiguity. Your Honor hit it right on the head. If this aspirational goal of community of interest suggests that we ought to have a beach community of interest that includes Okaloosa and Daytona Beach and we ought to preserve racial or language minorities within those things and that's more important than contiguity, so be it. Why so be it? Because both are to be implemented without subordination to any other provision of this article.

There's another word that Mr. Meros keeps using that doesn't appear in this article, and that's the word "all." He keeps saying that the requirement is to balance and implement all standards in this constitution; therefore, you can't ignore contiguity. You have to implement it.

I believe he described it as an on/off light switch, a binary procedure, you have to do it. Why, he says, because the constitutional amendment says "shall implement all standards in the constitution." It doesn't say that. It says to balance and implement the standards in the constitution, not all standards. Some standards would be fine. It doesn't say all standards. It doesn't say that's a binary requirement. It doesn't say that you have to

do this first before you go to these aspirational goals, because these aspirational goals are at least entitled to the dignity of the objective contiguity standard and may be indeed elevated above them in this balancing act that Amendment 7 would prescribe.

So we come back to, does this summary and ballot title tell the voter who presents to the voting booth what it is they're voting on.

We do cite to the Wadhams case. Wadhams, like here, the entire amendment was the ballot summary. They didn't parse words. They didn't describe the purpose. They just simply said, here is what it is. And consistent with the holding in Askew that this Court seems to be intimately aware of, the Wadhams court notes, the problem with the ballot in the present case is much the same as the problem with the ballot in Askew. By failing to contain an explanatory statement of the amendment, the ballot failed to inform the public that there was presently no restriction on meetings and that the chief purpose of this amendment was to curtail the board's right to meet.

They said it's deceptive because although it contains an absolutely true statement, it omits to state a material fact necessary in order to make the

statement not misleading. There was nothing on the ballot to inform the voter of the change to be accomplished by the amendment, which is the very reason why Section 101.161(1) requires an explanation statement.

Your Honor, the people have to know that there is a direct impact, in this case a direct repeal of the contiguity requirement in this amendment. And the failure of this summary and this title to give even a hint that that is a possibility, not a possibility, that is the case, renders this summary deficient for the reasons set forth in those cases that we cited in our memorandum.

Your Honor, the overall way in which this amendment came up, you know, Mr. Meros wants to quote legislative history. As we cite in our responsive memorandum, one of the legislative history elements was the fact that there was a joint resolution proposed in the Senate that specifically preserved the requirement of contiguity. That amendment was rejected by the House.

That amendment that would have addressed specifically the requirement that contiguity be preserved as a binary, on/off kind of element, was rejected in the adoption of Amendment 7. That's

what the legislative history shows.

To suggest that the legislature wasn't aware of the impact on contiguity that Amendment 7 had when it advanced this language is to ignore the way in which this matter came up. But it doesn't matter, really, because the language itself on its face provides the answer this Court needs.

Does the public know that contiguity is being taken away by adoption of Amendment 7? If the answer to that question is no, they're not apprised

of that fact, then this amendment must be taken off the ballot, Your Honor. And that's what we respectfully request this Court to do. Thank you very much.

THE COURT: Mr. Meros, anything else?

MR. MEROS: One thing, Your Honor. Again, if this Court can ignore the proper standard of review, the proper duty of the Court to let this go on the ballot if there's any reasonable, possible way to do so, then the Court can knock it off. But I suggest that the Florida Supreme Court's admonition when it reviewed 5 and 6 is exactly the way the Court must do it here.

In that case -- and this is cited on page three of our reply brief -- there was a question with

regard to 5 and 6, and this is cited in the Florida Supreme Court decision, where the standard in the ballot summary only said contiguous districts. And I don't know whether it was the text or the ballot summary.

And the argument there was, it only says contiguous districts, it doesn't mention overlapping or identical territory. Therefore, the intent is to take that out of the constitution. By its express term, it omits those things. And so, therefore, it's misleading. This is specifically with regard to 5 and 6.

What does the Supreme Court do there? It says, and I quote from the Supreme Court decision, or from the initial brief to the Supreme Court decision

which adopts this: No language in the amendment expressly purports to amend or repeal the current constitutional language, and the use of the term "contiguous" alone cannot be interpreted to impliedly amend or repeal current language. Implied repeal or amendment of one constitutional provision by a subsequent one is not favored and will not be found unless the two provisions are irreconcilably repugnant to each other, and then only to the extent of the repugnancy.

And based on this and based on the Supreme Court's own decision in 5 and 6, the fact that two key elements of the existing standards were not mentioned was harmonized to make it sure that it would not be taken off the ballot if there was a way to harmonize the provisions. It's just what the Court has to do here, Your Honor. And I urge the Court to do so. Thank you for your time.

THE COURT: Mr. Meyer, anything?

MR. MEYER: Hopefully the final word, Your Honor, the final ten words. "Both without subordination to any other provision of this article," that language doesn't appear in 5, that language doesn't appear in 6. There was no effort in 5 or 6 to create standards that in any way trump, accelerate over existing standards. And that's why the Supreme Court didn't have trouble there.

These ten words, Your Honor, should give this Court extreme trouble in approving this amendment, and we ask that you grant our summary judgment.

THE COURT: Does anybody else have anything? Now, we didn't talk about but I guess everyone is in agreement that this case is ripe for summary judgment. There's not anything that would prohibit -- that either side knows about that would

prohibit the issuance of a summary judgment. I do take note of the fact that it's time sensitive. We've got to move on along. I'm just the first stop on the way through. What's the time schedule that y'all have? What are we looking at?

MR. MEYER: Your Honor, the Supreme Court is scheduled for its annual summer recess beginning next week. And so we would submit to you that when this Court rules, one or the other of us I'm certain would be seeking an appeal of this order initially to the First District, requesting, I would assume jointly, pass-through jurisdiction to the Supreme Court, in order that the Supreme Court could reach this issue with finality before the first of September, when the printing of the ballots actually gets cut off. So we're looking at, I think, a drop-dead date in early September.

THE COURT: And I guess the other question that I have, everyone is in accord, too, that the Supreme Court will look at all of these and all of these arguments and everything else de novo. It will be just a start from scratch.

MR. MEYER: I believe that's the law, Your Honor.

THE COURT: Everybody agrees with that?

MR. MEROS: Now, whether the Supreme Court will decide it or the First District Court of Appeal may or may not, but de novo review I believe is correct.

THE COURT: And you concur, Mr. Meros, with that time frame, that we just need to get there by September?

MR. MEROS: Well, we need to have final adjudication, final determination.

THE COURT: And then they've got to print the ballots and everything else and they've got to know what goes on it.

MR. MEROS: Right.

THE COURT: Because I am the first stop on this journey and I have had an opportunity to read these cases, and I think I've read all of the briefs and all of the cases that were cited, I could go back and take some time to craft an order, but it might be in everyone's best interest if I go ahead and announce a ruling today. Is everybody comfortable with doing that?

MR. MEYER: Yes, Your Honor.

MR. MEROS: Yes.

THE COURT: I do agree with what Mr. Meros said, that for a court to interfere with the right of the people to vote on a proposed constitutional

amendment, the record must show clearly and conclusively that the proposed amendment is legally

defective. And that's a high burden, and it's a burden that it rightly should bear, because to remove it from the vote of the people should not be done without due deliberation and it should be clear and convincing.

I agree with Mr. Meros also that everything that the legislature does, it comes here, comes here with the presumption of correctness. And if there is a way to be found in which to approve the acts of the legislature, then that is what the Court should do. And I take that rule very seriously.

The arguments presented in the briefs and the arguments that I've heard here today, however, convince me that the plaintiff has met its burden in this case. Accordingly, I will grant the relief that they request. To me, this case is on all fours with Askew v. Firestone and Evans v. Bell. I think that those two cases, together with Armstrong, were the lynchpins of any decision that I make here.

And just to point that out, I will quote from Askew because it is -- it sort of encapsulates everything that I understood about this case. In Askew it says, "As it stands, subsection 8(e)

precludes lobbying a former body or agency for two years after an affected person leaves office. The ballot summary neglects to advise the public that there is presently a complete two-year ban on lobbying before one's agency. And while it does require the filing of financial disclosures before anyone may appear before any agency for two years

after leaving office, the amendment's chief effect is to abolish the present two-year total prohibition. Although the summary indicates that the amendment is a restriction on one's lobbying activities, the amendment actually gives incumbent office holders, upon filing a financial disclosure, a right to immediately commence lobbying before their former agencies, which is presently precluded. The problem therefore lies not with what the summary says but with what it does not say."

And that to me is what this case is about. "The purpose of Section 101.161 is to assure that the electorate is advised of the true meaning and ramifications of any amendment. A proposed amendment cannot fly under false colors. This one does." That I'm quoting from Askew. "The burden of informing the public should not fall only on the press and opponents of the measure. The ballot

title and summary must do this."

Now, Mr. Meros argued at length that it points out that the citizen can go and read Article V of the Florida Constitution. And that may be true, but how many people take a copy of the constitution in the voting booth with them? I mean, how were they to know that?

I think it's a stretch to say that the voter must go and inform himself by reading the Florida Constitution to determine what effect the amendment would have on rights that the citizen already has that is already in the constitution. And so I don't

think that that is a requirement that realistically that the voter should be required to do. And I think Askew is authority for the fact that when those rights are affected, that the ballot summary should inform the voter of the rights that are being affected.

Askew goes on to say, "Nevertheless, it is clear and convincing to us that the ballot language contained in SJR 1035 is so misleading to the public concerning material changes to an existing constitutional provision that this remedial action must be taken."

And my decision here, again, as with Askew, is

as to the existing condition that districts be contiguous. I did not go into 5 and 6 and the effects on 5 and 6. I agree with Mr. Meros that the ballot summary for 7 would not necessarily have to include any consequences should 5 and 6 be on the ballot and should 5 and 6 pass voter approval.

Then Evans, as I say, is another case that I felt that was directly on point. That's the Jacksonville city charter case. And here it talks more about section 101.161(1). Justice Grimes, he was then Judge Grimes, states, "There was nothing on the ballot to inform the voter of the changes to be accomplished by the amendment, which is the very reason why section 101.161(1) requires an explanatory statement."

And I agree with Mr. Meros' argument that citing verbatim the ballot language technically

complies with the requirements of 101. I don't see how it in any way whatsoever complies with the spirit of 101, which is to clearly and in plain and simple language inform the voter what the voter is to be voting on.

I'm not the brightest light on the Christmas tree, but it took me three days and reading all of these cases, reading all of these briefs, hearing

all of your arguments, to get a handle on what this amendment did and its effect on the existing laws in the constitution. I could hardly think that an average voter going in the voting booth would be able to make an informed decision as to rights that the voter would be putting in jeopardy by approving the amendment.

Now, that's not to say that the voter, if the voter were fully informed, could not vote that way. That certainly would be up to the voter. But I think it would have to be an informed choice.

So Amendment 7, I believe the only way to read the ten words that Mr. Meyer pointed out, would be to remove the one mandatory and all future mandatory standards that may be placed in the constitution. Currently, the only requirement in the constitution is that the districts be contiguous.

Passage of Amendment 7 would make being contiguous an aspirational goal that could be balanced with other aspirational goals and reviewed for compliance only if the legislative plan were not rationally related, which would be a very weak

standard for review. In effect, there would be no review.

As in Askew, Amendment 7 does comply with

101.161 because it does recite -- I guess Askew was not for that particular purpose. I don't find that having put the ballot language in the explanation portion of it would be any -- I think the law would allow that. But I think that failure to inform the public is clearly and convincingly an attempt to hide the ball. Amendment 7 as it stands, if it were passed, in its explanatory statement and title, flies under false colors.

So with those comments, Mr. Meyer, can you put us together a proposed order and send it by Mr. Meros so we can hurry this thing on its way?

MR. MEYER: Your Honor, we'll take care of that right away.

THE COURT: And if you can get it to me by Friday, I can sign it by Friday. As soon as you get it to me, I'll try to look over it. And send it by Mr. Meros, and if y'all agree that it comports with what I have ruled, then I'll sign it. If not, then I'll make whatever changes need to be made and get it on to you.

MR. MEYER: Your Honor, we'll endeavor to make that happen.

THE COURT: Thank all of you for good briefs and good arguments.

MR. MEYER: Thank you, Your Honor.

(Whereupon, the hearing was concluded at 10:55 a.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, Jo Langston, Registered Professional Reporter, do hereby certify that the foregoing pages 3 through 80, both inclusive, comprise a true and correct transcript of the proceeding; that said proceeding was taken by me stenographically and transcribed by me as it now appears; that I am not a relative or employee or attorney or counsel of the parties, or a relative or employee of such attorney or counsel, nor am I interested in this proceeding or its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of July 2010.

_____

JO LANGSTON
Registered Professional Reporter

ACCURATE STENOTYPE REPORTERS, INC.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida; DAWN K. ROBERTS, in her official capacity as the Secretary of State; FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Appellants,

v. Case No.1D10- 3676

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Appellees.
_____/

On appeal from the Circuit Court of the Second Judicial Circuit
In and For Leon County, Florida
Case No. 2010-CA-001803

DOCKET

SHEET

First District Court of Appeal Case Docket

Case Number: 1D10-3676

Final Civil Other Notice from Leon County

Department of State, Dawn K. Roberts etc. etal vs. Florida State Conference Naacp Branches, et al.

Lower Tribunal Case(s): 2010-CA-1803

03/09/2011 12:50

Date Docketed	Description	Date Due	Filed By	Notes
07/13/2010	order appealed			filed w/mot to expedite
07/13/2010	Notice of Appeal Filed		George N. Meros, Jr. 0263321	
07/13/2010	Motion To Expedite		George N. Meros, Jr. 0263321	
07/14/2010	Circuit Court Action / Acknowledgement letter			
07/14/2010	Transferred - Order by Judge			transf to Supreme Ct.
07/14/2010	Miscellaneous Order-200			This court certifies on its own motion that this appeal requires immediate resolution by the Supreme Court of Florida because the issues pending herein are of great public importance. The emergency motion to expedite filed July 13, 2010, is hereby deferred to the Florida Supreme Court for disposition if it accepts jurisdiction. If the Supreme Court declines to accept jurisdiction, the motion will be decided by this court at a later date. WOLF, KAHN, and PADOVANO, JJ., CONCUR.
07/15/2010	Notice of Appeal Filed		George N. Meros, Jr. 0263321	certified noa
07/15/2010	ORIGINAL PETITION		ORIGINAL PETITION	cert over to SC
07/15/2010	Acknowledged Receipt from Supreme Court		ORIGINAL PETITION	
08/10/2010	Case Permanent			
09/01/2010	Supreme Court Mandate		ORIGINAL PETITION	
09/01/2010	Supreme Court Disposition		ORIGINAL PETITION	SC opinion to LT
12/09/2010	ENTIRE FILE BATCH SCANNED			pre-scanned

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida; DAWN K. ROBERTS, in her official capacity as the Secretary of State; FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Appellants,

v.

Case No.1D10-_____
L.T. Case No. 2010-CA-1803

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Appellees.
_____/

FLORIDA HOUSE OF REPRESENTATIVES' EMERGENCY MOTION TO EXPEDITE

The Florida House of Representatives ("the House"), respectfully requests this Court to expedite proceedings in this matter and states:

1. On July 12, 2010, the trial court entered an order enjoining Defendants Department of State and Dawn K. Roberts, in her official capacity as the Secretary of State, from placing Amendment 7 (entitled "Standards for Legislature to Follow in Legislative and Congressional Redistricting") on the ballot for the general election. Appellants have filed a Notice of Appeal, attached hereto as an exhibit.

2. Amendment 7 is a legislatively-sponsored proposal approved for

placement on the November 2010 ballot by the constitutionally-required vote of at least three-fifths of the membership of each house of the Legislature. *See* Art. XI, Sec. 1, Fla. Const.

3. Striking a proposed constitutional amendment from the ballot raises constitutional issues of the highest order. *See, e.g., Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) ("The Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people."). Both the right of the people to vote on proposed amendments and the authority of the Legislature to propose such amendments are implicated.

4. 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).

5. Expedited consideration of this matter is necessary to ensure that proceedings are completed in advance of the printing of ballots for the November 2010 election. Failure to complete such proceedings before that time could jeopardize constitutional principles of the highest order, if this Court were to

determine that the trial court erred by striking Amendment 7 from the ballot.

WHEREFORE, the Florida House of Representatives respectfully moves this Court to expedite these proceedings so that all parties may be heard and this case adjudicated before August 16, 2010.

RESPECTFULLY SUBMITTED,

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FLORIDA BAR NO. 016295
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Mail this 13 day of July 2010, to the following:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this motion is Times New Roman 14 point and in compliance with the Florida Rules of Appellate Procedure.

George N. Meros, Jr.
Florida Bar No. 263321

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

FLORIDA DEPARTMENT OF STATE,
an agency of the State of Florida;
DAWN ROBERTS, in her official capacity
as the Secretary of State; FLORIDA HOUSE
OF REPRESENTATIVES; and FLORIDA SENATE,

Defendants/Appellants,

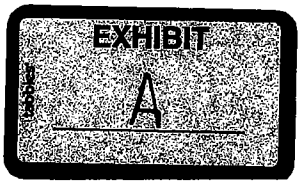
v. Case No. 2010-CA-1803

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Appellees.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that the Department of State, Dawn K. Roberts, in her official capacity as Secretary of State, the Florida House of Representatives, and the Florida Senate, Appellants, appeal to the First District Court of Appeal, the Order of this Court rendered July 13, 2010 by Judge James O. Shelfer. A copy of the Order is attached hereto. The nature of the Order is an Order Granting Summary Final Judgment.



CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Mail this 13 day of July 2010, to the following:

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\255036\8 - # 229513 v1

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs.

CASE NO.: 2010 CA 1803

DEPARTMENT OF STATE, an
agency of the State of Florida;
and DAWN K. ROBERTS,
in her official capacity as the
Secretary of State,

Defendants,

and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

_____/

ORDER GRANTING SUMMARY FINAL JUDGMENT

THIS MATTER came before the Court for hearing on July 8, 2010, upon cross motions for summary judgment. Both parties, on the record and by their motions agreed that there are no genuine issues of material fact for the Court to decide and that the case should be determined by Summary Judgment.

At issue is the title and ballot summary for an amendment to the Florida Constitution that is designated as Amendment 7. Amendment 7 is a legislative proposal approved by a super-majority of the legislature for inclusion on the November 2nd ballot. The ballot summary and the proposed amendment are, for all practical purposes, identical. The ballot summary and the title to Amendment 7 read as follows:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.--In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

The cross motions ask the Court to determine if the ballot title and the ballot summary comply with the requirements of Florida Statute 101.161(1) and the various appellate decisions that interpret the requirements of the statute. Defendant's request that Amendment 7 be found in compliance and be allowed on the ballot. The Plaintiff's request the ballot summary and title be found to be in violation of F.S. 101.161(1) and that Amendment 7 not be allowed on the November 2nd ballot. Plaintiffs argue that Amendment 7's ballot summary and title fail to advise the voters of the amendment's chief purpose and true effect. Plaintiff's argue that as found by the Supreme Court in other cases, this ballot summary and title seeks to "hide the ball" and that Amendment 7 "flies under false colors".

The bar is high for the Plaintiff. To interfere with the right of the people to vote on a proposed constitutional amendment the Court must find clearly and convincingly that the proposed amendment is legally defective. Further, this Court understands and takes seriously its admonition that every act of the legislature, especially a proposal to amend our Constitution, comes before the Court with a presumption of lawfulness. Conversely, the Defendants in this case need only convince the Court that there is any possible interpretation of the ballot language and title that allow a finding that they comply with the statue and the case authority----a very low threshold.

The arguments in the written briefs and orally presented by the lawyers have convinced the Court that it must find for the Plaintiffs. The ballot summary and title do not meet the requirements of Florida Statute 101.161(1) and therefore Amendment 7 cannot be included on the November 2, 2010 ballot.

Apart from the number of districts required to be drawn, the Florida Constitution currently contains only one requirement binding on the legislature when they meet every ten years to draw districts. That one mandatory requirement is that each district be contiguous. Amendment 7, were it to pass, would make that one mandatory requirement aspirational only and would subordinate contiguity to the other aspirational goals or "standards" contained in Amendment 7.

This case is on "all fours" with *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982) and *Evans v. Bell*, 651 So. 2d 162 (Fla. 1st DCA 1995) in which courts struck amendments due to defective ballot summaries. Those decisions, together with *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), serve as the lynchpin of this court's decision.

To be clear, there is nothing unlawful or improper about what the legislative proposal seeks to do. The wisdom of a proposed amendment is not a matter of concern for this Court. But to be legally entitled to a place on the ballot, the summary and title must be fair and must advise the voter sufficiently to enable the voter to intelligently vote for or against the amendment. "The purpose of section 101.161 is to assure that the electorate is advised of the true meaning , and ramifications (emphasis added) of an amendment." *Askew*. To meet the requirements of *Askew* and *Evans* and *F.S. 101.161* the ballot summary and title must inform the voter that a vote for the amendment is a vote to make the mandatory requirement of contiguity aspirational and to subordinate it to the other aspirational "standards" contained in the amendment. Requiring that all districts be contiguous is a valuable right afforded to all citizens of Florida. A citizen cannot, and should not, be asked to give up that right without being fully informed and making an intelligent decision to do so.

Amendment 7, if passed, would allow this or any future legislature, if it chose to do so, to gerrymander districts guided by no mandatory requirements or standards and subject to no effective accountability so long as its decisions were rationally related to, and balanced with, the aspirational goals set out in Amendment 7 and the subordinate goal of contiguity.

Accordingly, it is ORDERED and ADJUDGED that:

1. The Plaintiffs' Motion for Summary Judgment is GRANTED;

2. The Defendant's and Intervening Defendants' Motions for Summary Judgment are DENIED;

3. The Court ENJOINS the Defendants Department of State and Dawn K. Roberts, in her official capacity as the Secretary of State, from placing Amendment 7 on the ballot for the November 2010 general election.

DONE and **ORDERED** this 12th day of July, 2010, at Leon County, Florida.

JAMES O. SHELFER
Circuit Judge

Copies furnished to Counsel of Record

DISTRICT COURT OF APPEAL, FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

July 14, 2010

CASE NO.: 1D10-3676
L.T. No. : 2010-CA-1803

Department Of State, Dawn K. Roberts Etc. Etal	v.	Florida State Conference Naacp Branches, Et Al.
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

This court certifies on its own motion that this appeal requires immediate resolution by the Supreme Court of Florida because the issues pending herein are of great public importance.

The emergency motion to expedite filed July 13, 2010, is hereby deferred to the Florida Supreme Court for disposition if it accepts jurisdiction. If the Supreme Court declines to accept jurisdiction, the motion will be decided by this court at a later date.

WOLF, KAHN, and PADOVANO, JJ., CONCUR.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Jonathan Glogau, A.A.G.	Charles B. Upton	Miguel De Grandy
George N. Meros, Jr.	Andy V. Bardos	Allen C. Winsor
Scott D. Makar	Jennifer Blohm	Robert J. Telfer, I I I
Mark Herron	Peter M. Dunbar	Lynn C. Hearn
J. Andrew Atkinson	Ronald G. Meyer	Cynthia S. Tunnicliff
Brian A. Newman	Simonne Lawrence	Rick Figlio
Hon. Jackie Lee Fulford	Hon. Thomas D. Hall, Clerk	Hon. Bob Inzer, Clerk
am		

JON S. WHEELER, CLERK

SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida; DAWN K. ROBERTS, in her official capacity as the Secretary of State; FLORIDA HOUSE OF REPRESENTATIVES, and FLORIDA SENATE,

Appellants,

v. Case No. SC10-1375

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Appellees.
_____/

On appeal from the Circuit Court of the Second Judicial Circuit
In and For Leon County, Florida
Case No. 2010-CA-001803

and Certified by First District Court of Appeal
as an appeal requiring immediate resolution
by the Supreme Court of Florida
as a matter of great public importance
Case No. 1D10-3676

DOCKET

SHEET

Florida Supreme Court Case Docket

Case Number: SC10-1375 - Closed

FLORIDA DEPARTMENT OF STATE, ETC., ET AL. vs. FLORIDA STATE CONFERENCE OF NAACP BRANCHES, ET AL.

Lower Tribunal Case(s): 1D10-3676, 2010-CA-001803

03/09/2011 12:51

Date Docketed	Description	Filed By	Notes
07/14/2010	CERTFD JUDGMENT FROM TRIAL COURT	Hon. Jon S. Wheeler, Clerk D1 BY: Hon. Jon S. Wheeler, Clerk D1	
07/14/2010	No Fee - State		
07/14/2010	ORDER-CIRCUIT COURT		DATED 07/12/2010 - ORDER GRANTING SUMMARY FINAL JUDGMENT (FILED IN DCA 07/13/2010)
07/14/2010	NOTICE	AA Florida House Of Representatives HOUSE BY: AA George N. Meros, Jr. 263321	FILED AS "NOTICE OF APPEAL" (FILED IN DCA 07/13/2010)
07/14/2010	MOTION-EXPEDITE	AA Florida House Of Representatives HOUSE BY: AA George N. Meros, Jr. 263321	(FILED IN DCA 07/13/2010)
07/14/2010	LETTER	Hon. Jon S. Wheeler, Clerk D1 BY: Hon. Jon S. Wheeler, Clerk D1	DCA LETTER DATED 07/14/2010 TO CIRC COURT/PARTIES RE: ACK OF CASE
07/14/2010	ORDER-DISTRICT COURT OF APPEAL		DATED 07/14/2010 - This court certifies on its own motion that this appeal requires immediate resolution by the Supreme Court of Florida because the issues pending herein are of great public importance. The emergency motion to expedite filed July 13, 2010, is hereby deferred to the Florida Supreme Court for

			disposition if it accepts jurisdiction. If the Supreme Court declines to accept jurisdiction, the motion will be decided by this court at a later date.
07/14/2010	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.
07/19/2010	ORDER-OA&BRIEF SCHED/JURIS ACCEPTED (CERT JUDGMT)		The First District Court of Appeal has certified, pursuant to article V, section 3(b)(5) of the Constitution of Florida, that the trial court passes upon a question of great public importance requiring immediate resolution by this Court. We accept jurisdiction and expedite this appeal. Petitioners' brief on the merits shall be FILED on or before July 28, 2010. Respondents' answer brief on the merits shall be FILED on or before August 6, 2010; and Petitioners' reply brief on the merits shall be FILED on or before August 11, 2010. Please file an original and eight copies of all briefs. UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED. The Clerk of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida shall file the original record which shall be properly indexed and paginated on or before July 29, 2010. IT IS FURTHER ORDERED that the above case has been set for oral argument at 9:00 a.m., Wednesday, August 18, 2010, with a maximum of twenty minutes to the side allowed for the argument. NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.
07/19/2010	ORAL ARGUMENT CALENDAR		
07/21/2010	LETTER-CANON NOTIFICATION RE: JUSTICE		RE: FLORIDA SUPREME COURT
07/22/2010	RECORD/TRANSCRIPT	Hon. Bob Inzer, Clerk LEON BY: Hon. Bob Inzer, Clerk LEON	CONSISTING OF 2 VOLUMES OF RECORD AND 1 SUPPLEMENTAL VOLUME OF RECORD W/TRANSCRIPT
07/28/2010	INITIAL BRIEF-MERITS	AA Hon. Dawn Kimmel Roberts 985618 BY: AA Charles Burns Upton, Ii 37241	O&8 & E-MAIL
08/06/2010	ANSWER BRIEF-	AE Adora Obi Nweze BY:	O&8 (& E-MAIL)

	MERITS	AE Lynn Colby Hearn 123633	
08/09/2010	MOTION-AMICUS CURIAE	ME Hon. Charles J. Crist, Jr. BY: ME Erik Matthew Figlio 745251	O&9 & E-MAIL
08/09/2010	AMICUS CURIAE INITIAL BRIEF-MERITS	ME Hon. Charles J. Crist, Jr. BY: ME Erik Matthew Figlio 745251	O&8 & E-MAIL
08/10/2010	ORDER-AMICUS CURIAE GR		The motion for leave to file brief as amicus curiae filed by Governor Charlie Crist is hereby granted and they are allowed to file brief only in support of Appellees. The brief by the above referenced amicus curiae was filed with this Court on August 9, 2010.
08/10/2010	NOTICE-APPEARANCE	AA Florida House Of Representatives HOUSE BY: AA R. Dean Cannon, Jr. 0973149	O&7 & E-MAIL
08/11/2010	REPLY BRIEF-MERITS	AA Florida Senate SENATE BY: AA Peter M. Dunbar 146594	O&8 & E-MAIL
08/18/2010	ORAL ARGUMENT HELD		
08/31/2010	DISP-AFFIRMED		Based upon the provisions of section 101.161(1), Florida Statutes, article XI, section 5, of the Florida Constitution, and our precedent, we hold that the ballot language setting forth the substance of Amendment 7 does not inform the voter of the true purpose and effect of the amendment on existing constitutional provisions and, further, is misleading. Accordingly, the judgment of the circuit court is affirmed and Amendment 7 may not be placed on the general election ballot for November 2010. NO MOTION FOR REHEARING WILL BE ALLOWED.
08/31/2010	MANDATE		CC: COUNSEL
11/17/2010	ARCHIVES		file

DISTRICT COURT OF APPEAL, FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

July 14, 2010

SC10-1375

CASE NO.: 1D10-3676
L.T. No. : 2010-CA-1803

Department Of State, Dawn K. Roberts Etc. Etal	v.	Florida State Conference Naacp Branches, Et Al.
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

This court certifies on its own motion that this appeal requires immediate resolution by the Supreme Court of Florida because the issues pending herein are of great public importance.

The emergency motion to expedite filed July 13, 2010, is hereby deferred to the Florida Supreme Court for disposition if it accepts jurisdiction. If the Supreme Court declines to accept jurisdiction, the motion will be decided by this court at a later date.

FILED
THOMAS D. HALL
2010 JUL 14 P 3:51
CLERK SUPREME COURT
BY

WOLF, KAHN, and PADOVANO, JJ., CONCUR.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Jonathan Glogau, A.A.G.	Charles B. Upton	Miguel De Grandy
George N. Meros, Jr.	Andy V. Bardos	Allen C. Winsor
Scott D. Makar	Jennifer Blohm	Robert J. Telfer, III
Mark Herron	Peter M. Dunbar	Lynn C. Hearn
J. Andrew Atkinson	Ronald G. Meyer	Cynthia S. Tunnicliff
Brian A. Newman	Simonne Lawrence	Rick Figlio
Hon. Jackie Lee Fulford	Hon. Thomas D. Hall, Clerk	Hon. Bob Inzer, Clerk
am		

JON S. WHEELER, CLERK

DISTRICT COURT OF APPEAL FIRST DISTRICT FLA. CITO SURGERE STATE OF FLORIDA

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

FLORIDA DEPARTMENT OF STATE,
an agency of the State of Florida;
DAWN ROBERTS, in her official capacity
as the Secretary of State; FLORIDA HOUSE
OF REPRESENTATIVES; and FLORIDA SENATE,

Defendants/Appellants,

v.

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Appellees.
_____/

FILED
THOMAS D. HALL
2010 JUL 14 P 3:53
CLERK, SUPREME COURT
BY _____

Case No. 2010-CA-1803

NOTICE OF APPEAL

NOTICE IS GIVEN that the Department of State, Dawn K. Roberts, in her official capacity as Secretary of State, the Florida House of Representatives, and the Florida Senate, Appellants, appeal to the First District Court of Appeal, the Order of this Court rendered July 13, 2010 by Judge James O. Shelfer. A copy of the Order is attached hereto. The nature of the Order is an Order Granting Summary Final Judgment.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Mail this 13 day of July 2010, to the following:

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ACKNOWLEDGMENT OF NEW CASE

July 14, 2010

RE: FLORIDA DEPARTMENT OF STATE, ETC., ET AL. vs. FLORIDA STATE CONFERENCE OF NAACP BRANCHES, ET AL.

CASE NUMBER: SC10-1375
Lower Tribunal Case Number(s) : 1D10-3676, 2010-CA-001803
Lower Tribunal Filing Date: 7/13/2010

The Florida Supreme Court has received the following documents reflecting a filing date of 7/14/2010.

Certified Judgement from Trial Court
Lower Court Order Granting Summary Final Judgment
Motion to Expidite

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

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

wm

cc:

J. ANDREW ATKINSON
HON. JON S. WHEELER, CLERK
SCOTT DOUGLAS MAKAR
BRIAN ALLAN NEWMAN
CHARLES BURNS UPTON, II
ALLEN C. WINSOR
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ROBERT J. TELFER, III
JENNIFER SUZANNE BLOHM

Supreme Court of Florida

WEDNESDAY, JULY 14, 2010

CASE NO.: SC10-1375
Lower Tribunal No(s).: 1D10-3676,
2010-CA-001803

FLORIDA DEPARTMENT OF STATE, ETC., ET AL.	vs.	FLORIDA STATE CONFERENCE OF NAACP BRANCHES, 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.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

wm
Served:

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Supreme Court of Florida

MONDAY, JULY 19, 2010

CASE NO.: SC10-1375
Lower Tribunal No(s).: 1D10-3676,
2010-CA-001803

FLORIDA DEPARTMENT OF STATE, ETC., ET AL.	vs.	FLORIDA STATE CONFERENCE OF NAACP BRANCHES, ET AL.
Petitioner(s)		Respondent(s)

The First District Court of Appeal has certified, pursuant to article V, section 3(b)(5) of the Constitution of Florida, that the trial court passes upon a question of great public importance requiring immediate resolution by this Court. We accept jurisdiction and expedite this appeal.

Petitioners' brief on the merits shall be **FILED** on or before July 28, 2010. Respondents' answer brief on the merits shall be **FILED** on or before August 6, 2010; and Petitioners' reply brief on the merits shall be **FILED** on or before August 11, 2010. Please file an original and eight copies of all briefs. UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED. 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 provisions of that order.

The Clerk of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida shall file the original record which shall be properly indexed and paginated on or before July 29, 2010.

IT IS FURTHER ORDERED that the above case has been set for oral argument at 9:00 a.m., Wednesday, August 18, 2010, with a maximum of twenty minutes to the side allowed for the argument. NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

CANADY, C.J., PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

vm
Served:

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July 21, 2010

To All Counsel of Record

Re: Florida Department of State, etc., et al. vs. Florida State Conference of NAACP, et al.
Case No. SC10-1375

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
cc: Peter Antonacci, Esquire
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IN THE
SUPREME COURT
OF FLORIDA

CASE NO: 2010-CA-1803
SUPREME CT. NO: SC10-1375

DEPARTMENT OF STATE,
DAWN K. ROBERTS ETC. ETAL

APPELLANTS,

V

FLORIDA STATE CONFERENCE
NAACP BRANCHES, ET AL

APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF LEON COUNTY, FLORIDA

HONORABLE JAMES O. SHELFER

VOLUME 1

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THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY FLORIDA

CASE NO: 2010-CA-1803

SUPREME COURT NO: SC10-1375

DEPARTMENT OF STATE,
DAWN K. ROBERTS ETC. ETAL

PETITIONERS/APPELLANTS,

V.

FLORIDA STATE CONFERENCE
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IN THE
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CASE NO: 2010-CA-1803
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NAACP BRANCHES, ET AL

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APPEAL FROM THE CIRCUIT COURT OF LEON COUNTY, FLORIDA

HONORABLE JAMES O. SHELFER

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CASE NO: 2010-CA-1803

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V

FLORIDA STATE CONFERENCE
NAACP BRANCHES, ET AL

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APPEAL FROM THE CIRCUIT COURT OF LEON COUNTY, FLORIDA

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THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY FLORIDA

CASE NO: 2010-CA-1803

SUPREME COURT NO: SC10-1375

DEPARTMENT OF STATE,
DAWN K. ROBERTS ETC. ETAL

PETITIONERS/APPELLANTS,

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FLORIDA STATE CONFERENCE
NAACP BRANCHES, ET AL.

RESPONDENTS/APPELLEES.

SUPPLEMENTAL
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IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF STATE,
an agency of the State of Florida, *et al.*,

Appellants,

v.

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Appellees.

Case No. SC10-1375
L.T. Case No. 2010-CA-1803

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PRELIMINARY STATEMENT

Reference to the record on appeal shall be by "R" followed by the volume number and page number(s), *e.g.*, (R1–25-26). Supplemental Volume 1 shall be designated "RS1."

Citations to audio recordings of legislative proceedings are presented in an abbreviated format, omitting the parenthetical that indicates the location of the recording. All recordings of the proceedings of the Florida House are on file with the Clerk of the House of Representatives. All recordings of the proceedings of the Florida Senate are on file with the Secretary of the Senate.

In addition, a video recording of the meeting of the House Select Policy Council on Strategic and Economic Planning on April 15, 2010, is available at http://tinyurl.com/PCB-4-15-2010 (time stamp 9:21). A video recording of the meeting of the House Rules and Calendar Council on April 19, 2010, is available at http://tinyurl.com/HJR7231-4-19-2010 (time stamp 34:50). Video recordings of floor debate in the Florida Senate on April 28 and 30, 2010, are available at http://tinyurl.com/SenateArchives (time stamps 4:25:45 and 1:54:44, respectively).

All emphases are supplied.

STATEMENT OF CASE AND FACTS

The Question Presented

This appeal arises from a trial court order striking from the general election ballot a constitutional amendment proposed by the Florida Legislature that relates to redistricting. The trial court interpreted the proposed amendment to eliminate the long-standing and undisputed requirement in Article III, Section 16(a), Florida Constitution, that state legislative districts must consist of contiguous territory. It did so despite the total absence of any legislative intent to eliminate the contiguity requirement and without regard to the fundamental canons by which constitutional language is ordinarily interpreted and harmonized.

This appeal presents a single question: Whether the amendment can only be interpreted to eliminate the constitutional mandate that state legislative districts consist of contiguous territory, a result never intended by the Legislature, and one insupportable by the basic principles of constitutional interpretation.

Statement of the Facts

On January 22, 2010, the Florida Department of State certified for ballot placement two constitutional amendments proposed by initiative petition. (R1–11.) The amendments, sponsored by FairDistrictsFlorida.org ("Fair Districts") and designated Amendments 5 and 6, would create a two-tiered hierarchy of new redistricting requirements applicable to state legislative districts (Amendment 5)

and congressional districts (Amendment 6). (R1–18-19.) Amendments 5 and 6 would prohibit the intent to favor or disfavor incumbents or political parties and provide minimum protections for racial and language minorities. (*Id.*) After these mandates are satisfied, Amendments 5 and 6 would require districts to be compact and, wherever feasible, to follow political and geographical boundaries. (*Id.*)

Amendments 5 and 6 are notable because the Florida Constitution does not presently impose any subjective or fact-intensive constraints on redistricting. Since 1968, the Constitution has imposed two basic requirements on the creation of state legislative districts. First, Senate districts must number between 30 and 40, while Representative districts must number between 80 and 120. Art. III, § 16(a), Fla. Const. Second, districts must consist of "contiguous, overlapping or identical territory." *Id.* This Court has construed this provision to require contiguity—that is, that all territory of a district be in actual, physical contact. *In re Senate Joint Res'n 2G, Special Apportionment Session, 1992*, 597 So. 2d 276, 279 (Fla. 1992). The Florida Constitution imposes no requirements on congressional redistricting.

Amendments 5 and 6 precipitated significant public debate and discussion in the Legislature. In ten legislative committee meetings between December 2009 and April 2010, the Legislature studied the likely impact and practical feasibility of implementing Amendments 5 and 6. Fla. H.R. Select Policy Council on Strategic & Econ. Planning (Dec. 9, 2009; Jan. 11, 2010; Feb. 11, 2010); Fla. S. Comm. on

Reapp. (Dec. 9, 2009; Jan. 11, 2010; Jan. 13, 2010; Jan. 20, 2010; Feb. 11, 2010; Feb. 17, 2010; Mar. 2, 2010; Mar. 17, 2010; Apr. 12, 2010). On April 30, 2010, in response to Amendments 5 and 6, a supermajority of three-fifths of the Legislature approved the proposal challenged here—subsequently designated Amendment 7—for placement on the 2010 general election ballot. (R1–13.)

Amendment 7 directs the Legislature, in the creation of state legislative and congressional districts, to "balance and implement" all standards contained in the State Constitution. It creates two new standards that enable the Legislature to balance the compactness and local-boundary requirements of Amendments 5 and 6 with the promotion of minority rights and communities of interest. (R1–20-21.)

The text of Amendment 7 provides:

> In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in this constitution and is consistent with federal law.

(R1–20-21.) The ballot language is virtually identical to the amendment text:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.–In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into

> consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in the State Constitution and is consistent with federal law.

(*Id.*)

On May 21, 2010, Appellees brought this challenge to the accuracy of the proposed ballot title and summary. (R1–6-21.) Appellees contended that, because Amendment 7 establishes new redistricting criteria that would not be subordinate to other standards in Article III of the Constitution, it "eliminates" the mandate that districts be contiguous. (R1–56-58.) Appellees also argued that (1) Amendment 7 does not create any new standards, contrary to the language of the title (R1–55-56); (2) Amendment 7 "nullifies" Amendments 5 and 6, and the failure to identify this consequence is fatal (R1–62-67); (3) the summary must provide a definition for the phrase "communities of common interest" (R1–58-60); and (4) the summary must elaborate upon the legal standard of review created by Amendment 7 (R1–60-62).

On June 25, 2010, the Secretary of State, the Florida House, and the Florida Senate each filed responses to Appellees' Motion for Summary Judgment. (R1–120-58, 159-81, 182-84.) They emphatically rejected the suggestion that the proposed amendment would affect the existing contiguity mandate. (R1–127-29,

165-70.) "The balancing of equal and coordinate standards," the Florida House maintained, "would not permit the Legislature to disregard contiguity." (R1–166.)

At a final hearing on July 8, 2010, the Secretary and the Florida House and Senate explained that Amendment 7 was proposed in response to Amendments 5 and 6—not to eliminate the existing contiguity mandate. (RS1, Tr., 62:19–64:8.) They explained that the phrase "without subordination" was designed to place the standards in Amendment 7 on an equal footing with the standards in Amendments 5 and 6, so that neither set of standards would be inferior to the other, and both sets of standards would be balanced and implemented. (*Id.*; RS1, Tr., 31:6–32:15.)

On July 12, 2010, the trial court concluded that the ballot summary of Amendment 7 is misleading. The trial court recognized its obligation to uphold Amendment 7 if "any possible interpretation" can support its validity, but it then rejected the Legislature's interpretation of its own amendment. (R2–271.) The court concluded that, because Amendment 7 permits the Legislature to promote minority communities and communities of interest "without subordination" to the other standards in Article III, it would necessarily "subordinate contiguity" to the new standards in Amendment 7 and render contiguity "aspirational only." (R2–271.) In its order, the court complained that Amendment 7 "would allow this or any future legislature, if it chose to do so, to gerrymander districts guided by no mandatory requirements or standards and subject to no effective accountability so

long as its decisions were rationally related to, and balanced with, the aspirational goals set out in Amendment 7 and the subordinate goal of contiguity." (R2–272.)

On July 13, 2010, the Secretary and the Florida House and Senate appealed. (R2—274-281.) The appellate court certified the question presented as a matter of great public importance, *see* Art. V, § 3(b)(5), Fla. Const., and this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The ballot language of Amendment 7, which is virtually identical to the amendment itself, is accurate and will not mislead voters. To conclude otherwise, the trial court adopted a strained interpretation in disregard of the proposal's plain meaning, settled rules of interpretation, and the intent of the Legislature supported by a substantial body of legislative history. This Court must reverse.

Amendment 7 does not eliminate the long-standing constitutional mandate that state legislative districts be contiguous. Instead, it requires the Legislature to balance and implement all standards in the Constitution. This includes contiguity, which will remain in the Constitution. No constitutional standards will be ignored.

Amendment 7 does not afford the Legislature *carte blanche* to violate any standards. It enables the Legislature, in the formation of state legislative districts, to promote minority rights and communities of interest "without subordination" to other standards. This ensures that the standards in Amendment 7 will be weighed and balanced alongside the subjective standards proposed by Amendments 5 and 6, two amendments proposed by initiative petition. It does not permit the Legislature to ignore and violate the constitutional requirement that districts be contiguous.

The trial court erred in removing Amendment 7 from the ballot. This Court should find that the ballot language of Amendment 7 is not misleading and reverse.

ARGUMENT

I. Standard of Review.

Because this case presents a pure question of law, this Court's standard of review is *de novo*. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) (concluding that a *de novo* standard applies on appeal in a challenge to the accuracy of ballot language accompanying a constitutional amendment proposed by the Legislature).

If a legislative act is reasonably susceptible of *any* construction that will avoid invalidity, the Court is bound, from the respect due to a coordinate branch, to adopt that construction. *State v. Presidential Women's Ctr.*, 937 So. 2d 114, 116 (Fla. 2006); *Fla. State Bd. of Arch. v. Wasserman*, 377 So. 2d 653, 656 (Fla. 1979).

II. The Ballot Language of Amendment 7 Is Accurate.

A. The Legal Standard.

The Legislature is vested with constitutional authority, upon approval of a three-fifths supermajority of each chamber, to propose and submit to the judgment of the voters amendments to the Florida Constitution. Art. XI, §§ 1, 5, Fla. Const.

The substance of any proposed amendment must appear on the ballot. *See* § 101.161(1), Fla. Stat. (2009). The Court has held that the Constitution implicitly requires that ballot language be accurate. *Armstrong*, 773 So. 2d at 12.[1] The ballot

[1] Section 101.161(1), Florida Statutes, codifies this constitutional mandate. *Armstrong*, 773 So. 2d at 12. In the case of a legislatively proposed amendment, however, the constitutional accuracy requirement is the controlling provision. A

must give voters "fair notice" of the decision to be made. *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982). Ballot language "cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Armstrong*, 773 So. 2d at 12.

The ballot is not required to describe the proposed amendment's effect on other pending amendments, but only its substantial effects on existing provisions of the Florida Constitution. *Compare Adv. Opinion to Att'y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 123 (Fla. 2008), *with id.* at 130-31 (Lewis, J., dissenting).

The challengers of ballot measures bear the weighty burden to prove that ballot language is "clearly and conclusively defective." *Armstrong*, 773 So. 2d at 11. A court "must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *Askew*, 421 So. 2d at 156.

Importantly, this Court has accorded legislatively proposed amendments an additional measure of deference. *Armstrong*, 773 So. 2d at 14. It has explained:

> The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any

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legislative enactment directing that an amendment be placed on the ballot cannot be invalid for conflict with an earlier legislative enactment. *See McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) ("[W]hen two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent."). It would raise substantial constitutional issues if the Legislature, through its ordinary lawmaking powers, could restrict the constitutional authority of future Legislatures to propose amendments pursuant to Article XI, Section 1, Florida Constitution.

> reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.

Id. (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). Thus, in *Smathers v. Smith*, 338 So. 2d 825, 827 (Fla. 1976), the Court refused to strike a legislatively proposed amendment because it entertained "a doubt as to whether the Legislature has violated what appear to be the strictures on their amendatory powers." This heightened standard comports with the presumption of constitutionality that attends all legislative acts, and which requires that invalidity "appear beyond a reasonable doubt." *See Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008) (quoting *Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004)).

B. Amendment 7 Does Not Affect Contiguity.

The trial court wrongly concluded that Amendment 7 would permit the Legislature to ignore Article III, Section 16(a), Florida Constitution, and create non-contiguous districts in furtherance of minority voting rights and communities of interest. As Appellants explained below, Amendment 7 was never intended to—and would not—permit the Legislature to ignore contiguity.

1. The Plain Meaning of Amendment 7 Refutes the Trial Court's Interpretation.

In the interpretation of legislative enactments, "legislative intent is the polestar by which the court must be guided," *Bautista v. State*, 863 So. 2d 1180,

1185 (Fla. 2003),[2] and courts strive to give effect to "the intent of the framers and adopters." *Coastal Fla. Police Benevolent Ass'n, Inc. v. Williams*, 838 So. 2d 543, 548 (Fla. 2003). In this inquiry, the plain meaning of the enactment is "always the starting point." *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007).

The plain meaning of Amendment 7 is simple: The standards created by Amendment 7 will stand on an equal footing with other constitutional standards. All standards must be implemented. Some, like compactness, are inherently flexible and subjective. These must be reconciled with each other, and a sensible balance must be struck between them. But none may be broken or ignored.

This reading is apparent from the face of the amendment. Amendment 7 does not remove contiguity from the Florida Constitution. Contiguity will remain in the Constitution. At the same time, Amendment 7 commands the Legislature to "balance and implement the standards" in the Florida Constitution. This provision directs the Legislature to implement *all*—not *some*—standards in the Constitution.

"Implement" means to "carry out, accomplish; *especially*: to give practical effect to and ensure actual fulfillment by concrete measures." Merriam-Webster Dictionary. The Legislature would fail to carry out, accomplish, and give practical

[2] The same principles that regulate the interpretation of statutes are equally applicable to the interpretation of joint resolutions adopted by the Legislature, *see In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1043 (Fla. 1982), and to provisions of the Florida Constitution, *see Coastal Fla. Police Benev. Ass'n, Inc. v. Williams*, 838 So. 2d 543, 548 (Fla. 2003).

effect to the contiguity requirement were it to establish non-contiguous districts. In fact, the creation of non-contiguous districts would violate Amendment 7 itself.

Moreover, Amendment 7 provides that a redistricting plan is valid if "the balancing and implementation of standards is rationally related to the standards contained in this constitution." If the Legislature ignored contiguity and created districts of non-contiguous territory, the redistricting plan would not implement the standards in a rational way, and the redistricting plan would not be upheld.

The trial court, however, isolated the second sentence of Amendment 7 and concluded that, because it permits the Legislature to promote minority rights and communities of interest "without subordination" to other provisions of Article III, it permits the Legislature to disregard contiguity in furtherance of those interests.

This is not a reasonable interpretation. It converts "without subordination," which merely ensures that the standards in Amendment 7 are not relegated to an inferior position, into a complete preemption of other constitutional standards. It ignores the well-established maxim that constitutional provisions must be read as a coherent whole and in *pari materia*, *see Bush v. Holmes*, 919 So. 2d 392, 406-07 (Fla. 2006), and pays no attention to Amendment 7's explicit command that all standards be implemented. And it ignores the command to "balance" standards—a command that presupposes the equal dignity of those standards. Merriam-Webster Dictionary (defining "balance" to mean "to equal or equalize in weight . . . .").

It is notable that the Legislature chose the phrase "without subordination," rather than the familiar word "notwithstanding." "Notwithstanding" would have denoted primacy, or superiority. Words such as "elevate" or "priority" would also have denoted a paramount status. But the Legislature provided only that the new standards are not subordinate—or *inferior*—to other standards. If the Legislature had intended to preempt standards, it would have used more fit language. Because it is "presumed to know the meaning of words," *State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004), the Legislature's choice of words is purposeful and significant.

The phrase "without subordination" is relevant to standards which, by their nature, can be weighed and balanced with one another. Some standards are flexible and subjective and leave room for compromise. Thus, compactness does not require perfect circles or squares, but some acceptable degree of compactness. The acceptable degree of compactness might depend on an assessment of the other interests which the Legislature might validly pursue.[3] A district that becomes less

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[3] *See, e.g., Matter of Legislative Districting of State*, 475 A.2d 428, 437, 439 (Md. 1982) ("[T]he . . . compactness requirement . . . is a relative, rather than an absolute standard. . . . [T]he compactness requirement must be applied in light of, and in harmony with, the other legitimate constraints which interact with and operate upon the constitutional mandate that districts be compact in form.").

The interpretation of the compactness requirement in Amendments 5 and 6, moreover, remains to be determined. Some courts have construed compactness to impose an aesthetic mandate, and look only to the geometric shape of the district. *See, e.g., Larios v. Cox*, 314 F. Supp. 2d 1357, 1370 n.19 (N.D. Ga. 2004). Other courts have concluded that compactness embraces considerations beyond simple

compact in order to promote a community of interest—or which deviates from a local boundary to further minority interests—might reflect a rational harmonization of such relative standards. This is an illustration of the weighing and balancing of *equal* standards envisioned by Amendment 7. It is what Amendment 7 demands.

But a district cannot be *somewhat* contiguous, or *slightly less* contiguous. Contiguity is objective—a clear, binary choice. A district is either contiguous or not contiguous. It either consists of one, unified territory, or multiple, unconnected territories. Such clear, objective standards cannot be defeated by other standards—merely because those other standards are not inferior, or subordinate—where, as here, Amendment 7 expressly commands the implementation of *all* standards. To balance, harmonize, and implement all redistricting standards, the Legislature must strictly adhere to such objective standards as contiguity. Were the Legislature to ignore such black-and-white standards, its redistricting plan would not be upheld.

Like contiguity, the existing constitutional limit on the number of districts the Legislature may create is an absolute, objective requirement. Art. III, § 16(a), Fla. Const. (requiring 80 to 120 representative districts and 30 to 40 senatorial districts). By the trial court's reading, the Legislature could create any number of districts—say, four hundred Senate districts—if it determined that smaller districts

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aesthetics, requiring the creation of "functional voting districts that allow for effective representation." *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1569 (N.D. Fla. 1992); *accord Matter of Legislative Districting of State*, 475 A.2d at 437-39.

would promote communities of common interest. Plainly, this cannot be, and the Court would never interpret Amendment 7 to permit this result. If the Legislature created four hundred Senate districts, it would not "implement" all standards, and its redistricting plan would be invalid. This example depicts the absurdity of the trial court's interpretation and proves that the standards created by Amendment 7 can—and must—coexist in harmony alongside other constitutional standards.[4]

A second example demonstrates the plain meaning of Amendment 7. Like Amendment 7, Amendments 5 and 6 create new standards. Like Amendment 7, Amendments 5 and 6 do not subordinate all standards to contiguity. Thus, the first subsection of Amendments 5 and 6 provides that districts and redistricting plans:

> shall not 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.*

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[4] Appellees did not respond to this argument in their papers, and offered little more at the hearing (RS1, Tr. at 12:25 – 13:5 ("I *suppose* you could argue that if we think we ought to have pockets of noncontiguous communities of common interest forming a legislative district, *maybe* they would *even* trump and not be subordinated to the numeric objective criteria currently contained in Article III.").).

The trial court did not squarely address—but studiously avoided—the same argument. (R2–271 ("*Apart from* the number of districts required to be drawn, the Florida Constitution currently contains only one requirement . . . . Amendment 7 . . . were it to pass, would make that one mandatory requirement [*i.e.*, contiguity] aspirational only . . . .).) The court did not explain why it considered the contiguity requirement "apart from" the existing constitutional numerical requirement.

(R1–18-19.) The amendments then provide that the "order in which the standards within [each subsection] are set forth shall not be read to establish any priority of one standard over the other." According to the trial court's interpretation, because the Legislature must ensure the equal opportunity of racial and language minorities to participate in the political process—and because this mandate is not subordinate to contiguity—it may ignore the contiguity requirement and create non-contiguous districts in order to promote the rights of minorities. This is not a correct reading of Amendments 5 and 6, and it is not a correct reading of Amendment 7.[5]

2. The Rules of Construction Refute the Trial Court's Interpretation.

The trial court's conclusion that Amendment 7 eliminates the contiguity requirement ignores fundamental rules of construction and conflicts with this Court's recent decision in *Advisory Opinion to Attorney General re Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 190 (Fla. 2009).

In *Standards for Establishing Legislative District Boundaries,* this Court rejected an analogous argument with respect to Amendments 5 and 6. There, the opponents of Amendments 5 and 6 argued that, because the Constitution presently requires districts of "either contiguous, overlapping or identical territory," Art. III,

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[5] The reverse of this proposition, however, is equally true. If it is a correct reading of Amendment 7, it is a correct reading of Amendments 5 and 6. And, if Amendment 7 must be removed from the ballot for that reason, Amendments 5 and 6 must be as well.

§ 16(a), Fla. Const., Amendments 5 and 6, which require contiguous territory but make no mention of "overlapping or identical territories," repealed those criteria and, without notice to voters, nullified the option to create multi-member districts.

This Court disagreed. It explained that:

> 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.*

2 So. 3d at 190 (plurality opinion) (quoting *Jackson v. City of Jacksonville*, 225 So. 2d 497, 500-501 (Fla. 1969)). This Court found it possible to harmonize the multi-member district provision in the existing Constitution with the contiguity provision of Amendment 5 and 6. The Court found that there was no implied repeal of the option to create multi-member districts and no defect in the ballot summaries.

Conspicuously absent from the appealed order is the finding that it is impossible to construe Amendment 7 in harmony with the existing contiguity requirement. Instead, the trial court chose to construe Amendment 7 to relegate contiguity to a "subordinate" standard. This is not a fair reading of Amendment 7—much less the only reading—and was never intended by the Legislature. Just as Amendments 5 and 6 did not impliedly repeal the provision that permits multi-member districts, Amendment 7 does not impliedly repeal contiguity.

This Court's conclusion in *Standards for Establishing Legislative District Boundaries* is consistent with accepted principles of constitutional interpretation. The Court has often explained that constitutional provisions must, if possible, be harmonized. "A construction that nullifies a specific clause will not be given to a constitution unless absolutely required by the context." *Gray v. Bryant*, 125 So. 2d 846, 858 (Fla. 1960). If a "constitutional provision will bear two constructions, one of which is consistent and the other which is inconsistent with another section of the constitution, the former must be adopted so that both provisions may stand and have effect." *Broward County v. City of Fort Lauderdale*, 480 So. 2d 631, 633 (Fla. 1985) (quoting *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13, 16 (Fla. 1974)). These precepts plainly dictate that courts are "precluded from construing one constitutional provision in a manner which would render another superfluous, meaningless, or inoperative." *Chiles v. Phelps*, 714 So. 2d 453, 459 (Fla. 1998).

The interpretation of the trial court deprives the contiguity provision of effect and meaning. The interpretation advanced by Appellants harmonizes Amendment 7 with existing constitutional provisions, giving scope and operation to them all. Unless the latter interpretation is utterly untenable, it must be adopted.

Further, the trial court disregarded the well-settled axiom that, when two constructions are "possible," one of which would sustain the legislative act, courts must adopt the valid construction and sustain the enactment. *State v. Presidential*

Women's Ctr., 937 So. 2d 114, 116 (Fla. 2006); *State v. Williams*, 343 So. 2d 35, 37 (Fla. 1977). Appellees contended below that "without subordination" means "not lower," and that "not lower *may* mean higher." (R2–190.) Not true here. In this cases, "without subordination" means "equal to." The command to "balance" and "implement" all standards proves that Amendment 7 does not elevate its own standards to a superior or paramount position. This Court should not unnecessarily adopt an interpretation of the proposed amendment that renders the ballot summary misleading when other, at least equally reasonable interpretations are available.

In the cases cited by the trial court, the effect of the proposed amendment was not debatable. Their impact was clear and definite. *Askew*, 421 So. 2d 151; *Evans v. Bell*, 651 So. 2d 162 (Fla. 1st DCA 1995). In *Askew*, the Court struck a proposal to bar legislators from lobbying within two years after vacating office. Because the summary did not disclose that the proposal would replace an existing, unconditional two-year ban, it created the impression that the proposal enacted a new prohibition, while it relaxed an existing prohibition. In *Evans*, voters were not advised that a proposal to create an appointive career service board was a substitute for an existing provision that established an elective career service board.

In *Askew* and *Evans*, there was no dispute that the proposed amendments took the places of existing provisions, and that voters were never informed of the substitution. In this case, the trial court first adopted an extreme construction of

Amendment 7 and then, on the basis of that extreme construction, invalidated it. This Court's precedents reject such needless nullification of legislative enactments.

3. The Legislative History Refutes the Trial Court's Interpretation.

If Amendment 7 were ambiguous, the Court must "consider its history, [the] evil to be corrected, and the purposes intended by the Legislature." *McKibben v. Mallory*, 293 So. 2d 48, 52 (Fla. 1974); *accord E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009). In the construction of any legislative enactment, the "primary and overriding consideration" is "to give effect to the evident intent of the legislature." *Deason v. Fla. Dep't of Corr.*, 705 So. 2d 1374, 1375 (Fla. 1998). The intent of the Legislature is of such predominant importance that, while not necessary here, courts will deviate from the strict, literal meaning of an enactment to effectuate the manifest intent of the Legislature. *Deason*, 705 So. 2d at 1375; *State v. Ramsey*, 475 So. 2d 671, 673 (Fla. 1985); *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981).

Legislative history is an "invaluable tool" in the construction of legislative acts. *Massey v. David*, 979 So. 2d 931, 942 (Fla. 2008). The legislative history of Amendment 7 demonstrates that it was never intended to displace contiguity.

Between December 2009 and April 2010, legislative committees met on ten occasions to discuss the practical workability of Amendments 5 and 6 and to prepare for their implementation and potential implications for the redistricting process. *See* Fla. H.R. Select Policy Council on Strategic & Econ. Planning (Dec.

9, 2009; Jan. 11, 2010; Feb. 11, 2010); Fla. S. Comm. on Reapp. (Dec. 9, 2009; Jan. 11, 2010; Jan. 13, 2010; Jan. 20, 2010; Feb. 11, 2010; Feb. 17, 2010; Mar. 2, 2010; Mar. 17, 2010; Apr. 12, 2010). On February 11, 2010, the Chairperson of Fair Districts appeared before two legislative committees and attempted to answer questions presented by members of the committees. *See* Fla. S. Comm. on Reapp. & Fla. H.R. Select Policy Council on Strategic & Econ. Planning (Feb. 11, 2010). These discussions underscored significant concerns with Amendments 5 and 6.

On April 15, 2010, the House Select Policy Council on Strategic and Economic Planning first considered the proposed committee bill that became Amendment 7. Fla. H.R. Select Policy Council on Strategic & Econ. Planning, recording of proceedings (April 15, 2010). Extensive debate followed, both in committee and on the floor. The Legislature devoted ten hours and fifteen minutes to Amendment 7, including more than six hours of House and Senate floor debate.[6] In all this time, there was not one suggestion—either in committee or on the floor, by supporters or by opponents, in prepared statements or in answers to questions, in the House or in the Senate, or in public comments—that Amendment 7 would

[6] *See* Fla. S., recording of proceedings (Apr. 30, 2010) (1:29:12); Fla. S., recording of proceedings (Apr. 28, 2010) (2:01:59); Fla. H.R., recording of proceedings (Apr. 26, 2010) (1:36:29); Fla. H.R., recording of proceedings (Apr. 23, 2010) (1:01:01); Fla. H.R. Rules & Calendar Council, recording of proceedings (Apr. 19, 2010) (1:27:35); Fla. S. Comm. on Reapp., recording of proceedings (Apr. 16, 2010) (1:52:31); Fla. H.R. Select Policy Council on Strategic & Econ. Planning, recording of proceedings (Apr. 15, 2010) (43:43).

repeal contiguity. There is no evidence that such an effect was ever contemplated before Appellees' counsel decided to devise a legal challenge to Amendment 7.

Indeed, the legislative history furnishes clear evidence that Amendment 7 was intended *not* to affect contiguity. When House Joint Resolution 7231 was introduced, counsel for the Florida House explained to members of the Rules and Calendar Council that, if the voters approved Amendment 7 but not Amendments 5 and 6, Amendment 7 "would go into effect, but we would have a situation where the only standards in the Florida Constitution are *contiguity and a couple of others that don't relate to this at all.*" *See* Fla. H.R. Rules & Calendar Council, recording of proceedings (Apr. 19, 2010) (comments of George N. Meros, Jr.). The council reported the bill favorably. *See* Fla. H.R. Jour. 763 (Reg. Sess. Apr. 19, 2010).

Statements made in floor debate by supporters of Amendment 7 confirm this position. Asked how the proposal would "change the current redistricting process," Representative Erik Fresen responded: "The intent of this bill is not to change the current process, but rather to respond to the proposed change in the process of Amendments 5 and 6. . . . So it's not changing the current process, but it's an additional component to the two proposed amendments that would change the current process." Fla. H.R., recording of proceedings (Apr. 23, 2010). And Representative Robert C. Schenck explained that "communities of interest will be weighed in concert with the other standards in our State Constitution. We never

intended for that standard to somehow mandate that communities of interest ever trump the other standards." Fla. H.R., recording of proceedings (Apr. 26, 2010).[7]

There is no mention in the comprehensive staff analyses that attended the House and Senate proposals of an intent or expectation that Amendment 7 would or could, in any manner, affect contiguity. *See* Fla. S. Comm. on Ethics & Elec. CS/SJR 2288 (2010) Staff Analysis (Apr. 19, 2010); Fla. H.R. Rules & Calendar Council, HJR 7231 (2010) Staff Analysis (Apr. 20, 2010) (available at R1–77-98). And in this litigation, the Florida House and Senate have disavowed any intent to eliminate the long-standing contiguity mandate. Their statements in this litigation add to the substantial body of evidence that already supports the same conclusion.

Thus, Amendment 7 was never intended by the Legislature to sweep away the standards presently applicable to redistricting. Rather, the entire current of the

[7] At one point, the Senate considered a proposal that would have recited various redistricting standards and given them "priority" over other standards in the Constitution. *See* Fla. S. CS for CS for SJR 2288 (2010). It then abandoned this approach in favor of the proposal that contained the milder phrase "without subordination." *See* Fla. S. Jour. 941-42 (Reg. Sess. Apr. 28, 2010). Further, the abandoned Senate proposal restated the contiguity requirement, demonstrating an intent that contiguity remain a priority. It was unnecessary to restate contiguity in Amendment 7, because it did not prioritize its standards to other provisions. This proposal, however, is less noteworthy because is was never considered by the Senate and, in any event, courts generally do not draw inferences from proposals that do not pass, *United States v. Craft*, 535 U.S. 274, 287 (2002); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

legislative debate concerned the anticipated consequences of Amendments 5 and 6. Three specific concerns emerged from hours of committee and floor debate:

First: Supporters of Amendment 7 expressed concern that Amendments 5 and 6 would jeopardize the electoral position of racial minorities. *See* note 6. The concern rests on two considerations. Amendments 5 and 6 permit deviations from compactness and local boundaries *only* to promote the interests of minorities. But districts drawn predominantly on the basis of race violate equal protection. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Thus, because race is the *sole* justification under Amendments 5 and 6 for the creation of a district that is not strictly compact, the creation of such a district would, without Amendment 7, be telltale evidence of pure, race-based redistricting—and such minority districts will be constitutionally vulnerable.[8] Amendment 7, by permitting the Legislature to promote communities of interest in balance with compactness, establishes a race-neutral justification that will support the validity of districts that elect minority-preferred candidates.

[8] Under Amendments 5 and 6, the requirement of contiguity and the prohibition against favoring or disfavoring an incumbent or political party would also be superior to the compactness and local-boundary requirements, but it is difficult to imagine any set of circumstances in which these would compel the creation of a district that is not compact or deviates from local boundaries.

On occasion, race-based redistricting might be justifiable to the extent reasonably necessary to comply with the federal Voting Rights Act, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion), but these cases are not common.

Moreover, as the Chairperson of Fair Districts explained, Amendments 5 and 6 would require the Legislature first to create "minority districts" and then to make "the other districts" strictly compact and adherent to local boundaries. Fla. S. Comm. on Reapp., recording of proceedings (Feb. 11, 2010) (comments of Ellen Freidin). Thus, in creating "the other districts," the Legislature would be unable to deviate from strict compactness to promote minority communities. Amendment 7 allows the Legislature to balance "the ability of . . . minorities to participate in the political process and elect candidates of their choice"—even *after* it has created the so-called "minority districts" that Amendments 5 and 6 require at the outset.

Second: The Legislature expressed concern that, under Amendments 5 and 6, "aesthetic issues" such as compactness and local boundaries would "likely supersede the interest of maintaining communities of interest." Fla. H.R. Rules & Calendar Council, HJR 7231 (2010) Staff Analysis 19 (Apr. 20, 2010) (available at R1–77-98). Accordingly, the requirement of compactness—unless balanced with communities of interest—might prevent the preservation of Congressional District 25, which now includes the Everglades, one of the "most significant environmental communities of interest in the world." *Id.* Amendment 7 permits the Legislature to strike a sensible balance between the geometric considerations dominant under Amendments 5 and 6 and the protection of real communities with real interests.

Third: Amendments 5 and 6 assign standards to two subsections, but they expressly refuse to prioritize standards within each subsection. Thus, Amendments 5 and 6 presuppose the possibility of conflict among their standards. By providing that standards must be balanced, Amendment 7 would afford flexibility in cases of conflict or collision between the unranked standards of Amendments 5 and 6.

While Amendment 7 will affect and influence the implementation of standards contained in Amendment 7, it was not designed to and will not nullify Amendments 5 and 6. In presenting the bill in committee, Representative William Proctor stated that Amendment 7 would "blend" or "merge together" redistricting criteria traditionally considered by the Legislature and those of Amendments 5 and 6. Fla. H.R. Rules & Calendar Council, recording of proceedings (Apr. 19, 2010). Counsel for the Florida House noted that the standards created by Amendments 5, 6, and 7 would be balanced and implemented in "conjunction," or "combination." *Id.* (comment of George N. Meros, Jr.). When asked whether Amendments 5 and 6 would "be subordinate to" Amendment 7, Representative Dorothy Hukill, leading debate on the House floor, stated: "No." Fla. H.R., recording of proceedings (Apr. 23, 2010). Representative Steve Crisafulli explained that Amendment 7 "does not in any way trump or try and override any of the language in [Amendments] 5 and

6. . . . [T]his is in no way, shape, or form an effort to trump the language." *Id.*[9] As Representative Hukill explained: Amendment 7 "is very clear that [its] factors are to be considered, but they will not take precedence." Fla. H.R. Select Policy Council on Strategic & Econ. Planning, recording of proceedings (Apr. 15, 2010).

The express exclusion of political parties from the phrase "communities of common interest" is additional evidence that Amendment 7 was not intended to undermine Amendments 5 and 6. This exclusion, added by floor amendment to the joint resolution, *see* Fla. H.R. Jour. 938 (Reg. Sess. Apr. 23, 2010) (amendment 1 to HJR 7231 (2010)), bars any possible argument that the authority to respect and promote communities of common interest undoes the prohibition in Amendments 5 and 6 against redistricting with an intent to favor or disfavor a political party.

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[9] In their efforts to defeat Amendment 7, its opponents characterized it as a devious plot to "gut" Amendments 5 and 6 and defeat the will of the people. In their review of legislative history, however, courts give weight to the "comments made by proponents of a bill," *Ellis v. N.G.N. of Tampa, Inc.*, 561 So. 2d 1209, 1213 (Fla. 2d DCA 1990), *quashed on other grounds by* 586 So. 2d 1042 (Fla. 1991); *accord Asphalt Pavers, Inc. v. Dep't of Revenue*, 584 So. 2d 55, 58 (Fla. 1991), and not to the comments of its opponents. The "views of opponents of a bill with respect to its meaning . . . are not persuasive," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988):

> We have often cautioned against the danger, when interpreting a statute, of reliance upon the views of legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

Id.

The trial court's conclusion that no possible interpretation of Amendment 7 could preserve contiguity—and that either the existing standards or the standards in Amendment 7 must predominate—contradicts the plain intent of the Legislature.

C. Ballot Language That Closely Follows the Amendment Text Is Presumptively Clear and Unambiguous.

In recent cases, this Court has shown a strong reluctance to invalidate proposed amendments where the ballot summary is a virtual restatement of the amendment text. The trial court erroneously found deception in a summary that faithfully echoes the language of the proposed amendment.

The summary of Amendment 7 is a virtual recitation of the amendment. The only discrepancies enhance the clarity of the summary. Besides restating the amendment, the summary merely replaces "this constitution" with "the State Constitution" and "this article" with "Article III of the State Constitution."

In such circumstances, this Court has approved proposed ballot language with little difficulty. In *Advisory Opinion to the Attorney General re the Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. 2004), the Court sustained a measure to limit attorney compensation in medical malpractice cases. In finding the ballot language clear and unambiguous, the Court found no "material or misleading discrepancies between the summary and the amendment." *Id.* at 679. "In fact, the summary . . . [came] very close to reiterating the briefly

worded amendment." *Id.* Thus, the Court held that "the wording of the title and summary was sufficient to communicate the chief purpose of the measure." *Id.*

In *ACLU of Florida, Inc. v. Hood*, 881 So. 2d 664 (Fla. 1st DCA 2004), the plaintiffs attacked a legislatively proposed amendment authorizing the Legislature to require parental notification prior to the termination of a minor's pregnancy. While the text of the amendment authorized the Legislature to require parental notification "notwithstanding" the minor's right of privacy under Article I, Section 23 of the Florida Constitution, the summary did not make the same disclosure. In a unanimous decision, this Court ordered that the full language of the amendment—including the reference to the constitutional right of privacy—appear on the ballot verbatim. *ACLU of Fla., Inc. v. Hood*, Case No. SC04-1671 (Fla. Sep. 2, 2004).[10]

Next, in *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229 (Fla. 2006), the Court upheld a proposed amendment to define marriage. The differences between the amendment text and

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[10] Because the election was fast approaching, the Court issued its order quickly and stated it would later publish an opinion. *ACLU of Fla., Inc.*, Case No. SC04-1671 (Fla. Sep. 2, 2004). Later, the Court decided that, with "the election . . . having been held on November 2, 2004, [the Court] has now determined that no opinion shall be issued." *Id.* (Fla. Dec. 22, 2004). This post-*Armstrong* case demonstrates that when a ballot summary is defective, an amendment proposing a completely new section can be placed on the ballot in lieu of a defective summary, the remedy being far superior to striking the entire question because it enforces the self-executing constitutional authority of the Legislature to propose amendments. *See* Art. XI, § 1, Fla. Const. (providing that constitutional amendments proposed by the Legislature "shall be submitted to the electors").

ballot summary were minimal. The Court explained that the "title and summary do not impermissibly employ terminology divergent from that contained in the text of the actual proposed amendment," and that "the language submitted for placement on the ballot contains language that is essentially identical to that found in the text of the actual amendment." *Id.* at 1237.

In *Advisory Opinion to Attorney General re Funding of Embryonic Stem Cell Research*, 959 So. 2d 195 (Fla. 2007), the Court approved a proposal to fund embryonic stem-cell research. The Court noted that, while the summary omitted some details, its "language . . . closely tracks that which is used in the amendment itself." *Id.* at 201. And, in *Advisory Opinion to the Attorney General Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 488, 491 (Fla. 2007), the Court approved a summary that "closely follow[ed] the language of the full initiative," and that portion of a second summary that "follow[ed] the proposed constitutional amendment very closely."

The text and summary of Amendment 7 are virtually identical. As these precedents recognize, it is hardly possible to convey the substance of a proposal more clearly and unambiguously than by a verbatim recitation. In fact, an accurate summary is important precisely "[b]ecause voters will not have the actual text of the amendment before them in the voting booth when they enter their votes." *Armstrong*, 772 So. 2d at 12-13; *accord In re Adv. Opinion to the Atty. Gen. re*

Add'l Homestead Tax Exemption, 880 So. 2d 646, 653 (Fla. 2004) (ballot accuracy is necessary because "[v]oters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment"). Where, as in this case, the entire text of the proposed amendment is presented to voters on the ballot, any concerns regarding an inaccurate "summary" are alleviated.

Indeed, the 2000 legislative amendment to Section 101.161(1), Florida Statutes, recognized that the Legislature may elect to place the entire amendment on the ballot—rather than a summary. That section did—and does—require that the "substance" of an amendment be "printed in clear and unambiguous language on the ballot." Prior to 2000, that "substance" was "an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure." § 101.161(1), Fla. Stat. (1999). In *Wadhams v. Board of County Commissioners*, 567 So. 2d 414, 416 (Fla. 1990), the Court construed "explanatory statement" to mean a summary, and invalidated an amendment that had been placed on the ballot in its entirety.

In 2000, however, the Legislature amended Section 101.161(1), Florida Statutes, to exclude legislatively proposed amendments from the requirement of an "explanatory statement." *See* Ch. 2000-361, § 1, Laws of Fla. Thus, while the "substance" of legislatively proposed amendment must still appear on the ballot "in clear and unambiguous language," the "substance" of the amendment need not

be an "explanatory statement," or summary. The Legislature is not constrained by word limits, and it may place the entirety of the amendment on the ballot.[11]

In this case, voters *will* have the actual words of the amendment before them. The ballot will give voters fair notice of the matter to be decided. Voters presented with the actual words of the proposed amendment will not be misled, and parties challenging such ballot language must carry a uniquely heavy burden.

Finally, the Legislature reasonably believed that no summary could be more accurate than the amendment text itself. The Legislature was well aware of this Court's insistence on an accurate ballot summary, *cf. Fla. DCF v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004) ("The Legislature is presumed to know the judicial constructions of a law when amending that law . . . ."), and it elected to provide voters the entirety of Amendment 7. Had it done otherwise, it would have only altered Appellees' tactics—not immunized the ballot language from challenge.

No ballot language could have avoided this challenge. While courts are not concerned with the merits of an amendment, *see Adv. Opinion to Att'y Gen. re Funding of Embryonic Stem Cell Research*, 959 So. 2d at 197, litigants are. Never

[11] This amendment was a reaction to the *Armstrong* litigation, which was then pending before this Court. *See* Fla. S. Comm. on Ethics & Elec., SB 2104 (2010) Staff Analysis 2 (Mar. 20, 2000). The Legislature sought to "provide[] an exception to the ballot summary requirements of s. 101.161, F.S., for amendments proposed by joint resolution of the Legislature." *Id.* at 1. *Armstrong*, which was decided later that year, relied on the former version of the statute. 773 So. 2d at 12.

have Appellees offered what they believe to be accurate ballot language, and in this litigation they challenge ballot language identical to the amendment text.

For the Legislature's constitutional authority to propose amendments to have real meaning, this Court must require that challengers satisfy a substantial burden—not merely point out perceived imperfections in a summary.[12] There are countless ways to critique any ballot summary crafted by the Legislature. But the "legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that [the Justices of this Court] did and [the Court's] first duty is to uphold their action if there is any reasonable theory under which it can be done." *Armstrong*, 773 So. 2d at 14 (quoting *Gray*, 89 So. 2d at 790). Consistent with that oath, the Legislature accompanied Amendment 7 with a full and complete statement. The Court should not presume that members of the Legislature intended to obliterate contiguity without notice to the voters—and in violation of their oaths. The summary accurately reflects the amendment.[13]

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[12] Including Amendment 7, four of the six amendments slated by the Legislature for the general election ballot this November are now in litigation. *See Doyle v. Roberts*, Case No. 2010-CA-2114 (Fla. 2d Cir. Ct.); *FEA v. Roberts*, Case No. 2010-CA-2537 (Fla. 2d Cir. Ct.); *Mangat v. Dep't of State*, Case No. 2010-CA-2202 (Fla. 2d Cir. Ct.). Each of these cases challenges the summary proposed by the Legislature, and each—predictably—accuses the Legislature of "hiding the ball."

[13] Even if Amendment 7 eliminates the contiguity requirement (which it decidedly does not), its summary would not be misleading. The summary must "*identify the articles* or sections of the constitution substantially affected." *Adv.*

CONCLUSION

Amendment 7 was never intended to affect the long-standing requirement that state legislative districts consist of contiguous territory. Its plain meaning, the established rules of constitutional interpretation, and the clear legislative history of the proposed amendment resoundingly oppose the conclusion of the trial court.

Because the attempt to construe Amendment 7 to repeal the contiguity requirement is nothing more than a display of lawyerly inventiveness, without any foundation either in the plain meaning of the proposed amendment or the manifest intent of the Legislature, this Court should reverse the order of the trial court.

Opinion to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved, 2 So. 3d 968, 976 (Fla. 2009) (quoting *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984)) (emphasis added). The function of a summary is to "put a voter on notice" that an existing provision will be affected, *id.*—not to describe that effect in detail.

Here, the summary identifies the only affected article of the Constitution. The ballot summary advises voters that the standards created by Amendment 7 will not be subordinate to any other provisions in Article III. This is sufficient to afford "fair notice of that which [the voter] must decide." *Askew*, 421 So. 2d at 155.

The trial court's order imposes a more stringent standard of clarity and precision on the ballot summary than on the amendment text itself. If Amendment 7 eliminates the constitutional requirement of contiguity, it does so in these words: "without subordination to any other provision of this article." The ballot summary, however, contains words of identical import: "without subordination to any other provision of Article III of the State Constitution." The summary is not required to anatomize the terms of a proposed amendment, and detail the provisions of Article III. Instead, the voters must "do their homework and educate themselves about the details of a proposal," *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992), before entering the voting booth, *Adv. Opinion to Att'y Gen. re Right to Treatment & Rehab.*, 818 So. 2d 491, 498 (Fla. 2002). "If he does not, it is no function of the ballot question to provide him with that needed education." *Id.*

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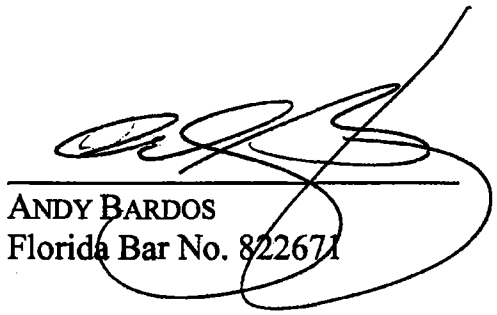

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IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1375
Lower Tribunal Case Nos. 2010-CA-001803, 1D10-3676

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida, *et al.*, Appellants,

v.

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Appellees.

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STATEMENT OF THE CASE AND FACTS

The question presented in this case is whether the ballot title and summary of proposed Amendment 7, which relates to legislative and congressional redistricting, gives voters fair notice of its chief purpose and effect.

On the last day of the 2010 legislative session (April 30, 2010), the Florida Legislature passed by two-thirds vote of each house a joint resolution relating to redistricting, identified as HJR 7231. (R1:63 n.2, R1:74-75.) The Department of State designated HJR 7231 as Amendment 7. (R1:63 n.2.)

The ballot summary approved by the legislature for Amendment 7 states:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING. - In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

(R1:74-75.) The ballot summary is nearly identical to the full text of the amendment, with the addition of the ballot title and specific references to the Florida Constitution. (*Id.*)

The legislature drafted and passed Amendment 7 in direct response to two citizen initiatives related to redistricting (Amendments 5 and 6) that had been certified for ballot position by the Department of State four months earlier. (Initial Brief at 3); (R1:15-19) (stating that Amendments 5 and 6 would limit legislature's discretion in drawing districts and explaining how Amendment 7 addressed this concern); (R1:161) (explaining that the legislature proposed Amendment 7 to "mitigate the unintended consequences of such rigid mandates for racial minorities and communities of common interest"). Amendments 5 and 6 would add to the Florida Constitution specific, prioritized, mandatory standards for the legislature to follow in both legislative and congressional redistricting. They are intended to establish fairness standards for use in creating legislative district boundaries. (R1:13; R1:71-72.)

Amendment 5 would create Article III, Section 21, to read as follows:

> 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 of this subsection conflicts with the standards of 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 another within that subsection.

(R1:71.) Amendment 6 would create Article III, Section 20, to establish identical requirements for the legislature to follow in establishing congressional district boundaries. (R1:72.)

Plaintiffs/Appellees, Florida State Conference of NAACP Branches, the League of Women Voters of Florida, and Democracia Ahora, together with several individual voters, brought the present action in circuit court asserting the ballot title and summary failed to comply with the accuracy requirement in Article XI, section 5 of the Florida Constitution and Section 101.161(1), Florida Statutes. (R1:6-21.) The complaint sought a judgment declaring that Amendment 7 failed to meet the constitutional and statutory requirements for placement on the ballot and enjoining the Department of State and Secretary of State from placing the amendment on the 2010 general election ballot. (*Id.*) The Florida House of Representatives ("House") and Florida Senate ("Senate") sought and were granted leave to intervene in the action. (R1:22-26; R1:38-40; R1:46.) The parties agreed to resolve the case pursuant to cross-motions for summary judgment on an expedited schedule. (R1:99-100.)

Plaintiffs moved for summary judgment on the grounds that the ballot title and summary for Amendment 7 failed to inform voters of the chief purpose and

true effect of the amendment, which Plaintiffs asserted is to free the legislature from any present and future mandatory standards applicable to drawing legislative and congressional district lines and to minimize the degree to which the redistricting plans are required to meet standards contained in the Florida Constitution. (R1:47-98.) Plaintiffs made numerous specific arguments, all of which are addressed herein. (*Id.*) Governor Crist sought and was granted leave of court to file an amicus brief in support of Plaintiffs. (R1:117-119: R2:229-30.)

The House and Senate each filed responses and cross-motions for summary judgment in support of Amendment 7; the Department of State/Secretary of State adopted the responses of the House and Senate. (R1:120-158; R1:159-181; R1:182-84.) The parties filed final replies in support of their respective motions for summary judgment. (R2:185-201; R2:202-204; R2:205-216; R2:217-228.)

After hearing argument on the motions, the trial court found that the ballot summary of Amendment 7 clearly and conclusively failed to inform the voter in plain language of what was to be voted upon. (T:73-79.) The court found that although the ballot summary matched the amendment's text, both were very difficult to understand. (T: 77-78) (stating it took the court three days, reading all of the cases and briefs and hearing all of the arguments, to understand the amendment and its effect on existing laws and provisions in the constitution.) The court found an average voter would not be able to make an informed decision

about the rights the voter would put in jeopardy by approving the amendment. (T:77-78.) In its written order, the court found:

> Amendment 7, if passed, would allow this or any future legislature, if it chose to do so, to gerrymander districts guided by no mandatory requirements or standards and subject to no effective accountability so long as its decisions were rationally related to, and balanced with, the aspirational goals set out in Amendment 7 and the subordinate goal of contiguity.

(R2:272.) Because the ballot title and summary failed to inform voters of the ramifications of the amendment, the court enjoined the Department of State and Secretary of State from placing Amendment 7 on the ballot for the 2010 general election. (*Id.*)

The Defendants filed a joint notice of appeal from the final judgment. (R2:274-281.) The First District certified the case pursuant to article V, section 3(b)(5) of the Florida Constitution, as passing upon a question of great public importance requiring immediate resolution by this Court. This Court accepted jurisdiction by order dated July 19, 2010.

SUMMARY OF THE ARGUMENT

Florida law requires all proposed amendments to the Florida Constitution, no matter their source, to be presented to voters with a clear and unambiguous explanation of the measure's chief purpose. Amendment 7 fails to meet this requirement.

The chief purpose of Amendment 7 is to maximize the Florida Legislature's discretion in drawing legislative and congressional districts by freeing it from all existing and future mandatory standards and minimizing the degree to which its plans may be reviewed for compliance with the standards in the Florida Constitution. The ballot title and summary the legislature approved for submission to the voters for Amendment 7 fails to inform voters of this purpose and effect. Specifically, voters are not informed that the discretionary redistricting criteria identified in the amendment may be implemented at the expense of other existing and future mandatory redistricting standards in the Florida Constitution, including the requirement that districts be contiguous. The failure to disclose this effect to Florida voters renders Amendment 7 fatally deficient.

Amendment 7 is also defective because its title suggests it creates "standards" when it does not. Further, it fails to disclose that it reduces the standard of review of compliance with redistricting standards in the State Constitution to the lowest standard recognized in the law, it fails to define the phrase "communities of common interest," and it fails to inform voters of its intent to nullify the effects of citizen-proposed Amendments 5 and 6, if approved by the voters.

ARGUMENT

I. STANDARD OF REVIEW

The question of whether a proposed constitutional amendment is defective is a pure question of law, subject to de novo review. *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008); *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

II. THE TRIAL COURT CORRECTLY FOUND THAT AMENDMENT 7'S BALLOT TITLE AND SUMMARY FAIL TO STATE IN CLEAR AND UNAMBIGUOUS LANGUAGE THE AMENDMENT'S CHIEF PURPOSE AND EFFECT.

A. The Legal Standard

Florida law imposes an "accuracy requirement" on all proposed constitutional amendments. *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000). This requirement flows from Article XI, section 5 of the Florida Constitution and is codified in Section 101.161(1), Florida Statutes.

Under these provisions and this Court's precedent applying them, a ballot title and summary must provide a clear and unambiguous explanation of the measure's chief purpose. *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982). They must disclose substantial impacts to the Florida Constitution. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 803-804 (Fla. 1998). The ballot title and summary cannot be misleading, either expressly or by omission. *Askew*, 421 So. 2d at 155-56. A ballot title and summary cannot "fly

under false colors" or "hide the ball" as to the amendment's true effect. *Armstrong*, 773 So. 2d at 16. Courts will strike proposed amendments from the ballot that are clearly and conclusively defective under these standards. *Askew*, 421 So. 2d at 154.

The Court affords a measure of deference to the legislature in reviewing legislatively-proposed amendments. *Armstrong,* 773 So. 2d at 14 ("our first duty is to uphold [the legislature's] action if there is any reasonable theory under which it can be done") (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). "This deference, however, is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." *Id.* Thus, the deference to legislative enactments does not exempt legislatively-proposed amendments from application of the same standard applicable to all proposed amendments, *i.e.*, whether the ballot title and summary "state in clear and unambiguous language the chief purpose of the measure." *Askew*, 421 So. 2d at 154-55. Such deference simply means that in order to strike a legislatively-proposed amendment from the ballot, the Court must find without any doubt that the ballot language is deficient. Where "there is doubt as to whether the Legislature has violated . . . strictures on their amendatory powers, [courts] are compelled to sustain [the] legislative action." *Smathers v. Smith*, 338 So. 2d 825 (Fla. 1976).

B. Amendment 7's Chief Purpose and Effect

The chief purpose and effect of Amendment 7 is to eliminate mandatory application of any existing or potential requirements related to redistricting in the Florida Constitution and to reduce the required level of compliance with existing and potential constitutional requirements to the lowest level recognized in the law.

The Florida Constitution currently provides only minimal specifications regarding the legislative districts that the legislature is to redraw every ten years: the legislature "shall apportion the state . . . into . . . consecutively numbered . . . districts of either contiguous, overlapping, or identical territory." Art. III, § 16, Fla. Const. Amendment 7 would permit—but not require—the legislature to reference two additional factors when drawing legislative and congressional districts: one, "the ability of racial and language minorities to participate in the political process and elect candidates of their choice" is to be "*take[n] into consideration*," and two, "communities of common interest other than political parties *may be respected and promoted*." (Emphasis added.) Although "*consideration*" of the specified interests of racial and language minorities is mandatory, action based upon these considerations is not. Therefore, it would be permissible under this provision for the legislature to consider the ability of a certain racial or language minority group to participate in the political process and elect a candidate of its choice but ultimately to decide, for any reason or for no

reason at all, to decline to take these interests into account when drawing the districts. Treatment of "communities of common interest" is even more permissive: such communities "*may be* respected and promoted." (Emphasis added.) Thus under Amendment 7 it would be permissible for the legislature to decide, for any reason or for no reason at all, to decline to consider communities of common interest when establishing legislative and congressional districts.

Notwithstanding the permissive nature of these considerations, Amendment 7 allows them to be followed "without subordination to any other provision of Article III of the State Constitution." Thus, Amendment 7 allows its new criteria to trump the existing constitutional requirement that districts be contiguous. Additionally, even though passage of Amendments 5 and 6 would result in additional mandatory redistricting standards, Amendment 7's "without subordination to" language would effectively nullify these new standards and allow them to be trumped by the permissive interests identified in the amendment. The result is there will be no mandatory standards, and the legislature will have unfettered discretion to draw districts motivated by purely political interests.

Further, whereas the Florida Constitution currently requires redistricting to be conducted "in accordance with the constitution of the state," Article III, Section 16, Florida Constitution, under Amendment 7 the state is to "balance and implement" the state constitutional standards, and its districts and plans are valid if

such balancing and implementation is "rationally related" to the standards in the state constitution. Thus Amendment 7 would render valid all but "irrational" districts and plans, even when the plans violate requirements of the Florida Constitution that are by their own terms mandatory.

C. Amendment 7 does not clearly and unambiguously inform voters that it would convert all existing and future mandatory redistricting standards, including contiguity, into optional criteria to be balanced with other aspirational goals, subject to minimal court scrutiny.

1. Plain Language

The Court has interpreted article III, section 16 of the Florida Constitution to require that each individual district be contiguous within itself, while allowing an individual district to overlap with, or be identical to, another individual district. *Advisory Opinion to the Attorney Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 190-91 (Fla. 2009) (citing *In re Apportionment Law Appearing as Senate Joint Resolution No. 1E*, 414 So. 2d 1040, 1045, 1050 (Fla. 1982)). The Court defines "contiguous" to mean "being in actual contact: touching along a boundary or at a point." *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1179 (Fla. 2003).

Amendment 7 would require *consideration* of the interests of racial and language minorities and *permit* respect and promotion of communities of common

interest "without subordination to" any other provision of Article III of the constitution. As the trial court found, this language is very difficult to decipher. (T: 77-78.) Upon careful study, however, it is apparent this language would allow the permissive considerations of Amendment 7 to trump the existing mandatory requirement in Article III, Section 16, that districts be contiguous. Thus, Amendment 7 would permit the legislature to justify a non-contiguous district by, for example, finding it is necessary to respect and promote a certain community of common interest which is not geographically contiguous. This could result in districts with detached, polka dot style segments not connected to each other. Thus the existing mandatory standard of contiguity would be "subordinated" to the wholly permissive considerations in Amendment 7.

Defendants dispute this effect, urging the Court to interpret the phrase "without subordination to" to mean "on equal footing." But this is not what the amendment says. As Defendants recognize, "subordinate" means inferior. The discretionary considerations of racial and language minorities and communities of common interest may not be assigned an *inferior* or *lower* value than "any other provision of Article III of the State Constitution." But *not lower* does not necessarily mean *on equal footing*. Indeed, *not lower* could just as well mean *higher*. It is true the legislature could have chosen other words (such as "notwithstanding," "elevate," or "priority") that would have made it clearer that the

permissive considerations of Amendment 7 may trump other redistricting standards. But the legislature also easily could have chosen words to express clearly that the Amendment 7 standards were to be "equal," or "on par with," other standards in Article III relating to redistricting. If that is what the legislature meant, that is what it should have said. Instead, by using the complicated phrase "without subordination to" which is difficult for experienced lawyers and judges to understand, the legislature hid the ball from voters as to the amendment's true meaning and effect.

The provision in the first sentence of Amendment 7 requiring the state to "balance and implement" the state constitutional standards does not to preserve the contiguity requirement. This first sentence is not even internally consistent: although "implementation" of standards suggests that each standard is to be adhered to, "balancing" of standards suggests that something less than full compliance with one standard may be acceptable if the deficiency is offset by compliance with another. *See* Mirriam-Webster Online (defining the verb "balance" to mean to "counterbalance" or "offset.") A balancing test, by its very nature, does not require compliance with every factor. *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (stating that no one factor of four-part balancing test is necessary or sufficient to find the deprivation of criminal defendant's right to a speedy trial); *State v. Jones*, 483 So. 2d 433, 438 (Fla. 1986) (stating not all factors in four-part

balancing test must favor the state in order to validate a sobriety checkpoint). Additionally, contrary to Defendants' repeated assertions that the amendment requires "all" standards to be implemented, the word "all" appears only in Defendants' brief, not in the amendment summary or text.

Furthermore, the fact that Amendment 7 requires the state to "balance and implement" the state constitutional standards while requiring it to "apply" federal requirements suggests that to "balance and implement" standards means something less than to "apply" them. There must be some reason the legislature chose different language for state standards than federal ones. *See Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 14 (Fla. 2004) (the Legislature is presumed to know the meaning of the words it chooses). Thus Amendment 7's "balance and implement" language, read together with the "without subordination language," permits the legislature to draw non-contiguous districts justified by—or "balanced with"—the permissive considerations relating to racial and language minorities or communities of common interest.

Similarly, the provision in the last sentence of Amendment 7 providing that districts and plans "are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution" also permits the contiguity requirement to be compromised. As with the first two sentences of the amendment, it is far from clear what this sentence means. But the fact that this

provision requires the balancing and implementing of standards to be "rationally related" to the state constitutional standards while requiring such balancing and implementing of standards to be "consistent" with federal law suggests that "rationally related" means something less than "consistent." The legislature cannot be presumed to have chosen different words without intending different meanings. Indeed, in the context of equal protection claims, the "rational relationship" standard is the lowest possible constitutional standard and is appropriately applied only where the challenged legislative action does not affect a fundamental right or a suspect class. *E.g., B.S. v. State*, 862 So. 2d 15, 18 (Fla. 2003).

A test that permits all but irrational plans would certainly permit a plan that sacrifices the contiguity of a district in favor of respect and promotion of a community of common interest—especially in light of Amendment 7's express provision allowing consideration of such interest without subordination to any other redistricting standard. As the trial court correctly concluded, "[p]assage of Amendment 7 would make being contiguous an aspirational goal that could be balanced with other aspirational goals and reviewed for compliance only if the legislative plan were not rationally related, which would be a very weak standard of review. In effect, there would be no review." (T:78).

The Defendants' assertion that the contiguity requirement is an "objective," "clear," "binary" standard which necessarily must be complied with is an

inaccurate, made-up distinction that has no support in case law or the proposed amendment. History shows that the question of whether certain districts satisfy the contiguity requirement is an often-litigated, heavily debated question presenting close questions of interpretation. *In re Apportionment Law Appearing as Senate Joint Resolution 1E*, 414 So. 2d 1040 (Fla. 1982) (rejecting argument that district was not contiguous because its eastern and western ends merely touched and finding challenged district "satisfies, but barely," the contiguity requirement); *In re Constitutionality of Senate Joint Resolution 2G*, 597 So. 2d 276, 280 (Fla. 1992) (holding contiguity requirement is met even if land travel outside of the district is necessary to reach other parts of the district due to the presence of a body of water with no connecting bridge); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 828 (Fla. 2002) (district stretching across Lake Okeechobee "stretche[d] to the limits" the contiguity requirement, but was permissible). But even if contiguity could correctly be characterized as an "objective" or "binary" standard, nothing in Amendment 7 gives voters notice that objective and binary standards are not to be included in the "balancing" of state constitutional standards.

The Court need not make an ultimate determination of the proper construction of Amendment 7 to decide this case. The Court need only determine whether the ballot title and summary provide the voter a clear and unambiguous explanation of the measure's chief purpose. *Askew*, 421 So. 2d at 155-56. If the

Court determines without any doubt that the answer to this question is a negative one, it must affirm the decision of the trial court to remove Amendment 7 from the ballot. Although the Court is "wary of interfering with the public's right to vote" on a proposed amendment, it is "equally cautious of approving the validity of a ballot summary that is not clearly understandable." *Advisory Opinion to the Attorney Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

2. Rules of Construction

Resort to principles of statutory construction does not render Amendment 7's ballot language any less ambiguous.

The interpretative principle disfavoring implied repeal of a constitutional provision has no application here. As Defendants acknowledge, the trial court did not find that the contiguity requirement was "repealed," but rather that it was relegated to a "subordinate" standard. (R2:271; Initial Brief at 17.) Additionally, the effect of Amendment 7 on the contiguity requirement need not be "implied"—it is contained (albeit surreptitiously) in the phrase "without subordination to any other provision of Article III of the State Constitution." Thus the trial court determined the effect of Amendment 7 upon the existing redistricting standards by construing the specific language in the amendment, not based upon an implication from the absence of reference to existing standards. This fact renders the present

case totally unlike *Advisory Opinion to Attorney Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 190 (Fla. 2009), where the Court rejected the Legislature's argument that Amendment 5 effectively repealed article III, section 16(a) of the Florida Constitution because the amendment "[did] not mention" overlapping or identical districts.

The trial court's construction of the effect of Amendment 7 on present and future mandatory redistricting standards was the only reasonable construction based upon the ballot language the legislature selected for the amendment. But even if the legislature was correct that another reading was "fair," or "debatable," contrary to Defendants' assertion this would not be a basis for reversing the trial court's judgment and submitting the amendment to the voters. The ultimate question before the Court remains whether the ballot language gives voters fair notice of the amendment's chief purpose and effect. *E.g.*, *Armstrong*, 773 So. 2d at 12-13. If the ballot language for Amendment 7 is fairly susceptible of multiple interpretations, then it is ambiguous, and must be stricken from the ballot. *E.g.*, *Smith*, 606 So. 2d at 621 ("At best, the ballot summary is ambiguous about its chief purpose and therefore cannot be included on the general election ballot.").

Defendants seek to import into this proceeding the well-established principle that if there is any interpretation under which a legislative enactment can be deemed valid, the court is obligated to adopt that construction. *E.g.*, *State v.*

Presidential Women's Ctr., 937 So. 2d 114, 116 (Fla. 2006) (narrowly construing terms "reasonable patient" and "risks" in abortion informed consent statute to find statute was not unconstitutionally vague). But this principle must be read together with the standard in proposed amendment cases requiring that notice to the voter of an amendment's purpose and effect be clear and unambiguous. Thus, as the trial court correctly found, the Defendants would prevail if "there is any possible interpretation of the ballot language and title *that allow a finding that they comply with the [statute] and the case authority* [regarding the accuracy requirement] . . . ." (R2:271) (emphasis added). No such interpretation exists in the present case.

3. Legislative History

Although Defendants pepper their brief with carefully selected excerpts of committee meetings and staff analyses, none of them are relevant to the ultimate question in this case: whether Amendment 7's ballot language gives voters clear and unambiguous notice of the Amendment's chief purpose and effect. "In evaluating an amendment's chief purpose, a court must look not to 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*, 773 So. 2d at 18.

By extensively relying upon legislative history to support their construction of Amendment 7, Defendants effectively concede that the ballot language they

approved for submission to the voters is ambiguous. It is only appropriate to look to legislative history if the words of the legislative enactment itself are ambiguous. *E.g.*, *Fla. Convalescent Ctrs. v. Somberg*, 840 So. 2d 998, 1001 (Fla. 2003).

In any event, some of the legislative history the Defendants fail to cite contradicts the very construction they now assert. Specifically, the staff analysis of Amendment 7 states the following in the section entitled "Effects of the Proposed Joint Resolution":

> Racial and Language Minorities: . . . . This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that enable the ability of racial and language minorities to participate in the political process and elect candidates of their choice, *without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion*.

(R1:92) (emphasis added). This same analysis also states the joint resolution "prohibits other standards in Article III from being read as a prohibition against the creation of crossover districts." (R1:94.) The analysis further states that "because the standards contained in this amendment are not subordinate to any other provision in Article III, *they would be of at least equal dignity with the standards contained in Subsection (1) of the [Amendments 5 and 6]*, and would be superior to the standards contained in Subsection (2) of [Amendments 5 and 6]." (R1:95) (emphasis added).

Each of these statements contradicts the construction of Amendment 7 Defendants urge this Court to adopt, and support the conclusion reached by the trial court based upon an objective review of the amendment language.

D. Similarity between the summary and amendment text does not automatically satisfy the accuracy requirement.

The text of Amendment 7 is difficult for even trained judges and lawyers to comprehend. (T: 77-78.) The average voter would find it nearly impossible to discern the chief purpose and effect by reading the summary or the amendment itself; use of the amendment language as a summary does not excuse its lack of clarity. The purpose of the accuracy requirement and the legislature's obligation to provide voters sufficient information "is to ensure that each voter will cast a ballot based on the *full* truth." *Armstrong*, 773 So 2d at 21. "To function effectively – and to remain viable – a constitutional democracy must require no less." *Id.*.

The extent to which a summary accurately portrays an amendment is certainly an appropriate consideration in measuring compliance with Article XI, Section 5 of the Florida Constitution and section 101.161, Florida Statutes. Thus, it is unsurprising that this Court has examined and commented upon the similarity between a summary and the underlying text in finding that a summary meets the constitutional and statutory requirements. (*See* cases cited in Initial Brief at 28-30).

But the ultimate question is always whether the summary fairly informs the voter of the chief purpose of the amendment and is not misleading, *see, e.g., Advisory Opinion to the Attorney Gen. re Extending Existing Sales Tax to Non-Taxed Servs. Where Exclusion Fails to Serve Pub. Purpose*, 953 So. 2d 471, 482 (Fla. 2007). Thus, the court's finding of similarity between the summary language and text is not an end in and of itself but rather a component of the overall evaluation of whether the summary meets these goals. *E.g., id.* at 488 ("We do not believe that this argument makes the summary misleading . . . .").

When, as here, a ballot summary is substantively identical to the text yet still fails to inform voters of the amendment's chief purpose or is misleading, it should be stricken. *Armstrong*, 773 So. 2d at 15 (explaining that even though ballot summary in *Askew* "faithfully tracked the text of the amendment," it was defective for failing to explain that it would supersede an existing constitutional provision); *Wadhams v. Bd. of County Comm'rs*, 567 So. 2d 414, 416 (Fla. 1990) (invalidating amendment to county charter where full text of amendment was placed on ballot); *Evans v. Bell*, 651 So. 2d 162, 166 (Fla. 1st DCA 1995) (same).

It would make a mockery of the accuracy requirement to hold that it is automatically satisfied by a ballot summary that simply parrots the amendment text verbatim. Such a rule would allow an amendment that is by all accounts indecipherable to be placed on the ballot simply because the summary matches the

amendment text, word for word, in its indecipherability. Those who ask the voters of this state to vote to amend their constitution have a higher duty than this. *E.g., Askew,* 421 So. 2d at 155 ("the proposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation") (internal quotations and citation omitted).

III. AMENDMENT 7 IS DEFECTIVE FOR SEVERAL ADDITIONAL REASONS.

A. The ballot title and summary mislead the public by suggesting that the amendment creates "standards," when it does not.

In an obvious attempt to confuse or mislead voters, Amendment 7's title mimics the titles of Amendments 5 and 6. If Amendment 7 were to be on the ballot, voters would see the following ballot titles:

Amendment 5:	STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING
Amendment 6	STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING
Amendment 7	STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING

The title of Amendment 7 is obviously designed to make voters think each of these amendments would impose standards for the legislature to follow when

conducting the redistricting process under the Florida Constitution. But this is not the case; although Amendments 5 and 6 propose express, mandatory standards, Amendment 7 makes ambiguous suggestions regarding interests that may be considered and allows these suggestions to trump both current and future redistricting standards. By placing Amendment 7 immediately after Amendments 5 and 6 and making its title indistinguishable from the titles of 5 and 6, Amendment 7 "flies under false colors" in an attempt to entice voters into believing that all three amendments will impose standards for the legislature to follow in redistricting. This is not the case, and voters deserve to know the truth.

Far from creating standards, as the Legislature admits in its Staff Analysis (R1:92, 94, 95), Amendment 7 will give the Legislature discretion to draw districts to suit its interests without adhering to any present or future mandatory requirements. Although the amendment identifies two interests not in the current constitution, it does not require compliance with these interests and therefore sets no "standards." The ability of racial and language minorities to participate in the political process and elect candidates of their choice need only be "take[n] into consideration," and "communities of common interest" (whatever they may be) "may be" (but don't have to be) "respected and promoted." These are not "standards." At best, they are, as the trial court called them, "aspirational goals." (T:78.) By leading the ballot summary with a title that states otherwise,

Amendment 7 misleads voters. *See Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (statement that amendment would "establish" citizens rights in civil actions was misleading where amendment actually capped level of recoverable noneconomic damages); *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991) (ballot language especially defective if it "gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence").

Nor does Amendment 7's attempt to create a new level of review create a redistricting standard. The purported rational relationship test means that only an irrational plan will not be deemed valid, but sheds no light whatsoever on the criteria for measuring acceptability of a district or redistricting plan. There is nothing in the amendment that justifies the title's promise that Amendment 7 will create standards for redistricting. On the contrary, the Legislature's amendment would eliminate mandatory rules for drawing district lines.

B. The ballot summary does not inform voters that Amendment 7 would reduce the level of judicial scrutiny of redistricting plans and districts.

Amendment 7 proposes to implement a new standard for judicial review of legislatively-apportioned districts and plans by declaring such districts and plans "valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution." The Florida Supreme Court has not

previously applied a rational relationship test to evaluate a legislative redistricting plan; rather, it looks to whether the plan facially "violates" the Florida Constitution. *See In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002) (*In re HJR 1987*). Furthermore, the Court's determination of the facial validity of an apportionment plan is without prejudice to subsequent "as applied" challenges based upon specific factual situations. *In re Apportionment Law Appearing as Senate Joint Resolution Number 1305*, 263 So. 2d 797, 808 (Fla. 1972); *In re HJR 1987*, 817 So. 2d at 829-31. The ballot summary fails to inform the voters whether the new "rational relationship" standard of review applies only to the facial review or to the as-applied challenges as well.

The "rational relationship" standard is the lowest constitutional standard applied to equal protection claims and is appropriately applied where the challenged legislative action does not affect a fundamental right or a suspect class. *E.g., B.S. v. State*, 862 So. 2d 15, 18 (Fla. 2003). Although it is not clear how an equal protection standard would be applied to specific constitutional standards, it is clear that the legislature intended to permit only the lowest level of constitutional review of its redistricting plans. As the trial court found, application of a "rationally related" test would mean "a very weak standard of review"; "[i]n effect, there would be no review." (T:78). Because the ballot summary does not inform

voters of this chief purpose and effect, Amendment 7 must be stricken from the ballot.

C. The ballot summary fails to inform voters of the meaning of the phrase "communities of common interest;" thus voters are left to guess at its meaning.

Amendment 7's ballot summary and text both provide that "communities of common interest other than political parties may be respected and promoted . . . without subordination to any other provision of Article III of the State Constitution." The phrase "communities of common interest" does not currently appear in the constitution and there is no definition or explanation of its meaning. This renders the amendment fatally ambiguous.

When a ballot summary uses a legal phrase, voters must be informed of its legal significance. *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 888, 889 (Fla. 2000) (striking proposed amendments relating to government discrimination because summary did not define "bona fide qualifications based on sex"). Otherwise, voters are left to guess at the term's meaning and will rely upon their own conceptions to do so. *Id.* A summary that does not define important terms is vague and ambiguous and thus violates Section 101.161, Florida Statutes. *Id; see also Advisory Opinion to the Attorney Gen. re People's Prop. Rights Amendments Providing Compensation for Restricting Real Prop. Use May Cover*

Multiple Subjects, 699 So. 2d 1304, 1309 (Fla. 1997) (striking ballot summary that failed to define "common law nuisance" because it did not inform the voter what restrictions were compensable under the amendment).

Without any definition of "communities of common interest," voters are left to guess at what this term means and will do so based upon their own conceptions and experiences. Voters' perceptions of "communities of common interest" will range broadly, from immigrant communities to country club communities to communities of people with common physical characteristics. A common understanding of this term is especially important because Amendment 7 would allow such communities to be "respected and promoted" without subordination to every other redistricting standard in the constitution, both present and future. This means that respect and promotion of a community of common interest could permissibly be the sole justification for the shape of a district that fails to comply with other mandatory criteria. Failure to provide voters with a definition of this potentially dispositive term deprives them of fair notice that the effect of Amendment 7 is to allow the legislature unrestricted discretion to disregard existing and future mandatory redistricting standards.

D. The ballot summary does not inform voters that the purpose and effect of the legislature's amendment 7 is to allow the legislature to draw districts that avoid the restrictions of citizens' initiatives 5 and 6.

The legislature admits that the purpose of Amendment 7 is to give it discretion to avoid the restrictions of the other standards in Art. III, including those that would be added by Amendments 5 and 6. (R1:92, 94, 95.) Voters are not given fair notice of this purpose and effect.

Amendments 5 and 6, if approved by the voters, will add several mandatory standards to the congressional and legislative redistricting process. Under these amendments, legislative and congressional districts may not be drawn "with the intent to favor or disfavor a political party or incumbent" or "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." Furthermore, to the extent consistent with these mandatory standards and federal law, districts shall be "as nearly equal in population as is practicable; . . . compact ; and . . . where feasible, utilize existing political and geographical boundaries." (R1:71-72.)

Amendment 7 uses language very similar to Amendments 5 and 6 relating to racial and language minorities, attempting to confuse voters into believing all three amendments will benefit these groups when in fact Amendment 7 would effectively eliminate the protections that would be given to racial and language minorities by Amendments 5 and 6. Amendments 5 and 6 state unequivocally 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.

(R1:71,72) (emphasis added.) This statement is unambiguous; it creates a mandatory standard which must be complied with in order for the legislature's redistricting plan to be valid. Amendment 7, on the other hand, states:

> The state shall *take into consideration* the ability of racial and language minorities to participate in the political process and elect candidates of their choice . . . without subordination to any other provision of Article III of the State Constitution.

(R1:75) (emphasis added.)

The language in Amendment 7 relating to racial and language minorities is seductively similar to that of Amendments 5 and 6, yet its effect is fatal to Amendments 5 and 6. Under Amendment 7 the legislature need only "take into consideration" the ability of racial and language minorities to participate in the political process and elect candidates of their choice. Once considered, the legislature is free to decline to take these interests into account when drawing districts. And because this "consideration" is at least equal to every other standard in the constitution, including those contained in Amendments 5 and 6, the legislature would remain free to draw a redistricting plan 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."

Thus even though voters will believe they are furthering the interests of racial and language minorities by voting "yes" for Amendments 5, 6, and 7, the reality is Amendment 7 destroys the very protections voters intended to create with their "yes" vote on Amendments 5 and 6. The ballot summary does not disclose this. Under these specific circumstances, the Legislature's failure to give voters notice of its purpose and effect (to avoid the restrictions of the citizen initiatives) renders the proposal misleading and contrary to section 101.161(1), Florida Statutes.

This result is supported by *Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), *rev. denied*, 523 So. 2d 577 (Fla. 1988). In *Kobrin*, a race to elect members to a county fire and rescue district was scheduled to be on the ballot. *Id.* The county then proposed to place a proposition in the ballot that would eliminate the district entirely, notwithstanding the election of district members to take place in the same election. *Id.* The court struck the proposition because it made no specific reference to the "totally inconsistent, but simultaneously conducted election, nor even to the elimination of the board itself." *Id.* The court concluded that "the apparent studied omission of such a reference and the consequent and just

as obvious failure to dispel the confusion which must inevitably arise from this set of circumstances renders the language as framed fatally defective." *Id.*

Defendants' sole defense of the lack of disclosure of the effects on Amendments 5 and 6 is that they are not obligated to make such disclosure, citing *Advisory Opinion to Attorney Gen. re Florida Growth Mgmt. Initiative Giving Citizens the Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118 (2008) (approving citizens' initiative sponsored by "Floridians for Smarter Growth" relating to local growth management plan changes) (*Growth Mgmt. Initiative*). But this opinion does not govern the facts of this case.

In *Growth Mgmt. Initiative*, the Court was considering a citizens' initiative that had achieved ten percent of the required signatures in one-fourth of the required congressional districts so as to trigger Supreme Court review. *Id.* at 118 (citing art. IV, § 10 and art. V, § 3(b)(10), Fla. Const.); § 15.21, Fla. Stat. This initiative would have preempted another citizens' initiative, sponsored by "Florida Hometown Democracy," *if* both initiatives successfully achieved ballot position and were approved by the voters. *Growth Mgmt. Initiative*, 2 So. 3d 118, 119 (Fla. 2009) (quoting text of Floridians for Smarter Growth's Amendment as intended to "pre-empt or supersede recent proposals to subject all comprehensive land use plans and amendments to votes").

At the time of the Court's opinion in *Growth Mgmt. Initiative*, Florida Hometown Democracy's amendment had been approved by the Supreme Court for placement on the ballot, but had not yet acquired the number of petitions necessary to be *placed* on the ballot. In fact, the Florida Hometown Democracy amendment did not achieve ballot placement until June 22, 2009, several months after the advisory opinion in *Growth Mgmt. Initiative*.[1] The "alternative" proposed amendment approved by the Court in *Growth Mgmt. Initiative* still has not achieved ballot position.[2] It is understandable that a majority of the Court did not find the Floridians for Smarter Growth amendment needed to disclose its potential effect upon the Hometown Democracy amendment in order to satisfy the accuracy requirement, because it was uncertain when—if ever—the two citizen initiatives ultimately would be placed on the ballot.

But there is no such uncertainty in this case. Amendments 5 and 6 achieved ballot placement on January 22, 2010. These citizen-sponsored amendments were certain to appear on the 2010 general election ballot, and the legislature

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[1] *See* Fla. Dept. of State, Div. of Elections, 2010 Proposed Constitutional Amendments, http://election.dos.state.fl.us/initiatives/initiativelist.asp?year=2010&initstatus=ALL&MadeBallot=Y&ElecType=GEN (last visited June 30, 2010).

[2] *See* Fla. Dept. of State, Div. of Elections, Initiatives/Amendments/Revisions, http://election.dos.state.fl.us/initiatives/initiativelist.asp (last visited June 30, 2010).

intentionally drafted Amendment 7 to interfere with their effectiveness, even borrowing their titles and portions of their text to conceal from voters the devastating effect of Amendment 7 on the effectiveness of Amendments 5 and 6. There can be no more classic case of "hiding the ball". As a timely filed legislatively-proposed amendment, Amendment 7 was also certain to appear on the 2010 general election ballot. Art. XI, § 5, Fla. Const. Under these unprecedented circumstances, in order to satisfy the accuracy requirement, Amendment 7's ballot summary must inform voters of its chief purpose and effect of eviscerating the mandatory standards contained in Amendments 5 and 6. Its failure to do so renders Amendment 7 clearly and conclusively defective.

CONCLUSION

The trial court correctly determined that the ballot title and summary of Amendment 7 fail to inform voters in clear and unambiguous language of the amendment's chief purpose and effect. Accordingly, voter approval would be a nullity. The trial court's ruling should be affirmed.

Respectfully submitted,

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I HEREBY CERTIFY that this brief uses Times New Roman 14-point font in compliance with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1375
Lower Tribunal Case Nos. 2010-CA-001803, 1D10-3676

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida, *et al.*,

Appellants,

v.

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Appellees.

GOVERNOR CHARLIE CRIST'S UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Pursuant to Rule 9.370 of the Florida Rules of Appellate Procedure, Governor Charlie Crist, by and through undersigned counsel, hereby moves this Court for leave to file the attached amicus curiae brief in support of Appellees' Answer Brief and the lower court's entry of summary judgment in their favor.

Undersigned counsel has requested and is authorized to represent that all parties consent to the filing of this brief.

The Governor seeks to appear as *amicus curiae* in this matter in furtherance of his constitutional duty to "take care that all laws be faithfully executed." Art. IV, § 1(a), Fla. Const. Specifically, the Governor seeks to ensure faithful execution of article XI, section 5 of the Florida Constitution and section 101.161(1), Florida Statutes, which collectively require that a statement accurately describing the substance of a proposed constitutional amendment appear on the ballot in clear and unambiguous language. The accuracy requirements of these provisions are intuitively central to the integrity of our constitutional democracy. When the people of Florida are presented with an opportunity to amend their Constitution, it is absolutely essential that they are presented with the information they need, in terms they can understand. The fundamental right of the people to collectively decide whether to approve a constitutional amendment would be rendered meaningless if the substance of a proposed amendment could be misrepresented on the ballot or presented in an indecipherable manner.

The Governor believes that the ballot clarity protections of article XI, section 5, and section 101.161 are of unique significance in this case because the challenged amendment proposed by a joint resolution of the Legislature would, if approved by voters, undermine two other amendments proposed by Florida citizens through the initiative process. The Legislature's use of unclear and inaccurate ballot language in such circumstances jeopardizes two fundamental aspects of Florida's participatory democracy—it prevents voters from casting an informed ballot on the legislative proposal, and, even more significantly, it directly burdens the people's right to amend their constitution by citizen initiative.

The Governor seeks leave to appear as amicus curiae on behalf of the Appellees in light of the paramount importance of the laws at issue to the integrity of our constitutional democracy. When the people of Florida are presented with an opportunity to amend the Florida Constitution, the most fundamental document of our state government, it is essential that they are given all the information necessary to make an informed choice. The ballot clarity requirements of article XI, section 5 and section 101.161 demand nothing less than full, clear, and accurate disclosure of the chief purposes and effects of a proposed constitutional amendment submitted to the voters for approval. The Governor seeks to appear in this case to help ensure that the proponents of proposed constitutional amendments are strictly held to this essential requirement.

Wherefore, the Governor respectfully requests the Court grant this unopposed motion for leave to file the attached amicus curiae brief.

Respectfully submitted this 9th day of August, 2010.

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IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1375
Lower Tribunal Case Nos. 2010-CA-001803, 1D10-3676

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida, *et al.*,

Appellants,

v.

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,

Appellees.

BRIEF OF GOVERNOR CHARLIE CRIST AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

Governor Charlie 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. In this case, the Governor seeks to ensure faithful execution of article XI, section 5 of the Florida Constitution and section 101.161(1), Florida Statutes, which collectively require that a statement accurately describing the substance of a proposed constitutional amendment appear on the ballot in clear and unambiguous language. While the Governor is generally able to rely on other officials within the executive branch to directly discharge his obligation of faithful execution, the Secretary of State is unable to do so in this case because she was named as a defendant due to her ministerial role in the ballot placement process.

The accuracy requirement of article XI, section 5, codified in section 101.161, is intuitively central to the integrity of our constitutional democracy. When the people of Florida are presented with an opportunity to amend their constitution, it is absolutely essential that they are presented with the information they need, in terms they can understand.

The people have a fundamental right to collectively decide whether to amend the Constitution. This fundamental right would be rendered meaningless if the substance of a proposed amendment could be misrepresented on the ballot or

presented to the people in an indecipherable manner. Moreover, the ballot clarity protections of article XI, section 5 and section 101.161 are of unique significance in this case because the challenged amendment proposed by a joint resolution of the Legislature ("Amendment 7") would, if approved by voters, eviscerate two other amendments proposed by citizen initiative ("Amendments 5 and 6"). The Legislature's use of unclear and inaccurate ballot language in such circumstances jeopardizes two fundamental aspects of Florida's participatory democracy—it prevents voters from casting an informed ballot on the legislative proposal, and, even more significantly, it directly burdens the people's right to amend their constitution by citizen initiative.

SUMMARY OF ARGUMENT

The ballot clarity requirements of article XI, section 5, Florida Constitution, and section 101.161, Florida Statutes, demand of the Legislature nothing less than full, clear, and accurate disclosure of the chief purposes and effects of a proposed constitutional amendment submitted to the voters for approval. Article XI, section 5 "plays no favorites"—its "strict minimum requirements" apply "across-the-board to *all* constitutional amendments, including those arising in the Legislature." *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000) (emphasis in original). Thus in evaluating the Legislature's attempted compliance with article XI, section 5, the

Legislature is not entitled to the typical deference furnished by the Court as a matter of respect between coequal branches of state government.

Even if the Legislature's demand for deference is not foreclosed by *Armstrong*, the Court should foreclose it here. The people are the ultimate sovereign in Florida, and all residual political power resides in them. *See* art. I, § 1, Fla. Const. Accordingly, the Court should hold that the respect owed the Legislature as a coordinate branch of government must yield to the respect owed to the people when the Court construes constitutional provisions, such as article XI, section 5, which directly implicate the balance of power between the people and the Legislature. Further, the Legislature should be held to the strictest possible standard where, as here, it seeks to expand its own power through the constitutional amendment process.

Appellants' extensive reliance on legislative history in their brief does far more to prove that Amendment 7's title and summary fail to satisfy the ballot clarity requirement than it does to rationalize reversal of the trial court's order. The voters will not have the benefit of Appellants' carefully chosen commentaries of legislators and their staff when confronting Amendment 7's confusing text on Election Day. At best, this history is irrelevant because the question of whether Amendment 7 can be ascribed a constitutional meaning through deferential rules of construction has nothing to do with the test for compliance with article XI, section

5. At worst, it constitutes a tacit admission that Amendment 7 is so impenetrable and bewildering that not even its chief advocates can defend the amendment without discovering and construing a series of ambiguities in a manner highly deferential to its legislative drafters.

The reality is that Amendment 7's language is irretrievably confusing and misleading. Thus the mere recitation of that language in the ballot summary woefully fails to inform, especially when read together with a ballot title that appears calculated to convince voters that Amendment 7 imposes "standards" for the Legislature to follow in drawing legislative districts when, in truth, it does the exact opposite: it obliterates standards the Legislature would *otherwise* have to follow in drawing these districts. Simply put, Amendment 7 constitutes an expansion of legislative power deceptively packaged as a restriction on legislative power. The trial court was correct to strike it from the ballot.

ARGUMENT

Article XI, section 5 of the Florida Constitution and section 101.161, Florida Statutes, require that a ballot submitting "a constitutional amendment . . . to the vote of the people" contain a summary conveying "the substance of [the] proposed amendment . . . in clear and unambiguous language," explaining "the chief purpose of the measure." § 101.161, Fla. Stat. (providing also for a ballot title "by which the measure is commonly referred to or spoken of"). This "truth in packaging" law

serves an indispensible purpose in the democratic process: ensuring that the people of Florida have notice of what they must decide when they are asked whether or not to amend their constitution. *Armstrong*, 773 So. 2d at 13.

Amendment 7's ballot title and summary violate article XI, section 5 and section 101.161 because they are inaccurate. They misleadingly represent the amendment's purpose as providing standards for the Legislature to follow in redistricting when the amendment does precisely the opposite: it eliminates binding standards that confine the Legislature's power to draw legislative districts by relegating those standards to mere aspirational guidelines.

Appellants attempt to escape this reality by acknowledging the text of Amendment 7 is ambiguous, then according the Legislature significant deference in construing Amendment 7 and applying that same level of deference to the title and summary. The Court should reject the creative and serpentine logic of Appellants' argument because it would result in an end-run around the ballot clarity requirement, which this Court has described as necessary for our constitutional democracy to "function effectively" and "remain viable." *Armstrong*, 773 So. 2d at 21. At most, Appellants establish that the ballot title and summary are hopelessly ambiguous, rendering the ballot language impermissibly unclear as opposed to impermissibly false. For the reasons stated in Appellees'

brief and for the reasons developed below, the trial court's order should be affirmed.

I. The Legislature's ballot title and summary are not entitled to deference.

Appellants contend, through winding logic, that a ballot title and summary drafted by the Legislature must be construed in a manner, if possible, that will sustain its validity. In reaching that conclusion, Appellants begin with the familiar axiom that actions of the Legislature are entitled to deference and should be upheld if susceptible to any construction that will avoid invalidity. *See* IB at 8. While their application of this maxim to the text of the proposed amendment appears permissible under *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956), *quoted in Armstrong*, 773 So. 2d at 14, Appellants' next leap is far less logical. After construing ambiguities in the proposed amendment in the light most favorable to them, they next contend that the ballot title and summary satisfy the "strict minimum standard for ballot clarity" mandated by article XI, section 5, *Armstrong*, 773 So. 2d at 21, by mimicking the language of the amendment.

Appellants' attempt to use the artifice of legislative deference as an end-run around article XI, section 5 must be rejected for several reasons. First, this Court made unmistakably clear in *Armstrong* that the Legislature is not entitled to a free pass from the requirements of article XI, section 5. To the contrary, the Legislature's obligation to describe its proposed amendments to the voters in clear

and accurate terms is no less strict than the people's obligation to do the same through the citizen initiative process. The ballot clarity "requirement plays no favorites-it applies across-the-board to *all* constitutional amendments, including those proposed by the Legislature." *Id.* (emphasis in original).

Further, even if *Armstrong* does not settle the issue, the Court should hold that the Legislature is not entitled to deference with respect to the ballot clarity requirement because the interests underpinning article XI, section 5 are far removed from the interest from which the general rule of legislative deference is derived. As Appellants implicitly acknowledge, that general rule owes its existence in Florida to the separation of powers doctrine, embodied in article II, section 3 of the Florida Constitution, which requires the Court to accord "the respect due to a coordinate branch [of state government]." *See* IB at 8. This Court recognized that same interest in *Armstrong* in acknowledging that the doctrine of legislative deference has "a measure of" utility when the Court conducts its review of legislatively proposed constitutional amendments. *Armstrong*, 773 So. 2d at 14 (recognizing deference owed to the Legislature as a coequal branch where deference is not foreclosed by "strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature").

However, the respect owed by and between the coequal branches of state government is not relevant to the ballot clarity requirement. The interest at stake with respect to ballot language is paramount, particularly with regard to legislatively proposed constitutional amendments, because of the respect that all branches of state government owe to their sovereign. In Florida, "sovereignty resides in the people." *Armstrong*, 773 So. 2d at 14 (quoing *Gray*, 89 So. 2d at 790); *see also* art. I, § 1, Fla. Const. ("All political power is inherent in the people."). In balancing the deference this Court owes the Legislature, as a coordinate branch of government, and the deference this Court owes the people, as the sovereign power in our constitutional democracy, the deference owed to the people must always prevail. Accordingly, irrespective of the deference this Court owes the Legislature in other contexts, the paramount deference owed to the people should require this Court to demand nothing less of the Legislature than strict, unwavering compliance with article XI, section 5.

As this Court explained in *Armstrong*, the purpose of the ballot clarity requirement "is to ensure that each voter will cast a ballot based on the full truth." *Armstrong*, 773 So. 2d at 21. In evaluating whether this requirement has been met, this Court has stated it "look[s] not to the subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself." *Id.* at 18. In light of the purpose of this evaluation—the clarity of what is

represented to the voters—the Legislature has no entitlement to deference, under article II, section 3 or otherwise, to place language before the voters that consists of something less than "the full truth." While deferential rules of construction may be appropriate in construing the text of an amendment, they are useless in determining to whether the ballot presents voters with "plain unequivocal language." *Advisory Op. to Atty. Gen. ex rel. Local Trustees*, 819 So. 2d 725, 730 (Fla. 2002).

If anything, the Legislature should be held to a stricter standard, particularly with respect to proposed amendments such as Amendment 7, through which the Legislature seeks to expand its own power. *See Smathers v. Smith*, 338 So. 2d 825, 828, 828 n.12 (Fla. 1976) (Legislators should have an "even more compelling notice-giving need[]" for constitutional amendments than for legislation, because "there is no executive 'check' for errors, omissions, and inconsistencies."). This Court has held that when the Legislature "attempt[s] to substantively alter a constitutional check and balance on its power [via legislation,] it is *not* owed judicial deference, great or otherwise." *Browning v. Florida Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1068 n.14 (Fla. 2010) (emphasis in original). The Court should similarly conclude that when the Legislature seeks to obtain additional power through the constitutional amendment process, its representations to the voters should be intensely scrutinized. All branches of

government owe the voters the fairest opportunity possible to understand the checks on state power they are being asked to relinquish.

As explained in detail below, Appellants' entire brief constitutes an acknowledgment that charitable rules of construction are necessary to decipher what the Legislature intended the proposed amendment to accomplish. Because those charitable rules of construction are unavailable to clarify a legislatively drafted ballot title and summary, Appellants' brief effectively demonstrates why the trial court's order must be affirmed.

II. Legislative history is irrelevant, at best, to the issue of whether Amendment 7's purpose and effect are clearly stated on the ballot.

In their initial brief, the Appellants rely heavily on legislative history to establish that the Legislature did not intend Amendment 7 to abrogate any redistricting standards that currently exist in the Florida Constitution. *See* IB at 20–28. Appellants' reliance on legislative history constitutes a tacit acknowledgement that the text of the amendment is ambiguous, because legislative history is "irrelevant" if meaning "can be discerned from the language" of the legislative pronouncement itself. *State v. Sousa*, 903 So. 2d 923, 928 (Fla. 2005); *Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000)

While it is certainly true that there is no *plain* meaning of the language of Amendment 7 or its ballot title and summary, the legislative history propounded by Appellants does nothing to cure this violation of article XI, section 5. Rather, the

Appellants' *post hoc* efforts to ascribe a meaning to the text only emphasize that the title and summary impermissibly hide the ball. Use of legislative history to clarify Amendment 7's intended purpose and effect cannot be appropriate because the pertinent question for ballot clarity purposes is whether *the voters* will be adequately informed when they cast their votes, not whether the Legislature *intended* a constitutional purpose. Voters will not have the benefit of transcripts of floor debates and committee hearings when they read the ballot title and summary in the voting booth.

Further, Appellants' assertion that the comments of a handful of legislators and staffers illuminate the true meaning of Amendment 7, and derivatively, the corresponding ballot language, is fundamentally illogical in the context of article XI, section 5. A ballot proposal "must stand on its own merits and not be disguised as something else." *Armstrong*, 773 So. 2d at 14–16. The "subjective criteria espoused by the amendment's sponsor" is irrelevant to this analysis. *Id.* at 18. What "counsel for the Florida House explained to members of the Rules and Calendar Council" in April, for example, *see* IB at 22, will be of no assistance to a voter confronted with the mystifying language of Amendment 7's ballot summary.

If meaning can be discerned from the text, then legislative history is irrelevant. Yet legislative history is equally irrelevant to unclear ballot language because the "ballot title and summary will be the only information that is available

to voters." *Florida Dep't of State v. Slough*, 992 So. 2d 142, 148–49 (Fla. 2008). Courts consider voter approval of an unclear ballot proposal a "nullity," not because the amendment is insusceptible to *any* meaning, but because an amendment is not "*accurately* represented on the ballot." *Id.* at 146 (emphasis in original). Thus Appellants' reliance on legislative history proves nothing more than that the ballot language is fatally inaccurate.

III. The ballot title and summary are unclear because they fail to alert Voters that Amendment 7 will neutralize other proposed amendments.

The legislative history set forth in Appellants' initial brief confirms that the ballot title and summary fail to alert voters to Amendment 7's purpose of altering the effect of Amendments 5 and 6. Appellants readily assert that "the entire current of the legislative debate concerned the anticipated consequences of Amendments 5 and 6." IB at 22–23 (quoting a legislator's explanation that the "intent" of Amendment 7 was "to respond to the proposed change in the process of Amendments 5 and 6"). The purpose of Amendment 7 was to undermine the binding standards proposed by Amendments 5 and 6. Yet Amendment 7's title and summary fail to notify voters of this aim, instead falsely suggesting the opposite—that the amendment would *create* binding standards rather than destroy them.

Accepting *arguendo* Appellants' conclusion that Amendment 7 could have no possible effect on *existing* redistricting standards, Amendment 7's summary makes no sense without reference to the provisions of Amendment 5 and 6.

Amendment 7 requires the state to "balance and implement the standards in the State Constitution," yet the Appellants adamantly insist that the *existing* standards are "absolute, objective requirement[s]" that are not susceptible to balancing. IB at 11–15 (arguing that Amendment 7 only "envision[s]" a "weighing and balancing of *equal* standards," i.e., standards not currently in the constitution, because the existing "standards cannot be defeated by other standards"). Thus, according to Appellants' argument, the only "provision of Article III" available for "balancing" with the discretionary considerations of Amendment 7 are the standards in Amendment 5 and 6—*which Amendment 7 was designed to weaken.*

Rather than make Amendment 7's purpose clear, the title and summary lead the reader on a labyrinthine quest for meaning, raising along the way—but failing to answer—questions relating to which standards are to be balanced and where they are to be found. Assuming the "balancing" language in Amendment 7 has some meaning in Appellants' argument, it can only be the relegation of the mandatory requirements proposed by Amendments 5 and 6 to optional factors for the Legislature's consideration, in the Legislature's discretion.

Appellants attempt to excuse the Legislature's failure to mention this chief purpose of Amendment 7 in the ballot language, relying on an unfounded interpretation of the ballot clarity requirement: that a title and summary must state the amendment's purpose *unless that purpose is to weaken or subvert the effect of*

other amendments on the ballot—in this case, Amendments 5 and 6. *See* IB at 9. Neither the constitution, nor the statute, nor case law carves out such an exception to the unqualified requirement that, *whatever* the proposed amendment's chief purpose may be, *that purpose must be clearly stated.* Accepting Appellants' argument would give future legislatures free reign to sabotage any proposed amendment by nullifying its effect with another amendment, all the while disguising their true purpose with impunity.

The purpose of the ballot clarity requirement—to ensure that the title and summary do not "hide the ball" from voters, *Slough*, 992 So. 2d at 147—is subverted no matter what kind of "ball" unclear ballot language "hides." Hiding a proposed amendment's effect on existing constitutional provisions and hiding its effect on other amendments on the ballot equally deceive the people who are entitled to be informed of the effect of their votes. Thus the Court should reject out of hand any contention that concealing a conflict with the provisions of Amendments 5 and 6 constitutes a deception that is not legally cognizable because those proposed amendments do not presently *exist* in the Constitution.

Furthermore, if all three of the amendments are approved by voters, then Amendment 7 would indeed affect "existing" constitutional provisions—those that would come into existence when Amendments 5 and 6 are added simultaneously to the addition of Amendment 7. Proposed amendments that directly contradict each

other need not necessarily refer to each other when, by virtue of their language and simultaneous existence on the ballot, they fairly apprise voters of the choice being presented. *See, e.g., Citizens for Term Limits & Accountability, Inc. v. Lyons*, 995 So. 2d 1051, 1055 (Fla. 1st DCA 2008) (approving the presentation of "alternatives to the electorate on the same ballot" where the "statement explaining [one] proposal inform[ed] voters in no uncertain terms" of its effect on another item on the ballot).[1] However, a proposed amendment's title and summary violate article XI, section 5 and section 101.161 when they obscure the fact that a vote for one proposed amendment would vitiate the effect of another on the same ballot. *Cf. Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988) (finding proposition language "fatally defective" where its failure to alert voters of conflict with another ballot item subjected voters to "bewildering and conflicting decision-making").

Moreover, Amendment 7's placement directly following Amendments 5 and 6 heightens its deceptiveness. Its title mimics the other redistricting amendments, repeating almost verbatim that it too provides "STANDARDS FOR [THE] LEGISLATURE TO FOLLOW IN . . . REDISTRICTING." Given that Amendment 7's actual effect would be the opposite of the preceding

[1] *See also Advisory Op. to Att'y Gen. re Florida Growth Mgmt. Initiative Giving Citizens the Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 118–21 (Fla. 2009) (approving title and summary of amendment requiring "[v]oter approval of growth management plan changes . . . if 10% of the voters in the city or county sign a petition calling for such a referendum" where "competing proposed amendment would" make voter approval mandatory).

amendments—eliminating standards instead of establishing them—its appearance on the ballot with an almost identical title guarantees that voters will be subjected to the type of "bewildering and conflicting decision-making" that courts have decried as "fatally defective." *Id.* In light of this, the Court should decline Appellants' invitation to create an exception to the rule that Article XI, section 5 prohibits drafters of ballot language from omitting an amendment's chief purpose when that purpose is to injure another amendment proposed on the same ballot.

IV. Word-for-word recitation of the amendment text does not render the ballot language clear, because the title and amendment are misleading.

Appellants argue that, because the summary repeats the text of the actual amendment almost verbatim, the summary is *ipso facto* clear and valid. To the contrary, the Florida Constitution requires more than the literal accuracy achieved by parroting the amendment's text. The ballot must also convey "the *true* meaning, and ramifications, of an amendment," and must not mislead the voter. *Askew v. Firestone*, 421 So. 2d 151, 151, 155–56 (Fla. 1982) (emphasis added). If the text of the amendment does not express its purpose plainly and unequivocally, as is the case with Amendment 7, then the summary must employ adequate language to ensure that voters have been clearly apprised of the chief purpose of the amendment.

Appellants cobble together quotations from various opinions in which summary language virtually identical to an amendment's text was held to be

sufficiently accurate. *See* IB at 28–30 (and cases discussed therein). From this, Appellants leap to the conclusion that divergence from the language of a proposed amendment is the *sine qua non* of a ballot clarity violation. To be sure, a ballot title and summary that "impermissibly employ terminology divergent from that contained in the text of the actual proposed amendment" may mislead voters. *Advisory Op. to Att'y Gen. re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1237 (Fla. 2006). However, it does not follow that direct quotation of an amendment's language ensures that a summary will *never* mislead voters. *See 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, 488 (Fla. 2007) (finding summary language "follow[ed] the proposed constitutional amendment very closely *and* [wa]s not misleading") (emphasis added).

To the contrary, this Court's precedent makes clear that nearly identical language does not assure ballot clarity. In *Askew v. Firestone*, this Court invalidated a joint resolution even though the proposed amendment's change to an existing constitutional provision was "as stated" in the ballot summary, because "the stated change [wa]s only incidental to the true purpose and meaning of [the constitutional provision] in its entirety." 421 So. 2d at 156. Discussing *Askew*, this Court subsequently noted that "[a]lthough the ballot summary *faithfully tracked the text of the proposed amendment*, the summary failed to explain" the

amendment's intended effect. *Armstrong*, 773 So. 2d at 14–16 (emphasis added). A ballot may be rendered "deceptive or misleading" not only by the language it uses, but also by the "omission of words and phrases," *Slough*, 992 So. 2d at 149—a danger that is not necessarily averted by merely repeating the amendment's text. *See Armstrong*, 773 So. 2d at 7 (holding ballot clarity must ensure that "each voter casts a ballot based on the *full* truth").

Additionally, this Court has cautioned that "the ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Slough*, 992 So. 2d at 148. Thus Appellants' argument that a summary's verbatim recital of amendment text alleviates "any concerns regarding inaccuracy," IB at 31, promises too much. The ballot title's stated purpose of "providing standards for the legislature to follow" is directly counter to Amendment 7's actual purpose of eliminating binding standards by making all criteria discretionary. When "read together" with the confusing language of the amendment, it will mislead voters, preventing them from casting an intelligent and informed ballot. *Id.* at 148; *cf. Armstrong*, 773 So. 2d at 18 (invalidating a joint resolution because the "main effect of the amendment . . . far outstrip[ped] the stated purpose" on the ballot).

The doubtfulness of Appellants' contention that use of the exact text of the amendment immunizes it from the ballot clarity requirement becomes even clearer

in light of Amendment 7's failure to define the amorphous concept, "community of common interests." A ballot summary is "misleading" and "must be stricken" where undefined terms place its meaning "within the subjective understanding of each voter to interpret." *Advisory Op. to Att'y Gen. re People's Prop. Rights Amendments Providing Comp. for Restricting Real Prop. Use may Cover Multiple Subjects*, 699 So. 2d 1304, 1308–1309 (Fla. 1997) (concluding that definitions of terms such as "in fairness," "loss in fair market value," and "common law nuisance" were necessary for clarity), *overruled on other grounds in Advisory Op. to Att'y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968 (Fla. 2009). Thus verbatim recitation of Amendment 7 cannot inform voters of its legal ramifications when it fails to define "community of common interests," a phrase that is not frequently used by the common voter and lacks a plain meaning. *See Advisory Op. to Att'y Gen. to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 898–99 (Fla. 2000) (invalidating a proposal that failed to define "otherwise unlawful classification" and "bona fide qualification based on sex").

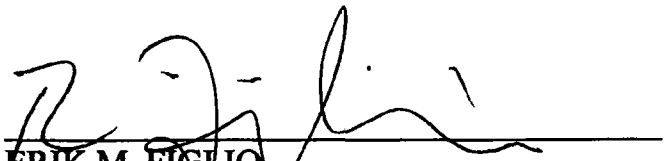
The people of Florida "deserve nothing less than clarity when faced with the decision of whether to amend [the] state constitution." *Slough*, 992 So. 2d at 149. "[I]t is the foundational document that embodies the fundamental principles through which organized government functions." *Id.* In defiance of that

requirement, the Legislature's ballot proposal employs what this Court has decried as "wordsmithing" that masks the true effect of a proposed amendment. *Id.* (recognizing that deceptive wording can be used "to enhance the chance of passage"). Accordingly, the Court should conclude that the trial court did not err in removing Amendment 7 from the ballot.

CONCLUSION

For the foregoing reasons, Governor Crist respectfully requests that this Court affirm the judgment of the trial court.

Respectfully submitted,



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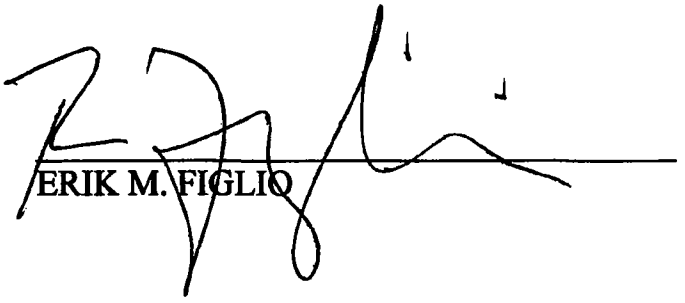
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that his Petition is typed in Times New Roman 14 point font and complies with Florida rule of Appellate Procedure 9210(a).



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Supreme Court of Florida

TUESDAY, AUGUST 10, 2010

CASE NO.: SC10-1375
Lower Tribunal No(s).: 1D10-3676, 2010-CA-001803

FLORIDA DEPARTMENT OF STATE, ETC., ET AL.	vs.	FLORIDA STATE CONFERENCE OF NAACP BRANCHES, ET AL.
Appellant(s)		Appellee(s)

The motion for leave to file brief as amicus curiae filed by Governor Charlie Crist is hereby granted and they are allowed to file brief only in support of Appellees. The brief by the above referenced amicus curiae was filed with this Court on August 9, 2010.

A True Copy
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Supreme Court of Florida

FLORIDA DEPARTMENT OF STATE, AN AGENCY OF THE STATE OF FLORIDA; **DAWN K. ROBERTS,** IN HER CAPACITY AS INTERIM SECRETARY OF STATE OF THE STATE OF FLORIDA, **FLORIDA HOUSE OF REPRESENTATIVES, AND FLORIDA SENATE,**

APPELLANTS,

V.

CASE NO. SC10-1375
L.T. CASE NOS. 1D10-3676
2010-CA-1803

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *ET AL.,*

APPELLEES.
_____/

NOTICE OF APPEARANCE OF COUNSEL

NOTICE IS HEREBY given that R. Dean Cannon Jr. of Dean Cannon, P.A., enters his appearance as additional attorney of record for the Appellant, Florida House of Representatives and the Florida Senate.

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IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF STATE,
an agency of the State of Florida, *et al.*,

Appellants,

v.

Case No. SC10-1375
L.T. Case No. 2010-CA-1803

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Appellees.

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PRELIMINARY STATEMENT

References to the record shall be by "R" followed by the volume number and page number(s), e.g., (R1–25-26). Supplemental Volume 1 shall be designated "RS1."

References to Appellees' Answer Brief shall be by "Br." followed by the page number(s), *e.g.*, (Br. at 12).

All recordings of the proceedings of the Florida Senate are on file with the Secretary of the Senate.

All emphases are supplied.

ARGUMENT

Amendment 7 adds two new redistricting standards and places them on equal footing with other constitutional standards. It commands the Legislature to harmoniously balance and implement all standards. No standard may be violated.

Appellees dodge this sensible interpretation and instead advance an implausible one. Appellees labor to show, through unsupported assertions, that "implement" does not mean "implement," and that Amendment 7 will devour all other redistricting standards, present and future, in the Florida Constitution.

Appellees prefer their tortured interpretation—which they concede is not compelled by the words of the proposed amendment—because it yields illogical consequences that were never intended and therefore not mentioned in the ballot language. This Court must reject their interpretation for the very same reason.

If courts grant deference to political opponents over the Legislature, and strike legislatively proposed amendments whenever those opponents contrive a misinterpretation of them, precious little will remain of the constitutional authority of the Legislature to propose amendments to the Florida Constitution.

I. Amendment 7 Does Not Affect Contiguity.

The phrase "without subordination" makes clear that the standards in Amendment 7 are not second-class standards, but on a par with the standards in Amendments 5 and 6. To create a supposed inaccuracy in the summary, Appellees

urge the Court to interpret this phrase to elevate the standards in Amendment 7 to a superior position, and to annihilate all other standards, without notice to the voters.

But even Appellees concede—as they must—that *nothing* compels their interpretation. Appellees state that "without subordination" does "not *necessarily* mean on equal footing," and "*could just as well* mean higher." (Br. at 12.) Thus, according to Appellees, the phrase "without subordination" could mean equal or superior. "Equal," of course, avoids any alleged defect in the ballot language.

This concession alone proves that Appellees cannot show "without any doubt that the ballot language is deficient." (Br. at 8.) But Appellees go further. They tempt the Court to make an astonishing leap: to reject a concededly valid interpretation that *avoids* inaccuracy, and to embrace an interpretation that (they claim) *creates* inaccuracy.[1] This Court's precedents, respectful of a coordinate branch of government, counsel against the unnecessary invalidation of legislative acts. If possible, the Court must adopt interpretations that sustain legislative acts. *See Capital City Country Club v. Tucker*, 613 So. 2d 448, 452 (Fla. 1993).

Once again, Appellees fail to address the illogical consequences of their interpretation. Under their interpretation, the Legislature could ignore not only

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[1] In discussing the legislative history of Amendment 7, Appellants do not, as Appellees claim, concede that Amendment 7 is ambiguous. Appellants stated that the meaning of Amendment 7 is "apparent from the face of the amendment." (Initial Brief at 11.) An alternative argument is not a concession.

contiguity, but also the numerical limitation on state legislative districts, *see* Art. III § 16(a), Fla. Const., and create *any* number of districts to promote communities of common interest. Appellees never address this inevitable conclusion.

Appellees suggest that the command to "balance" standards permits the Legislature to violate standards, and thus destroys the command to "implement" standards. (Br. at 13.) But Appellees misunderstand the nature of redistricting. Discretion to balance standards is essential to the complex task of redistricting. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

Discretion to balance standards is not, however, permission to violate them. Courts in states whose constitutions prescribe fact-intensive standards recognize that it is not only possible but essential to balance and implement all standards. *See, e.g., Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (commission may not "ignore any of the constitutional criteria" but enjoys "flexibility to give more emphasis to one goal over another"); *In re Reapportionment of Towns of Hartland, Windsor & West Windsor*, 624 A.2d 323, 330 (Vt. 1993) (state legislature must comply with "all constitutional and statutory requirements" but has "flexibility"); *Wilkins v. West*, 571 S.E.2d 100, 108 (Va. 2002) (state legislature must "satisfy a

number of state and federal constitutional and statutory provisions" but possesses "discretion in reconciling these often competing criteria").[2]

Appellees are plainly wrong to argue that contiguity is not a binary, objective standard. (Br. at 16.) The contours of this standard were "debated," but those questions are now settled. This Court has created bright-line rules to assess whether districts are contiguous. The creation of non-contiguous districts, contrary to those *per-se* rules, would violate the command to implement all standards.[3]

According to Appellees, this Court need not interpret the phrase "without subordination": the bare fact that Appellees dispute its meaning establishes its ambiguity. (Br. at 18.) This phrase is not ambiguous. But if it were, it would not invalidate Amendment 7. Where the words of a summary are borrowed from the amendment itself, this Court has not deemed uncertainties in meaning problematic. *See, e.g., In re Adv. Op. to the Att'y Gen. re Prot. From Repeated Med. Malpractice*, 880 So. 2d 667, 673 (Fla. 2004) (holding that "medical doctor" and

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[2] Appellees note that Amendment 7 requires the Legislature to *apply*—not *balance*—federal standards. (Br. at 14-15.) The reason for this difference is obvious, and harmless. Federalism dictates that federal law must prescribe the means of implementing federal standards. Whether federal standards must be balanced, or whether some federal standards are superior to others, is a matter for federal law. It does not follow that compliance with state standards is optional.

[3] Appellees also argue that the command to "implement the standards in this constitution" means some—not all—standards. (Br. at 14.) This makes no sense. When followed by a plural noun and a prepositional phrase, "the" invariably means

"three or more incidents" are not fatally ambiguous phrases, "because those words derive from the text of the proposed amendment itself").[4] Ambiguous phrases in ballot language that exactly mirror the actual text of the proposed amendment are "better left to subsequent litigation." *In re Adv. Op. to the Att'y Gen. re Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004); *accord Adv. Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1229, 1238 (Fla. 2006). Otherwise, no proposal could attain ballot placement, since no language can achieve perfect clarity and obviate the need for future interpretation.[5]

Finally, even if Appellees can show, clearly and without any doubt, that the words "without subordination" nullify all mandatory standards, the summary would not mislead. Because those very words appear in the summary, the voters

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"all." Any similar phrase—"the letters in the mailbox," or "the cars in the parking lot," or "the trees in the courtyard"—immediately disproves Appellees' suggestion.

[4] As a result, Appellees' complaints that the *amendment text* is complicated have no bearing on whether the ballot language accurately represents the proposed amendment. Ambiguities have proven fatal where (unlike this case) the summary has diverged from text of the proposed amendment. *See Adv. Op. to Att'y Gen. ex rel. Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 896-97 (Fla. 2000); *Adv. Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998).

[5] In fact, if Appellees were correct, Amendments 5 and 6 would not be entitled to ballot placement. They contain various words and phrases of doubtful, ambiguous meaning. The term "language minorities," which this Court construed to mean "any language other than English," is defined differently by the federal Voting Rights Act and Florida Statutes. 42 U.S.C. § 1973l(c)(3); 28 C.F.R. § 55.1; § 101.2515, Fla. Stat. (2009). The word "compact" invites endless debate. And

would understand, with equal clarity, that Amendment 7 nullifies those standards.

II. The Ballot Title Is Accurate.

Appellees revive their contention that the word "standards" in the ballot title is misleading. According to Appellees, Amendment 7 creates no standards because its standards are permissive, and not mandatory. (Br. at 23-25.)

Amendment 7 creates standards under any rational understanding. It requires the Legislature to consider the ability of minorities to participate in the political process and elect representatives of their choice. It also authorizes the Legislature to promote communities of interest, other than political parties.

A "standard" is any "criterion for measuring acceptability." Black's Law Dictionary (8th ed. 2004). Clearly, Amendment 7 provides criteria to measure the acceptability of districts. When it draws districts, the Legislature will refer to the standards in Amendment 7 to measure acceptability. When it reviews redistricting plans, the Court will measure the acceptability of districts by reference to the same standards. Whether mandatory or permissive, the provisions of Amendment 7 will serve as criteria to validate the specific districts created by the Legislature.[6]

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the protections for minorities are derived from federal law, and have given rise to an immense body of judicial interpretation over a period of forty-five years.

[6] The ballot language, moreover, "may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Adv. Op. to the Att'y Gen. re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002); *accord Adv. Op. to Att'y Gen. re Tax*

III. The Summary Correctly Expresses the Rationally-Related Standard.

Appellees argue that the ballot language should editorialize against the proposed amendment and advise voters that the term "rationally related" creates a "very weak" standard of review—essentially "no review" at all. (Br. at 25-27.)

Amendment 7 does not eliminate meaningful judicial review, or apply an equal-protection standard to redistricting plans. It merely recognizes that, in the delicate and complex task of redistricting, the Legislature must weigh and balance various interests and standards, and that redistricting plans should not be stricken based on reasonable differences of opinion. This approach is far from unusual in states where fact-intensive standards govern redistricting. As one court explained:

> We have traditionally accorded the Legislature substantial deference in determining how to strike the proper balance among the various directives and goals laid out by State and Federal law. . . . As long as the Legislature had a reasonable justification for drawing the districts as it did, we shall not question the Legislature's determination . . . . The Constitution does not require that the Legislature adopt the best plan that any ingenious mind can devise. If we required such a determination, any redistricting plan adopted by the Legislature would be subject to endless attack by those who are later able to devise what they contend is a superior plan that may indeed more closely approximate the constitutional commands.

Mayor of Cambridge v. Sec'y of the Commonwealth, 765 N.E.2d 749, 755-56 (Mass. 2002); *accord Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep.*

Limitation, 673 So. 2d 864, 868 (Fla. 1996). As in most cases, the brief ballot title of Amendment 7 derives clarity from the summary of the proposed amendment.

Redistricting Comm'n, 208 P.3d 676, 689 (Ariz. 2009) (holding that redistricting plan must be upheld, even if "debatable," unless "no reasonable commission would have adopted this plan"); *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 98-100 (Cal. Ct. App. 2006) (holding that the "inherent difficulty" of redistricting requires plans that "reflect a reasonable application" of standards to be upheld).

There is nothing unusual about Amendment 7's rationally-related standard. The word "rationally"—a word voters know and understand—accurately expresses that standard, without the derogatory, editorial description proposed by Appellees.

IV. "Communities of Common Interest" Is Not Misleading.

"Communities of common interest" is not legal jargon, but plain English. It is based on common sense. *See* American Heritage Dictionary (4th ed. 2009). (defining "community" to means a "group of people having common interests"). Amendment 7 may be overly explanatory, but the voter is clearly informed.

"Communities of common interest" has no contrary, technical definition under Florida law. It is not defined in the Constitution, in the Florida Statutes, or in the decisions of Florida courts. This Court has never required ballot language to prescribe definitions unknown to existing law or the proposed amendment.

Not all "important terms" must be specifically defined. (Br. at 27.) In *In re Advisory Opinion to the Attorney General re Medical Liability Claimant's Compensation Amendment*, this Court did not insist on a definition of "medical

liability," noting that "the precise meaning of his term is better left to subsequent litigation." 880 So. 2d at 679; *accord Adv. Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d at 1237-38 (holding that the term "substantial equivalent" is "not within the field of undefined legal phrases" that will mislead).

This case is entirely unlike *Advisory Opinion to Attorney General ex rel. Amendments to Bar Government from Treating People Differently*, 778 So. 2d at 890 ("*Treating People Differently*"), where the phrase "bona fide qualifications based on sex" was inscrutable shorthand for specific provisions in the amendment itself, or *Advisory Opinion to the Attorney General re People's Property Rights Amendments*, 699 So. 2d 1304, 1309 (Fla. 1997), where the phrase "common law nuisance"—a phrase defined by and known only to the law—required definition.[7]

V. The Summary Is Not Inaccurate for Its Failure to Disclose an Imaginary Effect on Other Proposed Amendments.

Last, Appellees attempt to convince the Court that Amendment 7 would annihilate the protections afforded to minorities by Amendments 5 and 6, and that the summary must explain this supposed effect. On the contrary, Amendment 7

[7] Again, Appellees' argument would invalidate Amendments 5 and 6. The summaries of Amendments 5 and 6 contain several undefined phrases. The word "contiguous" has a legal definition, but the summary did not disclose it. Nor do the summaries define the word "compact," a term of art whose meaning can "vary significantly." (R1–87-88.) The summaries do not define their protections for minorities, though they use technical, legal phrases. *See Georgia v. Ashcroft*, 539 U.S. 461, 480-84 (2003). And this Court rejected the argument that the summaries

will enhance the opportunity of all Florida citizens to participate in the political process. Moreover, a ballot summary need not explain the proposed amendment's effect on other pending proposals—proposals the voters might never adopt.

On its face, Amendment 7 cannot logically be construed to impair the protections afforded to minorities by Amendments 5 and 6. Amendments 5 and 6 afford minorities two minimum protections. These specific protections establish a floor that must be satisfied at all events. They are not erased from the Constitution by the broadly applicable—and perfectly compatible—command in Amendment 7 to consider the interests of minorities. General provisions do not eliminate specific provisions, *Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009), and constitutional provisions must, if at all possible, be harmonized with each other, *Gray v. Bryant*, 125 So. 2d 846, 858 (Fla. 1960).

It defies common sense to suggest that Amendment 7's broad safeguards for minorities displace the specific but limited safeguards of Amendments 5 and 6. Since 1992, through redistricting, the Legislature has markedly increased minority representation. Far from undoing these historic achievements, the broad protection afforded by Amendment 7 serves all-important, complementary purposes:

Amendments 5 and 6 require the creation of certain "minority districts."

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must define the legal phrase "language minorities." *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

But, in the creation of all other districts, the Legislature must be guided *solely* by compactness and local boundaries. *See* Fla. S. Comm. on Reapp., recording of proceedings (Feb. 11, 2010) (comments of Ellen Freidin). Amendments 5 and 6 would severely limit legislative discretion to protect minorities in these districts.

In *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), the Court held that Section 2 of the Voting Rights Act (the "VRA") does not require the creation of districts to protect minority communities that are too small to comprise a majority in a single-member district. Thus, where state law requires adherence to local boundaries, the VRA does not protect such communities from division into different districts. And while Amendments 5 and 6 require adherence to local boundaries, Fair Districts has stated that the protections for minorities in Amendments 5 and 6 merely codify the VRA, creating no additional protections for minorities. (R1–94.) Amendment 7 provides discretion to protect minority communities that cross local boundaries.

Amendments 5 and 6 ensure that the opportunity of minorities to elect representatives of their choice will not *diminish*, but any attempt to *enhance* that opportunity is encumbered by the requirements of compactness and adherence to local boundaries. Amendment 7 affords the Legislature a measure of discretion to enhance the opportunities of minorities to elect the candidates of their choice.

The Legislature designed Amendment 7 in response to these concerns. Amendment 7 was crafted to supplement—not supplant—the limited safeguards

provided by Amendments 5 and 6. There is no support for the suggestion that Amendment 7 nullifies the protections for minorities in Amendments 5 and 6.[8]

In any event, this Court has rejected the argument that a ballot summary must disclose a proposed amendment's effect on other proposed amendments. In *Advisory Opinion to Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court upheld for a proposed amendment sponsored by Hometown Democracy, requiring voter approval of all amendments to comprehensive land-use plans. But before voters could adopt the amendment, this Court evaluated a "competing proposed amendment" *expressly* designed to "pre-empt or supersede" the earlier proposal. *Adv. Op. to Att'y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 119, 121 (Fla. 2008). Hometown Democracy argued that the "proposal is intended to pre-empt or supersede the Florida Hometown Democracy proposed initiative," without disclosure in the summary. *See* Answer Brief of Interested Person Florida Hometown Democracy, Inc., at 21 (*available at* 2008 WL 5373017). This Court found irrelevant the proposal's preemption of the earlier, still pending proposal.

Two Justices dissented, but the majority was unpersuaded. In approving the

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[8] Amendment 7 will in no way affect the prohibition in Amendments 5 and 6 against an intent to favor or disfavor incumbents and political parties. In fact, it expressly excludes political parties from "communities of common interest."

"competing" amendment, three Justices noted that the proposal would not restrict any "existing" rights to subject growth management plans to referenda. 2 So. 3d at 123.[9] This Court thus confronted—and rejected—the same argument advanced by Appellees,[10] and did so in the context of a proposal that expressly declared, in the amendment text, its deliberate purpose to preempt another proposed amendment.[11]

No Florida court has ever stricken one proposed amendment because its summary did not explain its effect on another proposed amendment.[12] Summaries must explain effects upon *existing* constitutional law, *Treating People Differently*,

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[9] Appellees' attempt to distinguish this case is futile. (Br. at 33.) The fact that Hometown Democracy had not yet attained the needed number of signatures was never argued. The supposed distinction also opens a door to the relitigation of that case, now that Hometown Democracy has collected those signatures.

[10] An argument addressed in dissent, though not explicitly addressed by the majority, is implicitly rejected. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990); *State v. Lamar*, 659 So. 2d 262, 264 n.3 (Fla. 1995); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 11 (Fla. 5th DCA 2009).

[11] *Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), is easily distinguishable. There, the ballot asked voters whether the county commission should be the governing body of the fire and rescue service district. It did not advise voters that the proposal would eliminate the agency responsible for the district under *existing* law. It was this change to existing law that prompted the Court to invalidate the proposed amendment. *See id.* at 393 n.2.

[12] On Appellees' hypothesis, multiple proposals that affect one another—even unintentionally—would be mutually invalid, since the accuracy of the ballot on election day, and not political motivations, *see In re Adv. Op. to the Att'y Gen. re Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d at 680 (Pariente, J., concurring), is dispositive. Amendments 5 and 6 would thus be invalid for failure of their summaries to explain their reciprocal effect upon Amendment 7. And the amendment process could even degenerate into gamesmanship, as competitors aim to invalidate disfavored amendments by proposing other, interacting amendments.

778 So. 2d at 894-95, but not *potential* constitutional law. A mere proposal has not attained the dignity of an existing constitutional provision formally adopted by the voters. And voters can easily compare ballot summaries—such as the summaries of Amendments 5, 6, and 7—that will appear consecutively on the same ballot.[13]

VI. Amendment 7 Should Be Presented to the Voters.

Appellees' opposition here is political, not legal. Appellees simply *say* that Amendment 7 would demolish all constitutional standards—and attempt to sell this to the Court, to create some discrepancy between the text and a verbatim summary.

In ten hours of debate and fifty pages of briefing, the Legislature has set forth the intent of Amendment 7. With no better support than illogical argument, Appellees declare that the Legislature is wrong, and that the ballot language must identify seismic consequences which none but Appellees could have discovered. The integrity of the judicial process, the separation of powers, and the authority of the Legislature to propose amendments are of little worth if such assertions negate the plain words of the amendment and a definitive exposition of legislative intent.

Legislators take the same oath as the Justices of this Court. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000). Constrained by that oath, the Legislature discussed Amendments 5 and 6 in ten committee meetings; debated Amendment 7

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[13] Finally, any suggestion that the ballot language must describe the effect of Amendment 7 upon Amendments 5 and 6 is premature. Because Amendments 5 and 6 might not pass, Amendment 7's supposed effect on them might be irrelevant.

extensively; and, by a three-fifths supermajority vote, approved the ballot language of Amendment 7. Appellees seek to overturn the legislative process on the ground that the ballot language does not include their distortions of the amendment.

The Legislature placed the verbatim words of the amendment on the ballot to avoid any charge of "wordsmithing." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008). Now, Appellees claim that the *absence* of wordsmithing is misleading. This would place the Legislature in an impossible position. Had the summary stated (as Appellees appear to desire) that Amendment 7 will eliminate all mandatory standards (perhaps including the numerical limitation on districts), undermine judicial review, and thwart Amendments 5 and 6, the summary would have been attacked as editorializing, and as inconsistent with the amendment text.

Indeed, if there were any summary that would have satisfied these political opponents, they have not shared it—despite their heavy burden to prove "without any doubt that the ballot language is deficient." (Br. at 8.) And rather than request that the Court alter the summary, as in *ACLU of Fla., Inc. v. Hood*, No. SC04-1671 (Fla. Sep. 2, 2004), they demand that it not be presented to the voters at all.

Appellees' arguments are better left to public discourse. They disserve this Court's ballot accuracy jurisprudence and invite the Court boldly to enter the political fray. They do equal violence to the express authority of the Legislature to propose amendments to the Florida Constitution. The Court should reverse.

Respectfully submitted, this __ day of August, 2010.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this Brief is Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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Supreme Court of Florida

No. SC10-1375

FLORIDA DEPARTMENT OF STATE, etc., et al.,
Appellants,

vs.

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, et al.,
Appellees.

[August 31, 2010]

PER CURIAM.

The Florida Department of State, Dawn K. Roberts in her official capacity as the Secretary of State, the Florida Senate, and the Florida House of Representatives ("Roberts and the Legislature"), appealed to the First District Court of Appeal from a July 12, 2010, judgment of the circuit court striking a legislatively proposed constitutional amendment from the November 2010 general election ballot. The First District certified to this Court that the judgment is of great public importance and that the appeal requires immediate resolution by this Court under our jurisdiction set forth in article V, section 3(b)(5), of the Florida Constitution. We agreed and granted expedited review to decide the question of great public

importance—whether proposed Amendment 7, amending article III of the Florida Constitution, meets the requirements of Florida law for inclusion on the November 2010 ballot. As further explained below, we affirm the judgment of the circuit court striking proposed Amendment 7 from the ballot because the ballot language fails to inform the voter of the chief purpose and effect the amendment will have on existing, mandatory constitutional provisions in article III.

1. FACTS

On May 18, 2010, the Florida Legislature filed with the Florida Secretary of State a joint legislative resolution, Fla. H.J. Res. 7231 (2010) (HJR 7231), proposing an amendment to article III of the Florida Constitution. The amendment, designated Amendment 7 for the November 2010 general election ballot, would add section 20 to article III of the constitution as follows:

> **SECTION 20. Standards for establishing legislative and congressional district boundaries.**—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in this constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of this article. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution and is consistent with federal law.

Section 101.161, Florida Statutes (2009), provides that whenever a constitutional amendment is proposed for submission to a vote of the people, the substance of the

amendment shall be printed in clear and unambiguous language on the ballot.[1] See § 101.161(1), Fla. Stat. (2009). We have held that "[t]he purpose of section 101.161(1) is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982). In HJR 7231, the Legislature adopted the following statement, which essentially mirrors the language contained in proposed Amendment 7, and resolved that it be placed on the ballot as follows:

> BE IT FURTHER RESOLVED that the following statement be placed on the ballot:
>
> CONSTITUTIONAL AMENDMENT
> ARTICLE III, SECTION 20
> **STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING.**—In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law.

On May 21, 2010, a complaint for declaratory and injunctive relief was filed in the circuit court seeking to prevent placement of proposed Amendment 7 on the

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1. Section 101.161(1) also provides that for amendments and ballot language not proposed by joint legislative resolution, the explanatory statement included on the ballot shall not exceed 75 words in length.

November ballot. The suit was filed against the Florida Department of State and Secretary of State Dawn K. Roberts by plaintiffs Florida State Conference of NAACP Branches; Adora Obi Nweze; The League of Women Voters of Florida, Inc.; Deirdre Macnab; Robert Milligan; Nathaniel P. Reed; Democracia Ahora; and Jorge Mursuli. After the complaint was filed, Governor Charlie Crist was allowed to intervene as amicus curiae in support of plaintiffs, and the Florida House of Representatives and the Florida Senate were allowed to intervene as defendants in the circuit court.

The complaint alleged, inter alia, that the ballot title and summary for Amendment 7 fail to inform the voters that the amendment (1) would limit the mandatory application of constitutional standards and allow the Legislature to subordinate existing standards in article III to permissive and vague standards in the amendment; (2) would allow the Legislature to consider but not implement specific protections for minority voters contained in proposed constitutional Amendments 5 and 6, also slated for the November ballot;[2] (3) would allow the Legislature to "balance" standards in such a way as to create districts favoring or disfavoring incumbents; and (4) is intended to require validation of any district or

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2. See Advisory Op. to Att'y Gen. re Standards for Establishing Legislative District Boundaries, 2 So. 3d 175, 191 (Fla. 2009) (approving ballot title and summary); Advisory Op. to Att'y Gen. re Standards for Establishing Legislative District Boundaries (FIS), 24 So. 3d 1198, 1202 (Fla. 2009) (holding that the financial impact statements comply with statute).

plan that is related to nonmandatory standards in Amendment 7. The plaintiffs also alleged that the ballot title is misleading in that it purports to provide "standards" for redistricting while actually eliminating them.

The plaintiffs filed a motion for summary judgment seeking a judgment that the proposed amendment fails to advise voters of its chief purpose and true effect. Defendants Roberts and the Legislature filed cross motions for summary judgment. The parties agreed that there existed no disputed issues of material fact, and a final hearing was held on July 8, 2010. On July 12, 2010, the circuit court entered its order granting the plaintiffs' motion for summary final judgment and denying the defendants' motions for summary judgment. The circuit court's order found that the ballot language does not meet the requirements of section 101.161(1) in that it does not fairly advise the voters of the ramifications of the amendment. As a result, the circuit court enjoined the Department of State from placing Amendment 7 on the November 2010 ballot. In so ruling, the trial judge made the following pertinent findings:

> Apart from the number of districts to be drawn, the Florida Constitution currently contains only one requirement binding on the legislature when they meet every ten years to draw districts. That one mandatory requirement is that each district be contiguous. Amendment 7, if it were to pass, would make that one mandatory requirement aspirational only and would subordinate contiguity to the other aspirational goals or "standards" contained in Amendment 7.
>
> . . . .

> To be clear, there is nothing unlawful or improper about what the legislative proposal seeks to do. The wisdom of a proposed amendment is not a matter of concern for this Court. But to be legally entitled to a place on the ballot, the summary and title must be fair and must advise the voter sufficiently to enable the voter to intelligently vote for or against the amendment. . . . Requiring that all districts be contiguous is a valuable right afforded to all citizens of Florida. A citizen cannot, and should not, be asked to give up that right without being fully informed and making an intelligent decision to do so.
>
> Amendment 7, if passed, would allow this or any future legislature, if it chose to do so, to gerrymander districts guided by no mandatory requirements or standards and subject to no effective accountability so long as its decisions were rationally related to, and balanced with, the aspirational goals set out in Amendment 7 and the subordinate goal of contiguity.

Thus, the primary basis on which the circuit court invalidated the ballot language was that it failed to inform the voters that article III of the Florida Constitution currently contains a mandatory contiguity requirement which, if Amendment 7 is adopted, could be subordinated to the other considerations set forth in proposed Amendment 7.[3]

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3. Article III, section 16(a), of the Florida Constitution, titled "Senatorial and Representative Districts," requires that in the second year following each decennial census, the Legislature shall apportion the state in accordance with the constitutions of the State and 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."

II. ANALYSIS

The standard of review of the validity of a proposed constitutional amendment is de novo. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000). We are ever mindful that "[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). "A court may declare a proposed constitutional amendment invalid only if the record shows that the proposal is clearly and conclusively defective . . . ." Armstrong, 773 So. 2d at 11 (citing Askew, 421 So. 2d at 154).

A. Requirement that Ballot Language Inform Voters of Legal Effect and Ramifications of a Proposed Amendment

In reviewing the validity of ballot language submitted to the voters for a proposed constitutional amendment, we do not consider or review the substantive merits or the wisdom of the amendment. See Standards For Establishing Legislative District Boundaries, 2 So. 3d at 184; Fla. Dep't of State v. Slough, 992 So. 2d 142, 147 (Fla. 2008); In re Advisory Op. to Att'y Gen. re Med. Liab. Claimant's Comp. Amendment, 880 So. 2d 675, 677 (Fla. 2004); Askew, 421 So. 2d at 155. Our sole task is to determine whether the ballot language sets forth the substance of the amendment in a manner that satisfies the requirements of section 101.161, Florida Statutes (2009). Section 101.161(1) expressly requires that "[w]henever 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." § 101.161(1), Fla. Stat. "Section 101.161(1) is a codification of the accuracy requirement implicit in article XI, section 5 of the Florida Constitution." Advisory Op. to Att'y Gen. re Referenda Required for Adoption & Amendment of Local Government Comprehensive Land Use Plan, 902 So. 2d 763, 770 (Fla. 2005).

To conform to section 101.161(1), the ballot language "must state 'the chief purpose' of the proposed amendment. In evaluating an amendment's chief purpose, a court must look not to 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, 773 So. 2d at 18 (footnote omitted). In this analysis, we 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." Standards for Establishing Legislative District Boundaries, 2 So. 3d at 184 (quoting Advisory Op. to Att'y Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo, 959 So. 2d 210, 213-14 (Fla. 2007)). This evaluation also includes consideration of the amendment's "true meaning, and ramifications." Armstrong, 773 So. 2d at 16 (quoting Askew, 421 So. 2d at 156). "In practice, the accuracy requirement in

article XI, section 5, functions as a kind of 'truth in packaging' law for the ballot." Armstrong, 773 So. 2d at 13. The proposed change in the constitution must "stand on its own merits and not be disguised as something else." Askew, 421 So. 2d at 156. "Reduced to colloquial terms, a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an amendment." Slough 992 So. 2d at 147; see also Armstrong, 773 So. 2d at 16.

Moreover, we have consistently adhered to the principle "that lawmakers who are asked to consider constitutional changes, and the people who are asked to approve them, must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." Smathers v. Smith, 338 So. 2d 825, 829 (Fla. 1976). It is by these basic and longstanding principles that we must measure the ballot language presented to the voter for Amendment 7.

We do not ignore the fact that HJR 7231, proposing Amendment 7, was the product of a joint resolution passed by a three-fifths vote of the Legislature. While we traditionally accord a measure of deference to the Legislature, "[t]his deference . . . is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." Armstrong, 773 So. 2d at 14. We also recognize that section 101.161(1), which places strict requirements on ballot language presented for any

constitutional amendment or other public measure, is also a legislative enactment entitled to this Court's deference.[4]

B. The Ballot Language for Proposed Amendment 7

With these principles in mind, we turn to the question before the Court—whether the ballot language proposed for Amendment 7 comports with the requirements of section 101.161, the Florida Constitution, and our case law governing placement of proposed constitutional amendments on the ballot. The ballot language for proposed Amendment 7 states in pertinent part that in redistricting, "[t]he state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of article III of the State Constitution." See HJR 7231 (emphasis added).

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4. Contrary to the suggestion in the dissent that we have overlooked important precedent on constitutional construction, we are not unmindful of the rule of construction that requires a court to interpret an ambiguous constitutional provision, if possible, in such a manner as to harmonize it with existing constitutional provisions. However, as the authority cited in the dissent demonstrates, this rule of construction applies to existing constitutional provisions, not to proposed amendments. Our duty under section 101.161(1), Florida Statutes, and article XI, section 5, of the Florida Constitution is to assure that the chief purpose and effect of proposed amendments be presented to the voter in clear and unambiguous language.

In this case, the circuit court struck Amendment 7 from the ballot because the court concluded the ballot language did not inform the voters that the amendment would allow the existing mandatory constitutional requirement in article III, section 16(a), requiring that districts be contiguous to be subordinated to the discretionary standards contained in Amendment 7. We agree with this finding. Under the text of Amendment 7, if the discretionary considerations in Amendment 7 are not to be subordinated to any other provisions of article III, then it must follow that other provisions of article III may be subordinated to the discretionary considerations in the balancing process set forth in Amendment 7. This clearly alters the nature of the contiguity requirement currently contained in article III, section 16(a), of the constitution. Unfortunately, neither the text of the amendment nor the explanatory statement proposed by the Legislature makes this fact clear. Nowhere does the ballot language inform the voter that there is currently a mandatory contiguity requirement in article III, and nowhere does the language inform the voter that the contiguity requirement could be diluted by Amendment 7.

In Armstrong we invalidated a constitutional amendment because the ballot language failed to inform the voters that the provision would alter an existing provision in the Florida Constitution. We stated:

> In the present case, as explained above, the main effect of the amendment is simple, clear-cut, and beyond dispute: The amendment

> will nullify the Cruel or Unusual Punishment Clause. This effect far outstrips the stated purpose (i.e., to "preserve" the death penalty), for the amendment will nullify a longstanding constitutional provision that applies to all criminal punishments, not just the death penalty. Nowhere in the summary, however, is this effect mentioned—or even hinted at. The main effect of the amendment is not stated anywhere on the ballot. (The voter is not even told on the ballot that the word "or" in the Cruel or Unusual Punishment Clause will be changed to "and"—a significant change by itself.)

Armstrong, 773 So. 2d at 18 (footnote omitted). In the present case, Amendment 7 would allow the Legislature to nullify the currently mandatory nature of the contiguity requirement, placing it on par with the other discretionary considerations in the redistricting process—considerations that are subject to discretionary balancing by the Legislature. This is a matter that should have been clearly and unambiguously stated in the ballot language. Failing this clear explanation, the voters will be unaware of the valuable right—the right to have districts composed of contiguous territory—which may be lost if the amendment is adopted. For all these reasons, we agree with the well-reasoned judgment of the circuit court and affirm the judgment striking proposed Amendment 7 from the ballot because the ballot language fails to inform the voter of the chief purpose of Amendment 7 and the effect it will have on the existing, mandatory constitutional provisions in article III.

Although the circuit court did not reach the question of whether the ballot title is invalid as being misleading, we also find that the ballot title is misleading

and precludes placement of Amendment 7 on the ballot. The ballot title states "Standards for Legislature to Follow in Legislative and Congressional Redistricting." While purporting to create and impose standards upon the Legislature in redistricting, the amendment actually eliminates actual standards and replaces them with discretionary considerations. Thus, we conclude that the title is misleading as to the true purpose and effect of the amendment.

III. CONCLUSION

Based upon the provisions of section 101.161(1), Florida Statutes, article XI, section 5, of the Florida Constitution, and our precedent, we hold that the ballot language setting forth the substance of Amendment 7 does not inform the voter of the true purpose and effect of the amendment on existing constitutional provisions and, further, is misleading. Accordingly, the judgment of the circuit court is affirmed and Amendment 7 may not be placed on the general election ballot for November 2010.

It is so ordered.

PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.
PARIENTE, J., concurs with an opinion, in which PERRY, J., concurs.
CANADY, C.J., dissents with an opinion, in which POLSTON, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

PARIENTE, J., concurring.

While this Court is reluctant to interfere with the people's right to vote on a proposed constitutional amendment, the Court has an obligation to strike a ballot proposal that does not clearly and unambiguously inform the voter of the impact of the amendment. It should hardly be a controversial proposition that voters must be able to cast an intelligent and informed vote on the proposed constitutional amendment and understand whether the proposed amendment adds to their existing rights, alters existing rights, or dilutes existing rights provided to them by their constitution.

We must be always mindful that the "Constitution of Florida is a document of limitation by which the people of the state have restricted the forces of government in the exercise of dominion and power over their property, their rights and their lives." Smathers v. Smith, 338 So. 2d 825, 827 (Fla. 1976). Although the Florida Constitution sets forth the structure of state government, its essential purpose is to protect the rights of the people and to restrict the exercise of power by the government.

Of course, the people of this State also have a right to amend the constitution, and the voters have the right to decide to adopt a proposed amendment that provides the Legislature with greater authority, alters existing rights already guaranteed in the constitution, or restricts the effect of other

proposed amendments. The unifying principle for all proposed constitutional changes is that the voters "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be." Smathers, 338 So. 2d at 829. The "accuracy requirement in Article XI, section 5, functions as a kind of 'truth in packaging' law for the ballot" and applies "across-the-board to all constitutional amendments." Armstrong v. Harris, 773 So. 2d 7, 13-14 (Fla. 2000).

The Legislature asserts that in proposing this amendment, it was motivated by its interest in providing our citizens with greater protection when it comes to redistricting. If in fact the Legislature's intent was to provide the citizens with additional rights concerning redistricting, that purpose is not clearly and unambiguously conveyed. The proposed amendment appears to actually have the opposite effect. In this case, because the ballot summary fails to explain its chief purpose and the title misleadingly sets forth that the amendment is creating "Standards for the Legislature to Follow," we are obligated to strike the initiative from the ballot.

PERRY, J., concurs.

CANADY, C.J., dissenting.

The basis for the majority's decision to preclude the people of Florida from voting on proposed amendment 7 is the assertion that the amendment is misleading

because it fails to disclose that it would nullify the contiguity requirement currently in the Florida Constitution. But nothing about amendment 7 is misleading. The amendment, by its own plain terms, does not nullify the contiguity requirement but mandates the implementation of that requirement. I therefore dissent from the majority's ruling that the text of amendment 7 and its ballot title are defective and from the decision to remove the amendment from the ballot.

Article III, section 16(a) of the Florida Constitution provides that the Legislature "shall apportion the state . . . 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." Contrary to the majority's assertion, nothing in amendment 7 would nullify, dilute, or alter this provision of the Florida Constitution.

Amendment 7 provides that in establishing district boundaries or plans, "the state shall . . . balance and implement the standards in this constitution." H.J. Res. 7231, 2010 Leg. (Fla. 2010) (emphasis added). Amendment 7 further provides that "[t]he state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected

and promoted, both without subordination to any other provision of this article." Id. (emphasis added). Finally, amendment 7 also states that "[d]istricts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in this constitution." Id. (emphasis added).

The majority's reading of the amendment fails to give full effect to these provisions. That reading is based on the inference that the references in the text of amendment 7 to "balance" and "balancing" and the "without subordination to" clause vest the Legislature with a wholly discretionary power to ignore the contiguity requirement of article III, section 16(a). But the inference relied on by the majority is rendered wholly untenable by the express requirement in the amendment that the State "balance and implement the standards in this constitution" and by the express provision that the "balancing and implementation of standards" must be "rationally related" to the constitutional standards. The majority's interpretation of amendment 7 effectively reads the words "and implement" together with "and implementation" out of the text of the amendment.

"Implement" means "to carry out: accomplish, fulfill." Webster's Third New Int'l Dictionary of the English Language, Unabridged 1134 (1993). More particularly, "implement" means "to give practical effect to and ensure of actual fulfillment by concrete measures." Id. It is impossible to implement a requirement

or standard if the requirement or standard is disregarded. A standard which must be implemented has not been nullified.

Contrary to the majority's suggestion, the standard at issue—contiguity—is not a standard that is subject to dilution.

> This Court has defined "contiguous" as "being in actual contact: touching along a boundary or at a point." A district lacks contiguity "when a part is isolated from the rest by the territory of another district" or when the lands "mutually touch only at a common corner or right angle."

In re Constitutionality of House Joint Resolution 1987, 817 So. 2d 819, 827-28 (Fla. 2002) (citation omitted) (quoting In re Senate Joint Resolution 2G, 597 So. 2d 276, 279 (Fla. 1992)). A district either meets the contiguity requirement or fails to meet that requirement. Contiguity is thus a determinate requirement and not a vague standard that may be applied in varying degrees. In this respect, contiguity is like the constitutional requirement that there be between thirty and forty senatorial districts and between eighty and 120 representative districts.

The direction to "balance and implement" standards does not—as the majority contends—grant discretion to not implement the contiguity standard. If the Legislature adopted a plan with districts that did not meet the contiguity requirement, the Legislature would have failed to "balance and implement the standards of the constitution" and the "balancing and implementation of standards" would not be "rationally related" to the standards of the constitution. Under

amendment 7, the Legislature would have no more discretion to adopt a plan with districts not satisfying the contiguity requirement than it would have to adopt a plan with fifty senatorial districts and 150 representative districts. In short, the majority's reading of amendment 7 cannot be reconciled with the plain meaning of "implement."

Nor does the "without subordination to" clause justify the majority's conclusion that amendment 7 would nullify, dilute, or alter the contiguity requirement. Based on that clause, the majority reasons that the other requirements of the constitution "may be subordinated to the discretionary considerations in the balancing process set forth in Amendment 7." Majority op. at 11. The majority equates "without subordination to" with "superior to" or "without regard to." Id. In the full context of amendment 7, this interpretation is not plausible. The clause must be understood in conjunction with the provision that all of the constitutional standards must be implemented. H.J. Res. 7231, 2010 Leg. (Fla. 2010). In context, "without subordination to" can only mean "not inferior to." It cannot be understood to suggest that the Legislature can fail to implement the other constitutional standards of article III.

The majority's interpretation is not rescued by the assertion that the phrase "balance and implement the standards," the phrase "balancing and implementation of standards," and the "without subordination to" clause leave open the possibility

that not every standard must necessarily be implemented. The assertion springs from an inappropriate focus on the "without subordination to" clause and the references to "balance" and "balancing" in isolation from the full context of amendment 7. This assertion thus attempts to tease an ambiguity out of a text that unequivocally directs that "the state shall . . . balance and implement the standards in this constitution."

But even if disbelief could be suspended and the ambiguity could be found, the majority's position would nonetheless founder on the rule that "[a] construction that nullifies a specific clause will not be given to a constitution unless absolutely required by the context." Gray v. Bryant, 125 So. 2d 846, 858 (Fla. 1960). Since amendment 7 does not expressly repeal the contiguity requirement now in the constitution, any ambiguity in amendment 7 should be resolved to harmonize the amendment with the existing contiguity provision. See Jackson v. Consol. Gov't of Jacksonville, 225 So. 2d 497, 500-01 (Fla. 1969). The majority's analysis simply fails to take into account this cardinal rule of constitutional interpretation.[5]

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5. The majority's justification for this failure is not cogent. The majority asserts that the rule of construction does not apply to proposed constitutional amendments. This misses the point that the question here is the effect the proposed amendment, if adopted, would have on the existing constitutional provision. To decide if the proposal is defective because it fails to disclose to the voters that it would alter, nullify, or dilute the existing contiguity provision, the interplay of the proposal and the existing provision must be determined. The rule of constitutional construction obviously is relevant to that determination.

The chief purpose of amendment 7 is clearly articulated and presented to the voters in the ballot summary, which sets forth verbatim the operative text of the amendment. The text of the amendment speaks for itself, and it conceals nothing from the voters. There is nothing about the ballot title or the ballot summary that is inaccurate or misleading. Instead, the inaccuracy lies in the majority's unwarranted interpretation of amendment 7, an interpretation which cannot be reconciled with the amendment's plain meaning and which violates fundamental principles of constitutional interpretation. The people are thus denied the right to vote on amendment 7 based on an interpretation of the amendment which cannot withstand scrutiny.

The Constitution of Florida belongs to the people of Florida. Under our system of democratic governance, the people have the fundamental right to amend the constitution, which includes the right to consider constitutional amendments proposed to them by their representatives in the Legislature. The decision to remove amendment 7 from the ballot unjustifiably denies the people of Florida the opportunity to vote on this amendment to the constitution properly proposed to them by their elected representatives. The majority's decision unduly interferes with a process that is fundamental to our constitutional system of democratic governance.

POLSTON, J., concurs.

Certified Judgments of Trial Courts in and for Leon County – James Oliver Shelfer, Judge, Case No. 2010-CA-001803 – An Appeal from the District Court of Appeal, First District, Case No. 1D10-3676

R. Dean Cannon of Dean Cannon, P.A., Winter Park, Florida, Scott D. Makar, Solicitor General, Jonathan A. Glogau, Office of the Attorney General, Tallahassee, Florida, Peter M. Dunbar, Cynthia S. Tunnicliff, and Brian A. Newman of Pennington, Moore, Wilkinson, Bell and Dunbar, Tallahassee, Florida, C. B. Upton, General Counsel, Florida Department of State, Tallahassee, Florida, and George N. Meros, Jr., Allen Winsor and Andy Bardos of GrayRobinson, P.A., Tallahassee, Florida, and Miguel De Grandy, P.A., Coral Gables, Florida,

for Appellants,

Ronald G. Meyer, Jennifer S. Blohm, and Lynn C. Hearn of Meyer, Brooks, Demma and Blohm, P.A., Tallahassee, Florida, Mark Herron and Robert J. Telfer, III of Messer, Caparello and Self, P.A., Tallahassee, Florida,

for Appellees,

Erik M. Figlio, J. Andrew Atkinson, and Simonne Lawrence, Executive Office of The Governor, Tallahassee, Florida, on behalf of Governor Charlie Crist,

as Amicus Curiae

Aug. 18, 2010

<< All Other Archives

Florida Department of State v. Florida State Conference of NAACP Branches
SC10-1375
Aug. 18, 2010

Related Transcript

Florida Department of State v. Florida State Conference of NAACP Branches SC10-1375

This case involves a challenge to Amendment 7, which state lawmakers placed on the November ballot. This proposed constitutional measure deals with how the Legislature redraws the boundaries for its own districts and congressional districts. Critics, including the state NAACP, argued the ballot title and summary were misleading. A trial judge agreed and ruled Amendment 7 must be removed from the ballot. The state appealed to the First District Court of Appeal, which asked this Court to take the case.

Statewide impact

<< All Other Archives

>> PLEASE RISE.
HEAR YE HEAR YE HEAR YE THE
SUPREME COURT OF FLORIDA IS NOW
IN SESSION, ALL WHO HAVE CAUSE
TO PLEA, DRAW NEAR, GIVE
ATTENTION AND YOU SHALL BE
HEARD.
GOD SAVE THESE UNITED STATES,
THIS GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO
THE FLORIDA SUPREME COURT.
THIS MORNING WE HAVE A DOCKET
WITH THREE CASES.
JUSTICE PARIENTE IS UNABLE TO BE
WITH US HERE TODAY.
SHE.
>> HOWEVER, VIEWING THE ORAL
ARGUMENTS AND WILL BE
PARTICIPATING IN THE DECISION OF
THESE CASES.
THE FIRST CASE WE WILL CONSIDER
TODAY IS FLORIDA DEPARTMENT OF
STATE VERSUS FLORIDA STATE
CONFERENCE OF N.A.A.C.P.
BRANCHES.
REPRESENTATIVE CANON.
>> MR. CHIEF JUSTICE, JUSTICES
MATE PLEASE THE COURT, I'M DEAN
CANNON, AND I REPRESENT THE
FLORIDA SENATE, AND THE FLORIDA
HOUSE OF REPRESENTATIVES.
THIS IS NOT A BALLOT SUMMARY

CASE.
IN THIS CASE, THE LEGISLATURE AS
A COEQUAL BRANCH OF GOVERNMENT
EXERCISED IT'S AUTHORITY UNDER
ARTICLE 11, SECTION ONE OF OUR
CONSTITUTION TO OFFER THE VOTERS
THE ENTIRE TEXT OF A PROPOSED
AMENDMENT TO THEIR CONSTITUTION,
NOW KNOWN AS AMENDMENT 7.
INSTEAD OF TRYING TO SUMMARIZE
OR DESCRIBE THE TEXT, OF
AMENDMENT 7, THE LEGISLATURE
CHOSE TO PLACE THE ENTIRE TEXT
ON THE BALLOT FOR THE VOTER TO
SEE.
BY DOING SO, THE LEGISLATURE
AVOIDED ALL POSSIBILITY THAT A
DEFECTIVE SUMMARY COULD SOMEHOW
MISLEAD THE VOTERS, BY FAILING
TO ACCURATELY DESCRIBE THE
LANGUAGE OF THE TEXT ITSELF.
AMENDMENT 7 OFFERS THE VOTERS
THE CHOICE TO ADD NEW STANDARDS
FOR OUR CONSTITUTION, FOR THE
LEGISLATURE TO FOLLOW IN THE
REAPPORTION --
>> WHAT ARE THE NEW STANDARDS,
MR. CANON?
>> JUSTICE LEWIS, THAT THE
LEGISLATURE SHALL FIRST APPLY
FEDERAL REQUIREMENTS AND BALANCE
AND IMPLEMENT ALL STANDARDS IN
ARTICLE 3.
>> HOW IS THAT A STANDARD.
>> WELL, I WOULD... THAT IN AND
OF ITSELF, IS A DIRECTION --

>> THEY CAN --
>> WHICH IS A STANDARD AND THE STANDARDS THOUGH THEY MAY BE DISCRETIONARY ARE, NONETHELESS, STANDARDS AND WILL COMPEL THE LEGISLATURE TO TAKE INTO CONSIDERATION THE ABILITY OF RACIAL AND LANGUAGE MINORITIES TO PARTICIPATE IN THE POLITICAL PROCESS AND ELECT CANDIDATES OF THEIR CHOICE...
>> DOES IT... [INAUDIBLE] ARTICLE 3.
>> IT ADDS TO ARTICLE 3, SECTION 16-A BUT DOESN'T CHANGE ANYTHING THAT IS IN ARTICLE 3 TODAY.
>> AND, YOU ALREADY HAD TO FOLLOW... [INAUDIBLE], IS THAT CORRECT.
>> THAT'S CORRECT AND AMENDMENT 7 OFFERS THE VOTERS FOR THE FIRST TIME IN OUR STATE'S HISTORY THE ABILITY TO DIRECT THE LEGISLATURE TO BOTH TAKE INTO CONSIDERATION THE ABILITY OF RACIAL HANDLING OF MINORITIES TO PARTICIPATE IN THE POLITICAL PROCESS AND CONSIDER COMMUNITIES OF INTEREST OTHER THAN POLITICAL PARTIES AND THAT IS SIGNIFICANT, FOR TWO REASONS, FIRST, THOSE TWO THINGS TOGETHER, THE ABILITY OF RACIAL AND LANGUAGE MINORITIES TO PARTICIPATE IN THE PROCESS, AND, COMMUNITIES OF INTEREST OTHER THAN POLITICAL

PARTIES, PROHIBITS POLITICAL
PARTIES FROM BEING A FACTOR --
>> WHAT DOES THAT MEAN?
COMMUNITIES OF COMMON INTEREST
OTHER THAN POLITICAL PARTIES?
WHAT DOES A COMMUNITY OF
INTEREST.
>> COMMUNITIES OF INTEREST, BY
DEFINITION, ARE GROUPS OF PEOPLE
WITH COMMON INTERESTS.
>> THAT DOESN'T TELL ME MUCH.
WHAT EXACTLY -- I MEAN, I CAN
UNDERSTAND, RACIAL AND ETHNIC
MINORITIES, BUT WHAT IN THE
WORLD IS A COMMUNITY OF
INTEREST?
I'M NOT SURE THAT I UNDERSTAND
AND I'M NOT SURE THE PUBLIC
REALLY WILL UNDERSTAND WHAT A
COMMUNITY OF INTEREST MEANS.
>> WELL, THE COMMUNITIES OF
INTEREST CAN MEAN, ESSENTIALLY
THE DICTIONARY DEFINITION WHICH
IS A GROUP --
>> ANYTHING, ANY... PARTICULAR
THING IS A COMMUNITY OF
INTEREST.
>> IF THEY HAVE COMMONALITIES,
IN THE HISTORY THERE ARE SUCH
THINGS AS SOCIOECONOMIC
COMMUNITIES OF INTEREST, WHICH
ARE NEITHER RACIAL NOR PARTY
BASED, AND, SOME ARE DEMOGRAPHIC
SUCH AS THE ELDERLY AND SOME
A VOCATIONAL LIKE AGRICULTURAL
DISTRICTS, A CONCEPT FOR

REAPPORTIONMENT LAW, USED AS A
NON RACE-BASED JUSTIFICATION TO
DRAW DISTRIBUTIONS AND AMENDMENT
7 WAS A RESPONSE TO AMENDMENTS 5
AND 6, OFFERED FOR THE FIRST
TIME TO THE VOTERS AND,
AMENDMENTS 5 AND 6 WOULD HAVE
THREE SECTIONS.
THE FIRST, SECTION OF AMENDMENTS
5 AND 6 WOULD PROHIBITS
POLITICAL FAVORITISM, THAT IS --
>> LET ME ASK YOU THIS:
DOES IT MAKE ANY REFERENCE TO 5
AND 6?
>> NO, YOUR HONOR.
>> DOES THE VOTER KNOW READING
THIS AMENDMENT, DOES THIS
SOMEHOW INVOLVE 5 AND 6, OR
NEGATES 5 AND 6.
>> THEY WILL NOT --
>> JUST THIS AMENDMENT, WOULD
YOU KNOW THAT.
>> NOT AT ALL, YOUR HONOR AND
THE COURT LAID DOWN THE RULE
THAT IT IS NOT A REQUIREMENT OF
A PROSPECTIVE AMENDMENT TO
ANTICIPATE OR DESCRIBE ANY OTHER
PRO SPECK TV THINGS THAT MAY BE
ADDED TO THE CONSTITUTION,
LATER.
IN THE --
>> THIS ISN'T REALLY ADDED TO
THE CONSTITUTION LATER, IT SEEMS
TO ME WHAT WE HAVE IS AMENDMENTS
ON THE BLOOD, AMENDMENTS THAT
MAY BE ON THE BALLOT, IN THOSE

INSTANCES, AND THE PUBLIC WILL HAVE TO READ -- THEY WILL READ FIVE AND SIX AND READ 7, AND, MY ... WILL HAVE NO IDEA 7 IS THERE TO NEGATE OR EXPLAIN OR DO SOMETHING ABOUT FIVE AND SIX AND IT SEEMS TO ME, WE ARE REALLY DOING THE PUBLIC A DISSERVICE IF WE PUT THESE KINDS OF AMENDMENTS ON THE BALLOTS AND DON'T EVEN MAKE ANY REFERENCE TO THE FACT THERE IS SOMETHING ELSE THAT IS THERE THAT IS RELATED TO IT.
>> WELL, IN A SENSE, YOUR HONOR, WE DON'T KNOW IF 5, 6 OR 7 WILL BE PUT INTO THE CONSTITUTION.
>> BUT WE KNOW 5 AND 6 WILL BE ON THE BALLOT, CORRECT.
>> THAT'S CORRECT AND THE VOTER WILL HAVE 5, 6 AND 7 BEFORE THEM IN THE VOTING BOOTH AND WILL BE ABLE TO READ 5, 6 AND 7 AND ONE OF THE POTENTIAL DEFECTS WE HEARD TESTIMONY DURING THE SESSION, FROM BOTH AFRICAN-AMERICAN DEMOCRATS AND CUBAN-AMERICAN REPUBLICANS, TWO OF WHOM ARE SITTING MEMBERS OF CONGRESS, THEIR CONCERN WAS THE LEGAL EFFECT OF AMENDMENTS 5 AND 6, AFTER THE U.S. SUPREME COURT'S HOLDING IN BARTLETT VERSUS STRICKLAND, HANDED DOWN AFTER THE COURT APPROVED 5 AND 6 FOR THE BALLOT IT WOULD HAVE THE NET EFFECT OF REDUCING THE

MINORITY REPRESENTATION IN
CONGRESS AND THE LEGISLATURE.
AND, IT IS CRITICAL, YOUR HONOR,
THAT THE ONLY ISSUE BEFORE THE
COURT TODAY, IS WHETHER THE
SUMMARY IS MISLEADING AND IN
THIS CASE THE SUMMARY SCAN NOT
BE MISLEADING BECAUSE IT IS THE
ENTIRE TEXT OF AMENDMENT 7.
BUT, TO YOUR HONOR --
>> ARE THE -- THE AMENDMENT
ITSELF, IS A PUBLIC...
[INAUDIBLE] UNDERSTAND WHAT IS
THE PURPOSE AN EFFECT OF THE
AMENDMENT.
>> IT CAN -- THIS COURT HAS
NEVER STRUCK -- NO COURT IN
FLORIDA HAS EVER STRUCK AN
AMENDMENT WHERE THE FULL TEXT
WAS ON THE BALLOT, EXCEPT IN THE
LIMITED CIRCUMSTANCE WHERE THE
TEXT WAS A WHOLESALE INSTITUTION
OF AN EXISTING PROVISION OF
FLORIDA LAW.
WE THINK OF ARMSTRONG VERSUS
HARRIS OR ASKEW VERSUS FIRESTONE
AND THE PROPOSED AMENDMENT WHILE
IT WAS THE TEXT WAS TO DO
SOMETHING CONTRARY TO SOMETHING
ALREADY IN EXISTING LAW AND ONLY
THOSE LIMITED CIRCUMSTANCES HAS
THE COURT STRUCK IT AND, YOUR
HONOR IF THE RULE WERE SUCH THAT
AN AMENDMENT HAD TO ANTICIPATE
THE FUTURE ADDITIONS TO THE
CONSTITUTION WE COULDN'T ADD

ANYTHING TO THE CONSTITUTION.
THINK OF FOUNDATIONAL RIGHTS
THAT'S RIGHT TO DUE PROCESS OR
PRIVACY.
>> YOU KEEP SAYING FUTURE
AMENDMENTS TO THE CONSTITUTION
BUT, TO ME, THIS IS A TOTALLY
DIFFERENT THING.
WHAT THEY -- MAY HAPPEN TWO
YEARS FROM NOW IF SOMEONE WANTS
TO PUT SOMETHING ON THE BALLOT
AS OPPOSED TO THOSE THINGS THAT
ARE ACTUALLY ON THE BALLOT,
RIGHTED NOW.
THAT THE PUBLIC SHOULD BE AWARE
OF HOW THIS PARTICULAR AMENDMENT
MAY AFFECT OTHERS THAT ARE BEING
PROPOSED.
AND I'M CONCERNED.
THIS MAKES NO REFERENCE AT ALL.
WHILE IT DOESN'T HAVE TO
ACTUALLY REFERENCE THOSE
PARTICULAR AMENDMENTS, I KNOW
THERE IS CASE LAW, TO THAT
EFFECT AND THERE SHOULD BE
SOMETHING HERE THAT CLEARLY
INDICATES TO THE PUBLIC, IT
SEEMS TO ME, THAT THIS HAS A
RELATIONSHIP TO THE OTHERS, THEY
ARE BEING ASKED TO VOTE ON,
ALSO.
>> LET ME SEE, ALTHOUGH THE
COURT SETTLED IN THE GROWTH
MANAGEMENT CASE, THERE IS NO
REQUIREMENT, AND IT IS NO BAR OR
THERE IS NO REQUIREMENT THAT AN

AMENDMENT ON THE BALLOT
DISCLOSES INTERACTION WITH OTHER
AMENDMENTS ON THE BALLOT.
IN THIS CASE, EVEN IF THERE
WERE, AMENDMENT 7 DOES NOT
SUBSTITUTE ITSELF FOR FIVE AND
SIX AND DOES NOT --
>> WHAT IS THE RELATIONSHIP,
THEN?
TO FIVE AND SIX?
>> FIVE AND SIX, TO -- POLITICAL
PARTIES AND THE REAPPORTIONMENT
PROCESS AND REQUIRE THERE BE NO
DIMINISHMENT AND ABRIDGEMENT OF
THE RIGHTS OF LANGUAGE AND
RACIAL MINORITIES TO PARTICIPATE
IN THE POLITICAL PROCESS.
IT SETS, ESSENTIALLY A FLOOR
THAT -- WE CANNOT REGRESS, BUT,
THEN IN SECTION 2, IT SAYS,
DISTRICTS MUST BE COMPACT, AND
THEY -- MUST, WHERE FEASIBLE,
FOLLOW CITY AND COUNTY AND OTHER
POLITICAL BOUNDARIES.
AND, WHAT THAT WOULD MEAN IS TO
THE EXTENT THE LEGISLATURE
WANTED TO DRAW A NEW DISTRICT,
TO -- WHAT WE CALL A MINORITY
ACCESS DISTRICT WHERE THE
POPULATION MAY BE LESS THAN 50%,
BUT COMBINED WITH OTHER VOTERS
IN THE MAJORITY OF THE SAME
PARTY ELECT THE MINORITY
CANDIDATE THE U.S. SUPREME COURT
IN BARTLETT VERSUS STRICKLAND,
YOUR HONOR, SAID THOSE DISTRICTS

ARE NOT PROTECTED BY THE FEDERAL VOTING RIGHTS AMENDMENT AND THAT WAS IN NORTH CAROLINA WHERE THEY HAD A COUNTY PROVISION --
>> IT SOUNDS TO ME LIKE WHAT THE SECTION IS SAYING THAT -- IS THAT YOU CANNOT TAKE A SECTION OVER HERE AND PUT IT WITH ANOTHER SECTION THAT IS NOWHERE NEAR IT TO TRY TO, YOU KNOW, MAKE SOME KIND OF I -- I GUESS YOU ALWAYS REFER TO GERRYMANDERING.
AND THAT IS WHAT IT SOUNDS LIKE TO ME, AND, SO HOW DOES THIS RELATE TO THAT.
>> AMENDMENT 7 WOULD ADD A MEASURE OF FLEXIBILITY, THAT WOULD BE REMOVED BY SECTION 2 --
>> GIVE THE LEGISLATURE MORE AUTHORITY IN DOING THOSE DISTRICTS.
>> IT WOULD GIVE THEM MORE DISCRETION, YOUR HONOR, WITH RESPECT TO THE CRITERIA OF COMPACTNESS AND FOLLOWING CITY AND COUNTY BOUNDARIES BUT WOULD IN NO WAY UNDERMINE THE PROHIBITION AGAINST INTENTIONALLY FAVORING OR DISFAVORING A POLITICAL PARTY OR INCUMBENT.
WHAT THE TRIAL COURT WRONGLY CONCLUDED WAS, SOMEHOW, AMENDMENT 7 WOULD UNDO THE CONTIGUITY REQUIREMENT AND MAY

HAVE BEEN WHAT YOUR HONOR WAS REFERRING TO, WE CANNOT DRAW NONCONTIGUOUS DISTRICTS IF AMENDMENT 7 IS IN PLACE ANY MORE THAN WE CAN VIOLATE THE STANDARDS OF ARTICLE 3 TO SAY SENATE DISTRICTS HAVE TO BE BETWEEN 30 AND 40 IN NUMBER AND HOUSE DISTRICTS HAVE TO BE BETWEEN 80 AND 120.
WE CANNOT EXCUSE OURSELVES, AMENDMENT 7 GIVES US NO OPPORTUNITY TO NOT FOLLOW THE EXISTING PROVISIONS OF ARTICLE 3, SECTION 16A.
BUT, SUBSECTION 2 OF AMENDMENTS 5 AND 6 MIGHT PREVENT US AFTER BARTLETT FROM BEING ABLE TO DRAW A MINORITY ACCESS SEAT, AND WE HEARD TESTIMONY AGAIN FROM BOTH RACIAL... WITH MINORITIES, SOME SITTING MEMBERS OF CONGRESS AS FLORIDA CONTINUES TO EMERGE INTO THE NEXT DECADE AND THE LEGISLATURE DISCHARGES ITS DUTY TO REDISTRICT WE WILL NOT BE ABLE TO DRAW THE DISTRICTS TO THE EXTENT THEY ARE CONSTRAINED BY SECTION 2 OF AMENDMENTS 5 AND 6.
>> WHY DOES THIS DISCRETIONARY PROVISION NOT AFFORD DISCRETION WITH REGARD TO ALL OF THE ELEMENTS?
AS I READ THE AMENDMENT 7, IT SEEMS TO BE SAYING THAT IT

REALLY HAS NO STANDARDS, YOU CONSIDER ALL OF THESE THINGS BUT THERE ARE NO MANDATORY STANDARDS AND IT IS ALL DISCRETION AND EVERYTHING IS THE SAME, YOU CAN ELIMINATE THIS OR THAT AND ADD THIS, ADD THAT AND NONE OF WHICH ARE NECESSARILY BINDING OR REQUIREMENTS.
SO, EVEN THE CONTINUITY REQUIREMENT IS NO LONGER REQUIREMENT, BUT IS MERELY ONE OF THE ELEMENTS TO BEING CONSIDERED IS WHAT -- WHY IS THAT NOT THE CASE?
>> WELL, FOR THREE PRIMARY REASONS.
FIRST, THE TEXT DOESN'T SAY BALANCE AND IMPLEMENT SOME OF THE STANDARDS, IT IMPLIES GIVING EQUAL WEIGHT.
>> AGAIN IT IS GIVING WEIGHT TO THEM BUT NOT REQUIRING THEY HAVE ANY PARTICULAR REQUIREMENT.
>> BUT AMENDMENT 7 REQUIRES THE LEGISLATURE TO BALANCE AND IMPLEMENT AND THEY CANNOT FAIL TO IMPLEMENT ANY OF THEM AND TO THE EXTENT THEY DO --
>> YOU SEEM TO BE SPEAKING AROUND WHAT I'M ASKING YOU.
AS I UNDERSTAND AMENDMENT 7, IT GIVES THE LEGISLATURE FULL DISCRETION TO GIVE WEIGHT TO ALL OF THEM BUT NOT NECESSARILY TO FOLLOW ANY OF THEM.

>> TO THE CONTRARY, YOUR HONOR, THE TEXT AND THE LEGISLATURE INTENT --
>> I'M NOT WORRIED ABOUT INTENT. I DON'T THINK INTENT HAS ANYPLACE HERE.
WHERE IN THE TEXT DOES IT TELL US THAT YOU MUST FOLLOW ANY OF THOSE PARTICULAR ONES?
>> WHERE IT DOES WE HAVE TO IMPLEMENT THE STANDARDS IN THE STATED CONSTITUTIONS.
AND, THIS COURT HAS ARTICULATED MULTIPLE --
>> HOW?
BY BALANCING, SOME BALANCING, ISN'T IT.
>> THERE WILL BE BALANCING INVOLVED IN THOSE FACTORS, YOUR HONOR, THAT MAY BE SUBJECTIVE, SUCH AS COMPACTNESS --
>> IT DOESN'T SAY THOSE THAT ARE SUBJECTIVE.
DOES IT?
>> IT DOESN'T, YOUR HONOR BUT THAT IS NOT THE TEST BEFORE THE COURT.
THE TEST IS NOT -- COULD IT HAVE BEEN WRITTEN BETTER.
>> THE TEST IS, DOES IT IS SAY WHAT IT REALLY DOES AND I COME BACK TO -- I'M HAVING PROBLEMS SAYING IT IS STANDARDS WHEN IT IS ALL DISCRETION.
AND SECONDLY WHEN THE ARGUMENT IS THAT IT DOES NOT IMPACT ANY

EXISTING STANDARDS, WHEN AS I READ IT, IT REQUIRES ALL OF THEM.
YOU DON'T HAVE TO FOLLOW ANY OF THEM AS LONG AS YOU GIVE CONSIDERATION TO IMBALANCE.
>> AND YOUR HONOR I WILL SAY BOTH THE TEXT, WHICH DIRECTS THE LEGISLATURE TO IMPLEMENT THE STANDARDS, ALL OF THEM, AS WELL AS THE LEGISLATIVE HISTORY WHERE THERE WAS ABUNDANT TESTIMONY THAT THERE WAS NO INTENTION TO UNDERCUT THE EXISTING PROVISIONS OF ARTICLE 3, AS WELL AS THE CASES OF THE COURT, WHERE IN REDISTRICTING WHEN THE COURT LOOKED AT 5 AND 6, IT SAYS ABSENT EXPRESS REPEAL AN EXISTING CONSTITUTIONAL POSITION WILL BE CONSIDERED REPEALED BY IMPLICATION ONLY IF IT CANNOT BE HARMONIZED WITH THE PROPOSAL. HERE IT CAN BE HARMONIZED, GIVE IT THE READINGS...
>> MY CONCERN IS, WHEN YOU SAY HARMONIZED, WE HAVE CONSTITUTIONAL STANDARDS, CORRECT?
>> YES, YOUR HONOR.
>> AND THIS AMENDMENT SAYS THOSE ONLY BECOME PART OF A BALANCING ACT.
THAT IS WHAT I'M CONCERNED ABOUT.
>> AND THAT IS NOT OUR READING,

NOR OUR INTENT.
>> I CAN'T GET INTO INTENT,
BECAUSE, THE VOTER WON'T KNOW
WHAT YOUR INTENT IS BECAUSE THE
LEGISLATIVE HISTORY IS NOT GOING
TO BE ANYWHERE IN THE VOTING
BOOTH.
>> WELL, YOUR HONOR I WOULD
RESPOND THIS WAY:
IF THAT'S TRUE, THE ONLY
INTERPRETATION IS THAT THESE
WORDS OF AMENDMENTS 7 WILL
SOMEHOW RENDER OPTIONAL ALL OF
THE STANDARDS, IF THAT IS THE
ONLY --
>> NOT ONLY, THE REASONABLE --
REASONABLE READINGS OF IT,
BECAUSE IT'S NOT LIKE A PIECE OF
LEGISLATION, IN MY VIEW.
WHERE WE TRY TO BEND OVER
BACKWARDS TO MAKE SURE, WE TRY
TO GIVE INTENT, EVERYTHING THAT
WE CAN.
BUT, I'M CONCERNED THAT HERE IT
IS THE ACTUAL LANGUAGE THAT GOES
TO THE VOTER, NOT A
SOPHISTICATED LEGISLATOR OR
JUDICIAL OFFICERS, THE PUBLIC,
WHAT WILL THE PUBLIC THINK IT
MEANS.
>> HOPEFULLY GIVE THE WORDS, THE
MEANING THEY HAVE TO THEM LIKE
IF THEY WERE VOTING ON THE RIGHT
TO PRIVACY OR DUE PROCESS.
WE GAVE THE WORDS TO THE VOTERS,
YOUR HONOR, SO THEY'D HAVE THE

ABILITY TO READ THEM AND CHOOSE
TO ADD THEM TO THEIR ORGANIC LAW
OR NOT AND UNLESS THE -- THE
ONLY INTERPRETATION IS, EVEN IF
THAT IS THE CASE THE VOTERS MUST
GIVE IT THAT INTERPRETATION.
I EXPECT THEY GIVE IT THE
COMMON, ORDINARY MEANING WE HAVE
TO IMPLEMENT THE STANDARDS IN
THE CONSTITUTION AND BALANCE
THOSE AS BEST WE CAN AND PRESENT
TO IT THIS COURT AND THE COURTS
WILL HAVE A CHANCE TO JUDGE
THOSE PLANS IN 2012.
TO DETERMINE WHETHER WE HAVE
ACTUALLY DONE THAT.
>> BUT, IF THERE IS -- IF AN
AMENDMENT IS SUBJECT TO MORE
THAN ONE INTERPRETATION BY THOSE
READING... [INAUDIBLE] DOESN'T
IT MAKE IT AMBIGUOUS AS OPPOSED
TO CLEAR AND UNAMBIGUOUS.
>> YOUR HONOR, IN THIS COURT'S
JURISPRUDENCE, THIS COURT HELD
UNMISTAKABLY, WHEN THERE MAY BE
MORE THAN ONE INTERPRETATION, TO
A POTENTIAL AMENDMENT, IN
SMATHERS VERSUS SMITH IT SAYS IT
IS PREMATURE AND SPECULATIVE AND
THE COURT WILL NOT ADDRESS IT.
IF THERE IS ANY MEANING, TO GIVE
IT MEANING IT MUST BE ALLOWED --
>> WE ARE NOT LOOKING AT WHETHER
THE AMENDMENT IS VAGUE OR
AMBIGUOUS BUT WHETHER THE
SUMMARY IS, THAT IS TYPICALLY

WHAT YOU LOOK AT IN CASES LIKE THIS AND THERE IS NO LAW THAT SAYS THERE CAN'T BE A PROVISION IN THE CONSTITUTION THAT IS AMBIGUOUS OR VAGUE IF SUCH WERE THE CASE, NO CONSTITUTIONAL CASES WOULD BE COMING TO US, WOULD WE.

>> THAT'S CORRECT, YOU THINK OF FREE EXERCISE OF RELIGION OR THE RIGHT TO DUE PROCESS OF LAW, THOSE CAN GENERATE THOUSANDS OF INTERPRETATIONS BY THOUSANDS OF COURTS AND IT CAN BE NO BAR AND THIS COURT HELD, JUSTICE QUINCE IT IS NOT A PROHIBITION A PROSPECTIVE AMENDMENT MIGHT BE SUBJECT TO MORE THAN ONE INTERPRETATION.

>> BUT AMENDMENT IS AMBIGUOUS AND YOU ARE USING THAT AND -- AS THE BALLOT SUMMARY IN ESSENCE, THERE IS NOTHING YOU CAN DO. THERE IS NOTHING THIS COURT CAN DO IF YOU ARE GOING TO PUT THE WHOLE AMENDMENT ON THE BALLOT. THAT IS IN ESSENCE WHAT YOU ARE SAYING.

>> WHAT WE'RE SAYING IS IT CANNOT BE MISLEADING IN THAT CIRCUMSTANCE AND NO COURT IN FLORIDA SEVER STRUCK A PROSPECTIVE QUESTION WHERE THE TEXAS TEXT WAS THE SUMMARY, THERE WAS NO DISCONNECT AND IT WAS SUBJECT TO MORE THAN ONE

INTERPRETATION OR WE COULD NEVER
--
>> LAST FIVE MINUTES.
>> CONTINUE, IF YOU WOULD LIKE.
>> I'D RATHER RESERVE REMAINING TIME FOR REBUTTAL, YOUR HONOR, THANK YOU.
>> MR. MAKAR.
>> GOOD MORNING, MR. CHIEF JUSTICE, MEMBERS OF THE COURT, I'M RON MEYER, I'M HERE WITH MY PARTNERS, JENNIFER BLUM AND LYNN HARM AND, THIS CASE IS ABOUT THE CLARITY OF THE BALLOT SUMMARY AND IT DOESN'T MATTER WHETHER THE BALLOT SUMMARY IS DISTINCT AND DIFFERENT FROM THE AMENDMENTS, TO SAY THE --
>> LET ME TAKE YOU TO THE STATEMENT I MADE, A MINUTE AGO. DO WE HAVE THE AUTHORITY TO PROHIBIT THE PEOPLE FROM CONSIDER -- PROHIBIT THE PEOPLE FROM A PROPOSED CONSTITUTIONAL AMENDMENT BECAUSE THE AMENDMENT ITSELF IS AMBIGUOUS OR VAGUE.
>> THE PEOPLE OF FLORIDA IF THEY ARE TOLD WHAT THE PRIMARY PURPOSE AND EFFECT OF A BALLOT AMENDMENT IS IN CLEAR AND UNAMBIGUOUS TERMS COULD VERY WELL ELECT TO VOTE FOR AN AMBIGUOUS PROVISION TO THE FLORIDA CONSTITUTION.
>> HERE'S WHAT I'M TRYING TO UNDERSTAND.

IF YOUR POSITION IS THAT THIS
PROPOSED AMENDMENT IS AMBIGUOUS
-- CORRECT?
YOU PUT THAT IN YOUR BRIEF.
>> IT IS VERY AMBIGUOUS, YOUR
HONOR.
>> SO, IS IT YOUR POSITION THAT
THE BALLOT SUMMARY SHOULD CHANGE
THE MEANING OF THE AMENDMENT BY
ELIMINATING THE AMBIGUITY?
I DON'T UNDERSTAND HOW THAT
WORKS.
>> NO, YOUR HONOR, OUR POSITION
IS, THE BALLOT SUMMARY MUST IN
CLEAR AND UNMISTAKABLE AND
UNAMBIGUOUS -- UNAMBIGUOUS
TERMS, AND IN THE VOTING BOOTH
WHAT THE PRIMARY EFFECT OF
PASSING THIS AMENDMENT IS AND
THE PRIMARY EFFECT OF PASSING
THIS AMENDMENT, YOUR HONOR, IS
TO REMOVE THE ONLY MANDATORY
STANDARDS WHICH ARE CURRENTLY IN
THE CONSTITUTION RELATING TO
REAPPORTIONMENT.
NAMELY, CONGRUITY AND, IT SAYS
IT CREATES STANDARDS AND JUSTICE
LEWIS HIT IT ON THE HEAD.
THERE ARE NO STANDARDS IN
AMENDMENT 7, IT TALKS IN TERMS
OF ASPIRATIONAL GOALS.
>> WHAT ABOUT THE TERM
"IMPLEMENT" ISN'T THAT A
SIGNIFICANT TERM TO INDICATE IT
IS MORE THAN PURELY
ASPIRATIONAL?

>> YOUR HONOR, THE DIRECTION TO APPLY FEDERAL REQUIREMENTS AND BALANCE AND IMPLEMENT STATE CONSTITUTIONAL REQUIREMENTS IN ITSELF IS INCONSISTENT.
WE KNOW WHAT "APPLY" MEANS.
>> ONE THING WE KNOW, FOR SURE, IS IF IT IS A FEDERAL REQUIREMENT, WE MUST ABIDE BY IT.
>> WE AGREE ON THAT, YOUR HONOR.
>> OKAY.
>> BUT WHAT WE GET IN THE LANGUAGE OF BALANCING AN IMPLEMENTING AND THEY SAY ALL STANDARDS AND THERE IS NO "ALL" IN THE CONSTITUTIONAL AMENDMENT.
>> THESE STANDARD, CLEARLY, INDICATE THAT IT IS TALKING ABOUT ALL OF THEM.
>> IT MAY BE TALKING ABOUT ALL OF THEM BUT THEN YOU HAVE TO READ ON INTO THE AMENDMENT AND INTO THE SUMMARY, WHERE IT SAYS THEY HAVE GOT TO BE CONSIDERED, PROMOTED AND RESPECTED, BOTH WITHOUT SUBORDINATION TO ANY OTHER PROVISION OF ARTICLE 3 OF THE STATE CONSTITUTION.
>> WHAT --
>> YOUR HONOR --
>> IS THERE ANY WAY THAT THERE COULD BE A -- AN ACCURATE BALLOT SUMMARY FOR THIS AMENDMENTS.
>> IT IS AMBIGUOUS.
IF THE TEXT ITSELF IS AMBIGUOUS,

THAT IS, IT IS SUSCEPTIBLE TO
MORE THAN ONE REASONABLE
UNDERSTANDING, WOULD THE BALLOT
SUMMARY HAVE TO WEIGH OUT THOSE
POSSIBILITIES?
>> IT COULD BE THIS OR IT COULD
BE THAT?
IS THAT HOW YOU WOULD GET AN
ACCURATE BALLOT SUMMARY IN YOUR
VIEW.
>> YOUR HONOR IN MY VIEW, THE
VIEW OF THIS COURT IS THAT THE
BALLOT SUMMARY HAS TO IN CLEAR
AND UNAMBIGUOUS LANGUAGE
DESCRIBE THE PURPOSE AN EFFECT
OF THE AMENDMENT.
AND, THIS BALLOT SUMMARY DOES
NOT DO THAT.
YOU ARE INVITING ME TO REWRITE
THE BALLOT SUMMARY, I GUESS YOU
ARE ASKING ME COULD A BALLOT
SUMMARY BE CONFIGURED THAT WOULD
ACCURATELY SAY THAT PASSAGE OF
THIS AMENDMENT DOES INDEED
SUBORDINATE THE PRESENTS
REQUIREMENT OF THE CONSTITUTION
THAT DISTRICTS BE CONTIGUOUS,
AND SUBORDINATED TO CONSIDERING
COMMUNITIES OF INTEREST.
>> I'M JUST SAYING, BACK TO YOUR
ARGUMENT, THAT THE TEXT OF THE
AMENDMENT ITSELF IS AMBIGUOUS.
>> YES, SIR.
>> IF THAT IS SO, HOW IS THAT
DEALT WITH IN THE BALLOT
SUMMARY?

IT SEEMS TO ME YOU ARE
SUGGESTING THAT THE BALLOT
SUMMARY HAS TO SOMEHOW ELIMINATE
THE AMBIGUITY THAT IS INHERENT
IN THE TEXT AND I DON'T
UNDERSTAND THAT.
>> YOUR HONOR, WHAT THE BALLOT
SUMMARY HAS TO DO IS EXPLAIN
THAT AMBIGUITY TO THE VOTER WHO
IS COMING TO VOTE ON THE BALLOT
AMENDMENT.
IT HAS TO EXPLAIN THAT THIS
AMENDMENT WAS INDEED CRAFTED IN
RESPONSE TO JUSTICE QUINCE'S
ARGUMENTS OR QUESTIONS, THAT IT
WAS CRAFTED SPECIFICALLY FOR THE
PURPOSE OF UNDOING FIVE AND SIX
WHICH WERE ALREADY ON THE
BALLOT, HAD ALREADY BEEN
APPROVED NOT LIKE THE GROWTH
MANAGEMENT CASE WHERE THE
PETITION WAS FLOATING AROUND
HERE -- AND I DON'T BELIEVE
THERE IS ANY ARGUMENT ON THIS
RECORD, OVER THIS FACT -- HERE,
AMENDMENT 7 WAS CRAFTED WITH ONE
SPECIFIC PURPOSE IN MIND.
AND THAT WAS TO UNDO WHAT FIVE
AND SIX WERE DOING.
AND, HOW IT UNDID IT, IT CHOSE
TO UNDO IT IN THE A WAY OF
CREATING THESE ASPIRATIONAL
GOALS, CALLING THEM STANDARDS,
ADDING TO THE CONFUSION, QUITE
FRANKLY IN THE TITLE, CALLING
THEM STANDARDS AND PUTTING THE

SUBJECTIVE CRITERIA IN, THAT THE
PUBLIC WOULDN'T HAVE A WAY OF
KNOWING, EVEN RELATED TO FIVE
AND SIX.
SECONDLY, IN CREATING THESE
ASPIRATIONAL GOALS, AND GIVING
THEM A PREEMINENCE WITHOUT
DESCRIBING THIS IN A BALLOT
SUMMARY AND WITHOUT TELLING THE
VOTER, WE ARE GOING TO CREATE
THIS CONSIDERATION OF THE
ABILITY OF RACIAL LANGUAGE --
MINORITIES, AND RESPECTING AND
PROMOTING COMMUNITIES OF COMMON
INTEREST, WHATEVER THAT MEANS,
WE'RE GOING TO ELEVATE THAT TO
THE SAME DIGNITY OR, INDEED,
PERHAPS A HIGHER DIGNITY THAN IS
PRESENTLY IN THE CONSTITUTION
REQUIRING CONTIGUITY.
>> HOW DID THAT... [INAUDIBLE].
>> WITHOUT ANY OTHER PROVISION
OF ARTICLE 3, MEANS IT IS NO
LOWER THAN, IT COULD BE HIGHER
THAN, HOW DO YOU --
>> HOW DOES THAT READ, 16A OUT
OF THE CONSTITUTION?
WE HAVE MINIMAL CONSTITUTIONAL
REQUIREMENTS IN ALMOST EVERY
ARTICLE OF THE CONSTITUTION.
HOW DOES ADDING ONE, SOMEHOW
ELIMINATE THE OTHER?
>> JUSTICE POLSTON, IT DOESN'T
READ IT OUT OF THE CONSTITUTION.
WE HAVE NEVER ARGUED THAT
AMENDMENTS 7'S PASSAGE REPEALS

THE CONTIGUITY REQUIREMENT.
WHAT WE SAY IS, IT SUBSTANTIALLY ADMINISTERS AND ALTERS THE CONTIGUITY -- THERE IS THAT WORD -- REQUIREMENT AND PERMITS A COMMUNITY OF INTEREST TO BE CONSIDERED, WHICH WOULD TAKE PREEMINENCE, ARGUABLY, OVER THE CONTIGUITY REQUIREMENT.
THE TRIAL COURT MADE A GOOD EXAMPLE --
>> IF YOU DON'T ELIMINATE IT THE REQUIREMENT OF 16A IS STILL THERE.
>> THE REQUIREMENT IS THERE, YOUR HONOR, BUT IT IS SUBORDINATED TO POTENTIALLY CONSIDERATION OF A COMMUNITIES OF INTEREST, CONSIDERATION, BUT NOT ACTING ON RACIAL MINORITIES, AND THINGS OF THAT NATURE.
>> WAS THERE ANYTHING IN 16A, THAT SOMEHOW SAYS THAT THOSE STANDARDS HAVE TO HAVE PRIORITIZATION ON ANY OTHER THING, THAT MAY BE IN THE CONSTITUTION.
>> NO, YOUR HONOR, BUT WHAT I AM SAYING IS, THIS BALLOT SUMMARY THE VOTER, GOING TO THE VOTING BOOTH, IS GOING TO LOOK AT AND READ, HAS NO WAY OF KNOWING THAT THE PRESENT UNSALIABLE STANDARDS OF CONTIGUITY HAS NOW BEEN REDUCED TO A SUBORDINATE ROLE TO THESE ASPIRATIONAL GOALS.

AND, SO, THAT IS WHAT I'M SAYING
IS THE DEFECT HERE.
THE PUBLIC HAS A RIGHT TO KNOW.
CONTIGUITY IS A HAND CUFF ON THE
LEGISLATURE.
THEY ARE TOLD IN THE
CONSTITUTION IF YOU ARE GOING TO
CONFIGURE LEGISLATIVE DISTRICTS
YOU HAVE TO DO IT WITH
CONTIGUITY.
THAT IS THERE.
AMENDMENTS 7'S PASSAGE OPENS THE
HANDCUFF AND WE DON'T TELL THE
PUBLIC THAT.
WE DON'T HAVE A WHISPER IN
AMENDMENT 7 OR THE BALLOT
SUMMARY THAT SAYS BY PASSING
THIS AMENDMENT YOU ARE GOING TO
DIMINISH THE IMPORT OF
CONTIGUITY THAT IS PRESENTLY IN
THE CONSTITUTION, AND THAT IS
THE FAILURE...
>> ISN'T IT REALLY MORE
REASONABLE TO VIEW THE
CONTIGUITY REQUIREMENT AS A
RULE, AS OPPOSED TO A STANDARD.
SO THAT YOU... AND OUR CASE LAW
WOULD BE CONSISTENT WITH THAT.
BECAUSE, WE HAVE SAID THAT
CONTINUITY INVOLVES TOUCHING AT
A POINT, THAT'S CORRECT --
CONTIGUITY INVOLVES TOUCHING AT
A POINT.
>> CONTIGUOUS WITHIN YOURSELF.
>> RIGHT.
AND IT IS AN EITHER/OR

PROPOSITION AND YOU CANNOT BE A LITTLE CONTIGUOUS OR MORE CONTIGUOUS, IT'S AN EITHER/OR PROPOSITION, IT IS A RULE AS OPPOSED TO A STANDARD WHERE YOU CAN HAVE A CONTINUUM.
DOESN'T THAT REALLY MAKE MORE SENSE?
AND SO WHEN WE TALK ABOUT STANDARDS, WE REALLY AREN'T EVEN REFERRING TO THAT CONCRETE RULE THAT IS SET FORTH IN THE CONSTITUTIONS.
BECAUSE, THAT IS NOT THE SORT OF THING THAT CAN BE BALANCED.
>> YOUR HONOR, RESPECTFULLY I WOULD HAVE TO DISAGREE.
I THINK CONTIGUITY IS CLEARLY AN OBJECTIVE STANDARD PRESCRIBED IN THE CONSTITUTION --
>> YOU DON'T ACCEPT THE DISTINCTION BETWEEN RULES AND STANDARDS?
YOU THINK IT DOESN'T APPLY HERE.
>> YOUR HONOR, I'M NOT SURE THAT IT APPLIES HERE.
YOU KNOW, IT IS OUR VIEW THAT CONTIGUITY IS AND HAS BEEN SINCE IT WAS ADDED IN 1968, A STANDARD FOR THE LEGISLATURE TO BE FOLLOWING REAPPORTIONING THE STATE OF FLORIDA AND WHAT I AM SAYING TO YOU IS, BY GIVING AMENDMENT 7 THE ABILITY SIMPLY BY RESPECTING A COMMUNITY OF INTEREST, TO UNDO THAT STANDARD,

OR IF YOU WANT TO CALL IT A
RULE, I SUPPOSE THE SAME RESULT,
YOU ARE CHANGING A VERY
SUBSTANTIAL PROVISION OF THE
EXISTING FLORIDA CONSTITUTION.
AND YOU ARE SIMPLY NOT GIVING
THE VOTER WHEN HE OR SHE COMES
TO THE VOTING BOOTH ANY
INDICATION THAT THAT CHANGE IS
BEING MADE.
AND, THAT IS THE DEFECT THAT WE
SEE HERE.
THAT IS WHAT THE TRIAL COURT
BELOW SAID.
HE MUSED WHAT IF IN RESPECTING
AND PROMOTING A COMMUNITY OF
INTEREST THAT IT MADE SENSE TO
TAKE DESTIN AND DAYTONA BEACH,
TWO BEACH COMMUNITIES, THAT
CLEARLY HAVE COMMON INTERESTS
AND COMMUNITIES OF COMMON
INTEREST AND NEEDS, AND
CONCLUDED THAT THAT COMMUNITY OF
INTEREST, OF BEACH COMMUNITIES,
OUGHT TO SERVE AS A MEASURE FOR
REAPPORTIONMENT.
AND, APPLYING THE LANGUAGE OF
AMENDMENTS 7, THAT THAT
COMMUNITY OF COMMON INTEREST CAN
BE RESPECTED WITHOUT
SUBORDINATION TO ANY OTHER
PROVISION OF ARTICLE 3 OF THE
STATE CONSTITUTION.
YOU HAVE EFFECTIVELY SAID YOU
COULD HAVE A DISTRICT THAT WAS
NONCONTIGUOUS BECAUSE IT HAS A

COMMUNITY OF INTEREST THAT IS
NONCONTIGUOUS.
HOW DO YOU GIVE ANY MEANING AT
ALL TO THIS LANGUAGE WITHOUT
SUBORDINATION TO ANY OTHER
PROVISION OF ARTICLE 3 OF THE
STATE CONSTITUTION?
IF YOU DON'T RIDE IT THAT WAY?
AND, IF, INDEED, WHAT THE
DRAFTERS INTENDED WAS TO EXEMPT
CONTIGUITY, HOW DOES THE VOTER
GET AN INKLING OF THAT FROM
READING THE LANGUAGE, THAT SAYS
IT APPLIES TO ANY OTHER
PROVISION OF ARTICLE 3 OF THE
STATE CONSTITUTION AND, THERE
ARE -- I THINK THERE ARE 19 SUB
SECTIONS OF ARTICLE 3.
DOESN'T THE PUBLIC HAVE A RIGHT
TO THE KNOW WHEN YOU VOTE FOR
AMENDMENT 7, IN PROMOTING THESE
COMMUNITIES OF COMMON INTEREST,
OR CONSIDERING THE ABILITY OF
RACIAL AND ETHNIC MINORITIES,
TO ACHIEVE VOTER POWER, DOESN'T
THE PUBLIC HAVE A RIGHT TO KNOW
THAT THIS AMENDMENT SPECIFICALLY
EXCLUDES FROM THE REST OF
ARTICLE 3 THE CONTIGUITY
REQUIREMENT?
>> ARE YOU SAYING UNDER
AMENDMENT 7, THIS IS -- IF THIS
IS PASSED THERE COULD BE A
NONCONTIGUOUS DISTRICT.
>> YOUR HONOR, I THINK THAT IS
WHAT THE TRIAL COURT BELOW FOUND

AND I THINK THAT IS THE ONLY
READING THAT YOU CAN GIVE TO
THIS LANGUAGE, IN ARTICLE --
AMENDMENT 7.
>> WHERE DOES IT SAY THAT.
>> IT SAYS THAT YOU CAN RESPECT
A COMMUNITY OF COMMON INTEREST,
WITHOUT SUBORDINATION TO ANY
OTHER PROVISION OF ARTICLE 3 OF
THE STATE CONSTITUTION.
>> TO GET TO THAT POINT WOULDN'T
YOU HAVE TO READ SUBSECTION A AS
BEING SOMEHOW EXCLUSIVE OR
LANGUAGE IN THE AMENDMENT THAT
SOMEHOW REWRITES A OUT OF THERE?
WHERE DOES IT DO THAT.
>> DOESN'T REWRITE IT OUT OF
THERE, YOUR HONOR IT SIMPLY
DIMINISHES ITS ABSOLUTENESS AND
THAT IS WHAT THE VOTER IS NOT
BEING TOLD.
WHEN THEY GO TO THE VOTING
BOOTH, THAT WE'RE CHANGING WHAT
IS.
WHAT IS RIGHT NOW, NOBODY IS
ARGUING OVER.
THE DISTRICT HAS TO BE
CONTIGUOUS.
IF AMENDMENT 7 PASSES, IT MAY OR
MAY NOT BE CONTIGUOUS.
WHY?
BECAUSE IF YOU RESPECT THE
COMMUNITY OF COMMON INTEREST
OTHER THAN A POLITICAL PARTY,
AND YOU TREAT THAT AS NOT BEING
SUBORDINATED TO THE CONTIGUITY

REQUIREMENT, THEN YOU ON HAVE
YOU MADE A SUBSTANTIAL CHANGE
TO THE PRESENT FLORIDA
CONSTITUTION.
BUT YOU KNOW THERE IS NOT A
WHISPER OF THE CONTIGUITY IS NOT
MENTIONED.
ALL THAT IS MENTIONED IS EVERY
OTHER PROVISION OF ARTICLE 3,
YOUR HONOR AND WHAT WE SUGGEST
TO YOU IS THE CASE LAW HAS MADE
IT PLAIN THAT YOU CANNOT HIDE
IT.
YOU HAVE TO BE CLEAR.
THE FACT THAT WE'RE HAVING THIS
DISCUSSION AND DEBATE OVER WHAT
IT MEANS, WHAT IS COMMUNITY OF
COMMON INTEREST?
HOW DOES IT AFFECT THIS AND
THAT?
THESE ARE ALL TEMPS, YOUR HONOR,
TO THE FACT THAT THIS BALLOT
SUMMARY IS NOT CLEAR AND
UNAMBIGUOUS AS REQUIRED BY THE
STATUTE AND THE CONSTITUTION.
AND, SO THE PERSON GOING INTO
THE VOTING BOOTH, SIMPLY DOESN'T
KNOW THE FULL IMPACT AND EFFECT,
NOT ONLY THAT IT WILL HAVE TO
AMENDMENTS 5 AND 6, BUT, TO THE
EXISTING LANGUAGE IN THE FLORIDA
CONSTITUTION.
AND THAT IS THE PROBLEM, A MAJOR
PROBLEM WE HAVE, WITH THE
AMENDMENT 7.
>> REALLY, YOUR ARGUMENT REALLY

IS THAT AT LEAST THAT PART OF
THIS IS THAT THERE IS ONE THING
THAT IS VERY CLEAR, AND THAT IS,
THAT THE CONTIGUITY REQUIREMENT
MAY BE LOST OR IS NO LONGER A
REQUIREMENT AND THAT THE TEXT OF
THE AMENDMENT WHICH IS IN THE
BALLOT SUMMARY, DOESN'T
ADEQUATELY PUT THE VOTER ON
NOTICE ABOUT THAT CLEAR POINT.
>> CLEARLY.
AND IF THE SUMMARY HAD SAID THAT
THE TEXT OF THE AMENDMENT
AFFECTS THE CONTIGUITY
REQUIREMENT IN THE CONSTITUTION
THE ARGUMENT WOULD BE LESSENED
OR IF THEY SAID THE AMENDMENT
OMITTED BOTH WITHOUT
SUBORDINATION TO ANY OTHER
PROVISION OF ARTICLE 3 OF THE
STATE CONSTITUTION, JUST SIMPLY
ADDED AN AMENDMENT TO REQUIRE
THE LEGISLATURE TO CONSIDER
THESE ASPIRATIONAL GOALS AND
BALANCE THEM WITH THE OTHER
STANDARDS, PERHAPS, THEN, THE
FLAW OF THE AMENDMENT WOULD BE
PRESENT.
BUT, NONE OF THAT IS HERE.
THEY'VE HIDDEN THE FACT THAT
THIS IS IN EFFECT -- IN EFFECT
AND THE VOTER WILL SIMPLY NOT
KNOW THAT WHEN HE OR SHE
PRESENTS AT THE VOTING BOOTH.
WHAT THEY WILL SEE IS SOMETHING
THAT IS CALLED A "CREATION OF

STANDARDS" BY ITS TITLE, WHEN,
IN FACT, WHAT THE AMENDMENT DOES
IS, IT DILUTES THE ONLY -- WHAT
WE SUBMIT TO BE THE ONLY
STANDARD IN THE CONSTITUTION, OF
CONTIGUITY.
DOESN'T WRITE IT OUT OF THE
CONSTITUTION BUT CERTAINLY
SUBORDINATES IT, TO THESE
ASPIRATIONAL GOALS, THAT IS WHAT
THE COURT BELOW FOUND, AND, WE
DON'T SEE HOW THIS LANGUAGE CAN
LEAD TO A DIFFERENT RESULT HERE,
YOUR HONOR.
>> YOU ARE IN ESSENCE ARGUING
HERE THAT WHAT THE LANGUAGE DOES
IS MAKES THE COMMUNITY OF
INTEREST AND THESE OTHER
PORTIONS THEY TALK ABOUT, RACIAL
LANGUAGE, MINORITY...
[INAUDIBLE] THIS MAKES IT MORE
IMPORTANT I GUESS FOR LACK OF A
BETTER WORD THAN THE OTHER --
THAN THE CONTIGUOUS REQUIREMENT
THAT PRESENTLY EXISTS IN THE
CONSTITUTION AND THIS IS FLAWED
BECAUSE IT DOES NOT SAY THAT.
>> IT IS FLAWED BECAUSE IT
DOESN'T TELL THE VOTER EXACTLY
WHAT YOU HAVE STATED, YOUR HONOR
AND THAT IS THAT BY TREATING
THESE ASPIRATIONAL GOALS, THAT
YOU SHOULD CONSIDER THESE
THINGS, YOU SHOULD RESPECT AND
PROMOTE THESE COMMUNITIES OF
COMMON INTEREST AND IT'S NOT A

STANDARD, IT'S AN ASPIRATIONAL GOAL, YOU OUGHT TO DO THAT. THERE IS NOTHING WRONG WITH DOING THAT BUT WHEN YOU SAY, WHEN DO YOU THAT, YOU CAN TAKE PRECEDENCE OVER, THE ONLY STANDARD WHICH EXISTS IN THE CONSTITUTION, THAT BEING CONTIGUITY, AND YOU DON'T TELL THE PUBLIC THAT THAT IS WHAT YOU ARE DOING YOU HAVE RUN AFOUL OF THE DUTY OWED TO THE PUBLIC TO HAVE A CLEAR AND UNAMBIGUOUS BALLOT SUMMARY THAT DESCRIBES THE PRIMARY PURPOSE AND EFFECT. LET ME SIMPLY SAY IN THE BALANCE OF MY TIME, THE FAILURE TO DEFINE WHAT A COMMUNITY OF COMMON INTEREST IS, IS ALSO, WE THINK, A FATAL FLAW IN THIS AMENDMENT.
>> WHAT DO YOU THINK A COMMUNITY OF INTEREST --
>> WHATEVER I WANT IT TO BE, A GATED COMMUNITY, A BEACH COMMUNITY, AN ELDERLY POPULATION, A FARMING COMMUNITY.
>> IS THERE ANY CASE LAW, FEDERAL OR STATE THAT TALKS OF COMMUNITIES OF COMMON INTEREST.
>> I AM NOT AWARE OF ANY CASE LAW THAT DEFINES THIS IN THE CONTEXT OF A CONSTITUTIONAL -- CONSTITUTIONAL RESPECT, THAT SAYS YOU SHOULD RESPECT THESE COMMUNITIES OF INTEREST.

THERE IS NOTHING CLEAR AND
DEFINED AND, AGAIN, IF WE HAVE
TO GUESS, IF I GO TO THE VOTING
BOOTH AND SAY, WELL A COMMUNITY
OF COMMON INTEREST ARE PEOPLE
LIKE ME AND I SUPPORT THAT AND
SOMEBODY ELSE SAYS, WELL, IT IS
IS REALLY, YOU KNOW, GATED
COMMUNITIES OR BEACH COMMUNITIES
OR SOME OTHER GROUPING, WE ARE
VOTING ON A CONSTITUTIONAL
AMENDMENT THAT APPLIES TO ALL
THE PEOPLE, BUT WE HAVE NO
SINGLE UNDERSTANDING, NOR CAN WE
DERIVE AN UNDERSTANDING OF WHAT
THAT MEANS FROM LANGUAGE USED IN
THE BALLOT ITSELF AND THAT IS A
PROBLEM AND LET ME ALSO TOUCH
ON, IN MY REMAINING TIME, THE
FACT THAT THE CASE LAW SUGGESTS
THERE IS NOT A REQUIREMENT FOR A
PROPOSED BALLOT AMENDMENT TO
ADDRESS OTHER BALLOT AMENDMENTS
AND CERTAINLY THE GROWTH
MANAGEMENT DECISION OF THIS
COURT WOULD LEAD YOU TO THAT BUT
WE THINK IN THE FACTS OF THIS
CASE, WHERE THIS PARTICULAR
AMENDMENT WAS CRAFTED SOLELY AND
EXCLUSIVELY TO UNDO, MITIGATE
AMENDMENTS 5 AND 6, WHICH WERE
ALREADY ON THE BALLOT, AND
BEFORE THE LEGISLATURE, AND,
FORMED THE BASIS OF THE
DISCUSSION BY THE LEGISLATURE,
IN CRAFTING AMENDMENT 7, AND

GIVING IT AN OPPORTUNITY TO UNDO
AMENDMENT 5 AND 7, THE PEOPLE
OUGHT TO AT LEAST BE TOLD THAT.
>> SO IT IS A RACE, THAT YOU
THAT IF YOU GET YOUR BALLOT
THERE FIRST, SUBSEQUENT BALLOTS
HAVE TO REFER TO THE PREDECESSOR
BUT NOT THE OTHER WAY AROUND.
>> YOUR HONOR, I DON'T THINK
FIVE AND SIX IN ANY WAY AFFECT
SEVEN, BUT SEVEN WAS CRAFTED
EXCLUSIVELY TO 5 AND.
>> THEORETICALLY YOU COULD HAVE
DIFFERENT BALLOTS THAT AFFECT
EACH OTHER AND YOUR COUNSEL SAYS
THE VOTERS NEED TO FIGURE THAT
OUT WHEN THEY LOOK AT IT IN THE
VOTERS' BOOTH, OTHERWISE, WHAT
CAN YOU DO, AS A MATTER OF
CONSTITUTIONAL LAW?
ARE WE TO REQUIRE EVEN AMENDMENT
TO SOMEHOW REFER TO OTHER
POTENTIALLY AMENDMENTS THAT MAY
OR MAY NOT BE PASSED .
>> YOUR HONOR, I THINK WHAT YOU
CAN DO, YOU CAN LOOK AT THE
FACTS OF THIS CASE AND SAY, THAT
IN THIS INSTANCE, THIS WAS DONE
IN AN EFFORT TO UNDO FIVE AND
SIX, TO MASQUERADE ITSELF AS
PART OF A GROUP OF AMENDMENTS,
USING THE SAME KIND OF BALLOT
TITLE CREATING STANDARDS FOR
LEGISLATIVE REAPPORTIONMENT.
AND, YET, IN FACT NOT BE PART OF
THAT GROUP OF AMENDMENTS BUT

UNDERMINING THEM.
>> SO WE WAIT AND PATCH THEM TOGETHER AND AT THE END, WE SAY, HERE'S ALL THE PROPOSED CONSTITUTIONAL AMENDMENTS THAT WILL GO ON THE BALLOT AND SEE WHAT INTERPLAY THEY HAVE WITH EACH OTHER AND MAKE CERTAIN REQUIREMENTS, CONSTITUTIONALLY, THAT THEY SOMEHOW REFER TO EACH OTHER.
>> JUSTICE POLSTON, YOU DON'T HAVE TO GO THAT FAR.
I THINK WHAT YOU SHOULD DO, SO IS BE MINDFUL OF THE FACT THAT THE PEOPLE WHO ARE ASKED TO VOTE ON THIS AMENDMENT OUGHT TO NOW WHAT ITS GENESIS WAS.
>> LET ME ASK YOU ONE FINAL QUESTION.
IF THE PUBLIC -- 60%, I THINK, HAS TO BE VOTED ON --
>> YES, YOUR HONOR.
>> ALL THREE OF THEM.
WHAT IS THE EFFECT?
>> I THINK FIVE AND SIX BECOME WATERED DOWN AND MEANINGLESS, AND CAN BE TRUMPED BY AMENDMENT 7, THAT SAYS IF YOU TAKE INTO CONSIDERATION THIS OR THAT, THAT IS NOT GOING TO BE SUBORDINATED TO ANYTHING THAT IS IN FIVE OR SIX, OR ELSEWHERE IN THE CONSTITUTION.
SO IF THEY ALL THREE PASSED, FIVE AND SIX BECOME VIRTUALLY

SURPLUS.
THANK YOU, YOUR HONOR.
>> THANK YOU.
REPRESENTATIVE CANON.
>> THANK YOU, YOUR HONORS, AND JUSTICE QUINCE I WOULD LIKE TO PICK UP ON YOUR QUESTION, IF ALL THREE PASS, THEY ALL THEN RIPEN INTO OUR CONSTITUTION.
>> SO WHAT CAN THE LEGISLATURE THEN DO?
>> WELL, THE LEGISLATURE WILL HAVE TO APPLY THE TERMS OF THE EXISTING PROVISIONS OF ARTICLE 3, THE CONTENTS OF 5, 6 AND 7 TOGETHER, AND THEY WORK TOGETHER.
>> SO HOW WOULD THE LANGUAGE THEN IN 7, THAT TALKS ABOUT "WITHOUT SUBORDINATION", WITH ANY OTHER PROVISIONS WORK.
>> WE WOULD APPLY, THE WAY WE INTERPRET IT WHEN WE WROTE IT, YOUR HONOR, WAS IT WOULD BE NEITHER INFERIOR NOR SUPERIOR. WE COULD HAVE CHOSEN THE WORD, "NOTWITHSTANDING THE OTHER PROVISIONS OF ARTICLE 3" AND THAT WOULD HAVE IMPLIED A SUPERIORITY AND WE DIDN'T.
>> WITHOUT YOUR -- YOU KNOW, WHAT CONCERNS ME, YOU WERE PART OF THE LEGISLATURE THAT THE... THAT PASSED THE RESOLUTION AND A FUTURE LEGISLATURE THAT WAS NOT A PART OF THIS, THEY COULD IN

FACT READ THE LANGUAGE, IT SEEMS TO ME, AND --
IN THE MANNER THAT THE APPELLEES ARE TALKING ABOUT AND, WE HAVE A COMMUNITY OF INTEREST AND WE WANT TO LOOK AT THE OTHER ASPIRATIONAL STANDARDS AS HE CALLS THEM AND SAY, WE WANT A DISTRICT THAT LOOKS LIKE THAT.
>> IF THAT WERE TRUE THE LEGISLATURE COULD APPROVE A PLAN WITH 800 SENATE DISTRICTS OR TWO HOUSE DISTRICTS.
ACCORDING TO THE LOGIC OF MR. MEYERS' ARGUMENT WE CAN DISREGARD ANYTHING IN ARTICLE 3 AND THAT IS NOT LOGICAL AND THIS COURT HAS SID THAT IF A LEGISLATIVE ACT IS REASONABLY SUSCEPTIBLE OF ANY CONSTRUCTION -- ANY CONSTRUCTION -- THAT AVOIDS INVALIDITY, THE COURT IS BOUND TO A COORDINATE BRANCH TO ADOPT THAT CONSTRUCTION, THAT IS THE LAW.
IF THERE IS ANY INTERPRETATION, THE LEGISLATIVE BRANCH EXERCISES POWERS UNDER ARTICLE 11, SECTION ONE TO PUT IT BEFORE THE VOTERS IT MUST BE GIVEN THAT INTERPRETATION AND NOTHING IS MORE IMPORTANT AND NOTHING IS MORE COMPLEX THAN THE FACT THAT IN THE LAST TWO DECADES THE LEGISLATURE MADE HISTORIC GAINS IN MINORITY REPRESENTATION OF

BOTH LANGUAGE AND RACIAL
MINORITIES IN OUR STATE AND
COMPLEXITY TO MR. CHIEF JUSTICE
KENNEDY'S POINTS, COMPLEXITY
CANNOT BE A BAR TO ADDING
SOMETHING TO THE CONSTITUTION.
IT MAY BE SUBJECT TO MORE THAN
ONE INTERPRETATION, BUT, IF THAT
WERE THE BAR, IT WOULD PROHIBIT
THINGS FROM BEING ADDED WE COULD
NOT FUNDAMENTAL RIGHTS AS DUE
PROCESS OF LAW OR RIGHT TO
FREEDOM OF SPEECH.
>> BUT, IN THE SAME VERNACULAR,
WORDSMITHING CANNOT BE UTILIZED
TO DECIDE WHAT THE PURPOSE OF --
YOU ARE REQUIRED TO SET FORTH
THE PURPOSE AND EFFECT OF A NEW
AMENDMENT AND THAT IS WHAT WE'RE
GETTING INTO, AN ERA OF PURE
WORDSMITHING EVERY TIME WE LOOK
AT THESE THINGS, AND, AGAIN,
IT'S NOT JUST THE LEGISLATURE, I
MEAN, THERE ARE TIMES WHEN
PROPONENTS COME FORTH WITH WHAT
THE PURPOSE AND WHAT THIS EFFECT
IS, AND, IT IS NOTHING BUT
TALKY-TALK OR WORDSMITHING TO
TRY TO CONVINCE PEOPLE THAT THIS
IS WHAT SHOULD BE ADOPTED
WITHOUT REALLY ADDRESSING WHAT
THE TRUTH OF THE THE MATTER IS,
ISN'T THAT WHAT WE'RE LOOKING TO
DO?
WE'RE NOT TRYING TO GET TO THE
TRUTH OF THE MATTER TO INFORM

THE VOTING PUBLIC.
>> NO, YOUR HONOR.
>> WE'RE NOT.
>> NOT AT ALL.
BECAUSE... A SUMMARY, ALL THE CASES THIS SORT HANDED DOWN, THE WORDSMITHING CAN ONLY OCCUR IF THE SUMMARY FAILS TO FAITHFULLY ARTICULATE THE TEXT.
HERE, WE GIVE THE VOTER THE TEXT.
THERE CAN BE NO WORDSMITHING, THERE IS NO EDITORIALIZING AND APPEAL AND GAVE THE VOTER... TO AVOID ANY POTENTIAL WORDSMITHING AND NOTHING --
>> WHAT ARE YOU SAYING WE ARE LOOKING AT?
IN THIS PARTICULAR PROPOSED AMENDMENT?
WE ARE LOOKING AT A TEXT OF THE ACTUAL AMENDMENT, CORRECT.
>> YES.
>> AND FOR ALL INTENTS AND PURPOSES IS THE SAME AS A BALLOT SUMMARY.
>> IN SOME CASES, YOUR HONOR, AMENDMENTS HAD A -- HAVE A SUMMARY.
AND, THAT RAISES THE POINTS, WHAT WAS THE LEGISLATURE TO DO?
IF THE LEGISLATURE HAD TRIED TO DESCRIBE IN A SUMMARY THAT WAS DIFFERENT THAN THE TEXT I'M SURE MR. MEYER WOULD BE ARGUING THE SUMMARY FAILED TO ADEQUATELY

EXPLAIN HOW IT MIGHT INTERACT
WITH 5 AND 6 AND 5 AND 6 HAVE
THE SUMMARY AND WE CHOSE TO GIVE
THE PEOPLE OF FLORIDA THE VERY
WORDS THEY MAY CHOOSE OR MAY NOT
CHOOSE TO ADD TO THE
CONSTITUTION, SPECIFICALLY, TO
AVOID JUSTICE LEWIS ANY CHARGE
OF EDITORIALIZING OR
WORDSMITHING OR TRICKERY AND
NOTHING COULD BE MORE FAITHFUL
TO THE TEXT THAN THE TEXT ITSELF
AND REAPPORTIONMENT IS
INCREDIBLY COMPLEX AND, YOUR
HONOR, PRESERVING COMMUNITIES OF
INTEREST IS HOW THE LEGISLATURE
HAS PROTECTED MINORITY RIGHTS
BECAUSE THE 14TH AMENDMENT TO
THE U.S. CONSTITUTION SAYS A
RACE-BASED DISTRICT BY ITSELF IS
SUBJECT TO AN EQUAL PROTECTION
CHALLENGE AND TO DRAW DISTRICTS
THAT ARE MINORITY ACCESS
DISTRICTS, THE LEGISLATURES HAVE
TO COMBINE THE ABILITY OF THE
RACIAL AND LANGUAGE MINORITIES
TO PARTICIPATE IN THE PROCESS
WITH COMMUNITIES OF COMMON
INTEREST OTHER THAN RACE, AND,
THAT IS WHY THOSE TWO PHRASES
ARE BOTH IN AMENDMENT 7, TO GIVE
THE LEGISLATURE THE TOOLS TO
PROTECT THE MINORITY RIGHTS THAT
WOULD BE RESTRAINED BY SECTION 2
OF AMENDMENTS 5 AND 6.
>> WELL OUR TIME HAS RUN OUT.

I WANT TO THANK BOTH SIDES FOR
THE EXCELLENT BRIEFING AND
EXCELLENT ARGUMENT.