SUPREME COURT
STATE OF FLORIDA

LOREAN S. EVANS; HENRY McDERMOTT; LUCILLE McDERMOTT; and CHERYL LEE HARRISON,

Appellants,

vs.

CASE NO. 65,898

GEORGE FIRESTONE, as Secretary of State of Florida; and REASON '84: THE COMMITTEE FOR CITIZENS RIGHTS IN CIVIL ACTIONS, a political action committee,

Appellees.

/

APPELLANTS' REPLY BRIEF

On Certified Appeal from the
District Court of Appeal for the First District.

ARTHUR ENGLAND
FINE, JACOBSON, BLOCK, ENGLAND,
KLEIN, COLAN & SIMON
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

BARRY RICHARD
ROBERTS, BAGGETT, LAFACE & RICHARD
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

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JUSTICIABILITY

Reason '84 suggests that there is "no compelling reason" for this Court to address the constitutional validity of Proposition 9 prior to the election. Significantly, the same argument was raised in Fine v. Firestone[1] 448 So.2d 984 (Fla. 1984), and flatly rejected by this Court. Reason '84 argues that this Court assumed jurisdiction in Fine v. Firestone because of the "unarticulated premise" that approval of Proposition One prior to a decision would have created chaos in government fiscal planning.[2] History fails to support their position. Virtually every challenge to a proposed amendment to the Florida Constitution, whether by initiative or otherwise, has been heard and decided prior to the election at which it was to be submitted to the voters. Most of them did not involve issues that raised any specter of governmental chaos.[3]

Undoubtedly, a real "unarticulated premise" for the Court's consistent practice of deciding ballot challenges prior to the election is a recognition of the fact that forcing the challengers to wait until after the public has adopted an amendment places them at a

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[1] See Citizen's Amicus Curiae Brief, Fine v. Firestone, Case No. 64,739.

[2] "Unarticulated premise" is a convenient concept reminiscent of "the silent majority". It allows the Appellees to ascribe to the Court whatever motives suit their argument.

[3] Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963 (Fla. 1912); Collier v. Gray, 157 So. 40 (Fla. 1934); Gray v. Moss, 156 So. 262 (Fla. 1934); Gray v. Childs, 156 So. 274 (Fla. 1934); City of Coral Gables v. Gray, 19 So.2d 318 (Fla. 1944); Gray v. Golden, 89 So.2d 785 (Fla. 1976); Pope v. Gray, 104 So.2d 841 (Fla. 1958); Rivera-Cruz v. Gray, 104 So.2d 501 (Fla. 1958); Goldner v. Adams, 167 So.2d 575 (Fla. 1964); Adams v. Gunter, 238 So.2d 824 (Fla. 1970); Weber v. Smathers, 338 So.2d 819 (Fla. 1976); Smathers v. Smith, 338 So.2d 825 (Fla. 1976); Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (Fla. 1978); Askew v. Firestone, 421 So.2d 151 (Fla. 1982); Grose v. Firestone, 422 So.2d 303 (Fla. 1982); Fine v. Firestone, supra. Only four of these challenges involved lower court decisions enjoining them from being submitted to the voters. Interestingly, in Smathers v. Smith, supra, counsel for Reason '84, Chesterfield Smith, acting as the plaintiff, challenged a proposed constitutional amendment prior to the election and successfully prevailed over the Attorney General's argument that the action was premature and the issue could be considered after the election.

psychologically unfair disadvantage, and detracts from the credibility of the opinion by inviting the criticism, however unfounded, that the Court was politically motivated.

Reason '84 gives particular emphasis to its argument that Plaintiffs' due process point is non-justiciable. Reason '84 would be correct if the due process argument addressed the constitutionality of a proposed amendment as applied. Such an argument would necessitate awaiting a case in which the revision had actually been applied to determine whether or not it was unconstitutional in its practical application. In this case, however, plaintiff's argue that Proposition 9 is facially violative of the Due Process clause. In such a case, there is no rational justification for waiting until after the election to rule, particularly when the Court has assumed jurisdiction anyway.

MORE THAN ONE SUBJECT

Little discussion is required concerning Reason '84's extraordinary positions regarding the affect of Article XI, Section 3 on Proposition 9. Four reasons are offerred as to why the one-subject limitation is not violated, and surprisingly none withstands even the most cursory analysis.

Reason '84 says that Proposition 9 merely adds one provision to the Declaration of Rights. (Answer Brief at pp 8, 13). They fail to suggest how that fact provides them any comfort, or is in any way relevant to the Court's analysis. It is not relevant, of course. Proposition One, which the Court struck from the ballot in Fine v. Firestone, also sought to add only one provision to the Constitution.

Reason '84 asserts that Proposition 9 does not affect any functions of government. Plaintiffs agree. Again the point is irrelevant. Fine does not set standards only for multi-subject governmental upheavals. Proposition One happened to have that feature, but the fabric of the Fine decision affects all initiative proposals. Reason '84 clearly would not be permitted by initiative to abolish Article I of the Constitution simply because it deals with citizens' rights rather than governmental structure.

Reason '84 argues for a post-election judicial evaluation of Proposition 9, rather than a pre-election evaluation, based on the possibility of later harmonizing this amendment with other provisions of the Constitution. (Answer Brief at pp. 1, 16-18). Reason '84, however, seems to have missed the Court's point in Fine when it expressly withdrew the implication from prior cases that the Court will act as a judicial housekeeper to cure constitutional conflicts created by faulty initiative amendments. Fine v. Firestone, supra.

Finally, Reason '84 again struggles to identify the unity of purpose for Proposition 9 with some definition of its "one subject". It has now concluded that the subject is citizens' rights in civil actions, more or less. This newest attempt at a definition is comical.

Reason '84 first says that Proposition 9 contains "one elementary concept" dealing with the rights of civil litigants. (Answer Brief at page 8). The concept to which it refers, however, predictably requires three separately numbered and unrelated sections to state. Then Reason '84 immediately restates the so-called subject by adopting the generic label used by Judge Willis but suggesting that the two limitation features of the amendment are really not "the subject" but rather "matters directly connected therewith". (Answer Brief at pp. 8-9) The problem, of course, is that the definitional problem in this case is insurmountable. The voters are told that "health care costs" is the subject, but that topic can't be found anywhere in the amendment proposed.

What this all boils down to is simply this. If "the subject" of Proposition 9 is "citizens right in civil actions", the subject is so encompassing and generic as to defy analysis and, just as in Fine, the Court must look more closely into the parts of the proposal to determine its true effects and meanings. After all, numerous "citizens' rights" are established in the Declaration of Rights in the Constitution, most of which arise or are defended in civil (as opposed to criminal) actions. If Fine means anything, limitations could never be placed on all, or even two of those basic rights, by a single-subject initiative petition.

If, on the other hand, the subject of Proposition 9 is a "limitation on recoveries of damages in civil actions", then it suffers fatally from the inclusion of the wholly unrelated summary judgment provision. That provision has absolutely nothing to do with "the subject" of civil damages. In fact, Reason '84 itself gave this second subject an accurate and different description when it said the summary judgments are intended "to streamline litigation in an overworked court system." (Answer Brief at page 24).

DECEPTIVE BALLOT SUMMARY

Reason '84 cites Grose v. Firestone, supra, for the proposition that the ballot summary does not have to include a discussion of all possible future effects of the proposed amendment. Plaintiffs entirely agree and have not advanced such an argument. Indeed, a discussion of all possible effects of Proposition 9 would require more than seventy-five words in the summary and probably more than fifty pages in the brief.

Plaintiffs have argued only that the summary must give voters fair and accurate notice of the chief purpose and full sweep of the amendment. It cannot mislead voters by suggesting that its chief purpose is to expand rights without clearly and unambiguously advising voters that it is really limiting rights, and it cannot suggest to voters that it is offering something new when it is not. The proposed amendment in Grose stated precisely what the chief purpose of the amendment was, did not include a title or editorial comment designed to slant the summary in favor of passage, did not attempt to make a limitation appear as an expansion and did not suggest that it was creating something new when, in fact, it was not.

Reason '84 argues that Proposition 9 gives "constitutional recognition, for the first time, of citizens' rights in civil actions." The proposed amendment, they argue, would freeze the enumerated rights "in constitutional concrete" thus "guaranteeing citizen's greater rights than they now enjoy." Perhaps it is acceptable to argue that the proposal freezes some rights "in constitutional conrete" if we accept Reason '84's strained interpretation of "rights" as being "rights" not to be held jointly and severally liable and not to be required to compensate victims for damages a defendant has caused in excess of $100,000.

Once again, as this Court stated in Askew v. Firestone, supra, the problem with this proposition is in what it does not say. If Proposition 9 freezes these "rights" in

constitutional concrete, it also freezes in constitutional concrete the dis-establishment of major long-standing rights and this dis-establishment is, at best, obscured by the amendment's positive gloss in favor of the so-called establishment of new rights.

In the trial court, Reason '84 argued that if the summary is found to be defectively misleading, the Court should fashion a remedy by placing the actual amendment on the ballot. That argument is now reiterated before this Court and should be summarily rejected.

The problem of misleading the voters is not resolved in the case of Proposition 9 by placing the amendment itself on the ballot. Subsection (b) of the actual amendment, like the summary, conveys the impression that the summary judgment provision creates something new. In order for the summary to accurately give notice to the voter of the actual significance of subsection (b), it would be necessary for the summary to state that the provision constitutionalizes a currently existing law. Thus, the Court would have to rewrite the summary, a political function which would not be appropriate for the Court. The only proper function of the Court is to pass upon the validity of the language as written.

In any event, as a matter of public policy the Court should not invite sponsors of proposed constitutional amendments to draft the amendment in language strongly slanted in their favor with the security of knowing that the Court will rewrite it if the proposal is challenged in court and it becomes necessary to preserve its place on the ballot. The public interest will best be served by placing sponsors on notice that they have a fiduciary obligation to the public to draft ballot summaries fairly, and that they violate that obligation at their own risk.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by hand delivery upon **Robert L. Shevin, Esquire,** First Federal Building, Suite 3050, One Southeast Third Avenue, Miami, Florida 33131; **Julian Clarkson, Esquire,** Holland and Knight, Post Office Drawer 810, Tallahassee, Florida 32302; **Chesterfield Smith, Esquire,** 1200 Brickell Avenue, Post Office Box 015441, Miami, Florida 33101; and **Donald W. Weidner, Esquire,** Legal Counsel for Reason '84, Post Office Box 2411, Jacksonville, Florida 32203 on this 1st day of October, 1984.

FINE, JACOBSON, BLOCK, ENGLAND,
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