O.A. 11-8-91 047

ORIGINAL

48pp

FILED
SID J. WHITE
OCT 18 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN RE:

ADVISORY OPINION TO THE ATTORNEY GENERAL
LIMITED POLITICAL TERMS IN CERTAIN
ELECTIVE OFFICES

Case No. 78,647

BRIEF OF THE AMICUS CURIAE
UNITED STATES REPRESENTATIVE LAWRENCE J. SMITH

Steven R. Ross
General Counsel to the Clerk

Charles Tiefer
Deputy General Counsel to the Clerk

U.S. House of Representatives
The Capitol, H-112
Washington, D.C. 20515
(202) 225-9700

Attorneys for United States
Representative Lawrence J. Smith

October 17, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Constitutional and Statutory Provisions:

Page

Constitutional and Statutory Provisions (cont'd):

Miscellaneous:

INTERESTS OF THE RESPONDENTS

The National Conference of State Legislatures (NCSL) is a bipartisan organization created in 1975 to serve the legislators and staffs of all of the nation's States and territories. NCSL is participating as a Respondent in this case not to protect or oppose the interests of any particular candidates for public office,[1/] but to "advance the effectiveness, independence and integrity of the several legislatures as equal coordinate branches of government in the several states." NCSL By-Laws, Art. II, Sec. 1(1).

The Southern Legislative Conference (SLC) is a non-partisan association that was established in 1947 to encourage intergovernmental cooperation among legislators in southern jurisdictions and acts as one of four regional legislative conferences operating within The Council of State Governments. The mission of the SLC, like The Council of State Governments generally, is the attainment of excellence in all facets of state government.

The interests of both Respondents would be threatened by the enactment into law of the initiative petition entitled "Limited Political Terms In Certain Elective Offices" ("Term Limits Initiative"). The Respondents view the Term Limits Initiative as a substantial threat to the capacity of state legislatures to reflect the

---

[1/] NCSL's by-laws preclude any direct or indirect participation "in any political campaign on behalf of or in opposition to any candidate for public office." NCSL By-Laws, Art. II, Sec. 2.

popular will and to make meaningful the constitutional protections of the separation of powers at the state level. As will be developed in the body of the brief, the Respondents believe that the Term Limits Initiative undermines these fundamental interests to such an extent that it violates the Constitution of the United States.

STATEMENT OF THE CASE

On September 5, 1991, the Secretary of State submitted to the Attorney General the Term Limits Initiative, which would limit to eight consecutive years any person's service as a State Senator or Representative.[2/] Service in

---

[2/] The eight-year limit also applies to the Florida Lieutenant Governor, any officer of the Florida cabinet, and any United States Representative or Senator elected from Florida. This brief will address only the constitutionality of the Term Limits Initiative as applied to Florida Senators and Representatives. The full text of the Term Limits Initiative provides:

> The people of Florida believe that politicians who remain in elective office too long may become preoccupied with re-election and beholden to special interests and bureaucrats, and that present limitations on the President of the United States and Governor of Florida show that term limitations can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office.
>
> Therefore, to the extent permitted by the Constitution of the United States, the people of Florida, exercising their reserved powers, hereby declare that:
>
> 1) Article VI, § 4 of the Constitution of the State of Florida is hereby amended by:
>
> a) inserting "(a)" before the first word thereof and,

(continued...)

office that precedes the effective date of the initiative would not be counted toward the eight-year limit. The purpose of the Term Limits Initiative is set forth in its opening sentence:

> The people of Florida believe that politicians who remain in elective office too long may become preoccupied with re-election and beholden to special interests and bureaucrats, and that present limitations on the President of the United States and Governor of Florida show that term limitations can increase voter participation, citizen

---

2/ (...continued)

b) adding a new sub-section "(b)" at the end thereof to read:

"(b) No person may appear on the ballot for re-election to any of the following offices:

"(1) Florida representative,
"(2) Florida senator,
"(3) Florida Lieutenant governor,
"(4) any office of the Florida cabinet,
"(5) U.S. Representative from Florida, or
"(6) U.S. Senator from Florida.

"if, by the end of the current term of office, the person will have served (or, but for resignation, would have served) in that office for eight consecutive years."

2) This amendment shall take effect on the date it is approved by the electorate, but no service in a term of office which commenced prior to the effective date of this amendment will be counted against the limit in the prior sentence.

3) If any portion of this measure is held invalid for any reason, the remaining portion of this measure, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application. The people of Florida declare their intention that persons elected to offices of public trust will continue voluntarily to observe the wishes of the people as stated in this initiative in the event any provision of this initiative is held invalid.

involvement in government, and the number of persons who will run for elective office.

The Term Limits Initiative is similar to companion efforts in California, Colorado, Oklahoma, and Washington.[3/] Supporters of term limits generally charge that legislators are too entrenched and that incumbents have too much of an advantage in winning re-election. But the circumstances of the Florida Legislature are different, and deserve special mention.

Legislative Turnover. The ten-year period from 1979-1989 has seen a turnover rate of 88% in the Senate and 83% in the House -- even without the imposition of term limits.[4/] That is not surprising. In a State that has enjoyed rapid population growth, the decennial redistricting process, which must adjust district lines to comply with the equal population standards of the United States Constitution and the statutory requirements of the Voting Rights Act of 1965[5/], necessarily alters the make-up of the Legislature in a dramatic fashion. Thus, it is quite likely that the

---

[3/] The California term limits were approved by the voters in 1988 and were recently upheld as constitutional by the California Supreme Court. See Legislature of the State of California et al. v. Eu, S019660 (Cal. S. Ct. Oct. 10, 1991). As this brief will explain in greater detail, the California case was wrongly decided and, in any event, is distinguishable.

[4/] During the eight years from 1982-90, which did not include a redistricting, a majority of the seats in both the Senate (55%) and the House (62%) have turned over.

[5/] See U.S. Constitution, Fourteenth Amendment; Voting Rights Act, 42 U.S.C. § 1973.

composition of the Florida Legislature will change markedly in the next two years, even before the proposed term limits could have any effect. For example, 47 new members were elected to the House in 1982, after the last redistricting, and a similar number, more than a third of the House, is expected to be elected in 1992.

Change in Legislative Leadership. The internal operation of the Florida Legislature is less dependent on seniority than the legislatures in other states. There is, therefore, no basis on which to claim that the leadership (and thus control) of the State Legislature has become calcified. By tradition, the Speaker of the Florida House serves only one two-year term and retires from the Legislature at the end of that term. Most members of the House hold committee chairs for only two years, thus ensuring a continuing change in the leadership of that body. As a matter of fact, in the last ten years, only a few members of either house have been chair of the same committee for more than four consecutive years. Although there is not the same tradition of retirement after service for the Senate President, that office has also been held for only two years. Committee assignments in the Senate are also rotated, indeed in the past ten years a number of members of the minority party have served as a committee chair in the Senate.

Limited Legislative Resources. State legislators in Florida do not enjoy munificent benefits. They serve

part-time -- only sixty session days each year. Each representative is permitted to hire one legislative assistant and one secretary to staff his or her district office and to spend $18,000 per year to cover all other office expenses. State senators may employ no more than three staff people, and have an office allowance no greater than $21,000 per year. The remainder of the legislative staff is hired on a non-partisan basis. Florida law strictly bars the use of legislative staff time for campaign-related activities. See Section 106.15(3), Fla.Stat. (1989).

Each representative is entitled to a bulk-rate mailing allowance for 1991 of perhaps $8,000, which would not even be enough to send one piece of mail to each household in his or her district[6/], and the content of that mailing is strictly limited. For example, the newsletter may not contain any logo or slogan reproduced from a legislator's campaign materials, the content and size of photographs is limited, and the size of the type in which the legislator's name appears is restricted. Regulations on the Use of All House Newsletters, Their Production and Mailing, ERIC Advisory Board (Jan. 17, 1990). Even more importantly, the newsletter may not announce any campaign events, contain

---

6/ The average district in the House of Representatives has about 108,000 people. Assuming that each household contains 1.7 people and a mailing rate of $.16 per piece of mail, a state representative would need to spend over $10,000 to reach each household just once every year. Last year, the allowance was cut to $4,000 and it may be cut to less than $8,000 this year.

partisan references, or solicit political support. Guidelines for Newsletters, Policies & Procedures, Committee on House Administration (undated).

Campaign Finance Reform. Florida has long been a leading state in the area of campaign finance reform. Newly-enacted campaign finance laws in Florida also restrict any advantage that might otherwise be enjoyed by incumbent legislators. As enacted earlier this year, HB 2251 permits a person to contribute only $500 to a legislative campaign (half of the previous limit) and minor children are limited to $100. No contribution can be made, solicited, or knowingly accepted in a government building.

Controlling the Influence of Special Interests. Florida is also a leading state in the area of promoting ethics in government. For many years now, Florida law has prohibited former legislators from lobbying the Legislature for two years after their retirement. See Ch. 91-85, Laws of Florida. Just last Fall, even tighter restrictions on gifts were enacted in HB 31-A. That legislation prohibited public officials and certain public employees from soliciting or accepting gifts of over $100 from lobbyists, the principals of lobbyists, political committees or committees of continuous existence and prohibited the same interest groups from giving gifts of over $100 to public officials and certain public employees. CS/SB 1042, enacted earlier this year, authorized the House and Senate to establish a lobbyist

registration program that would provide oversight of lobbyist activities. CS/SB 1042 also requires disclosure by lobbyists, principals of lobbyists, political committees and committees of continuous existence of all gifts between $25 and $100 given to public officials and certain specified employees. CS/HB 417, enacted last session, expanded the Sunshine Amendment, which requires public financial disclosure by public officers, candidates and employees. The legislation increased the Commission on Ethics' authority to investigate and punish those who violate ethical standards.

The Open Process of Redistricting. Finally, the creation of the legislative districts themselves takes place in an open process that is itself subject to federal and state judicial review. The Florida Legislature is currently holding a series of 31 public hearings throughout the State in order to gather public comment. In addition, a computer software program is available for $20 from the Legislature that would allow any person to draw and to submit legislative maps, and the Legislature is making available a Public Access Workstation in the Capitol for any persons who wish to work on map-drawing there. See Open Letter from the Florida Senate Committee on Reapportionment (Sept. 9, 1991). Moreover, any voter dissatisfied with the results of the legislative line-drawing can file a lawsuit charging

violation of the United States Constitution or of the federal Voting Rights Act.[7/]

SUMMARY OF ARGUMENT

In this brief, the Respondents will demonstrate that the Term Limits Initiative violates the core rights of Florida voters to meaningful participation in the democratic process -- rights protected by the First Amendment to the Constitution of the United States. Voters would be denied the right to elect candidates of their choice for legislative office.[8/] Candidates who have proven their ability and dedication as public servants would be denied the right to hold legislative office. And the legislature -- the most democratic and responsive of the institutions that constitute Florida's republican government -- would, over time, become increasingly unaccountable and enfeebled.

As the United States Supreme Court recently made clear, an election law that substantially burdens First Amendment liberties "can survive constitutional scrutiny only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that

---

[7/] See Reynolds v. Sims, 377 U.S. 533 (1964)(establishing requirement of one-person/one-vote); Thornburg v. Gingles, 478 U.S. 30 (1986)(applying Voting Rights Act); Davis v. Bandemer, 478 U.S. 109 (1986)(recognizing as justiciable claim of partisan gerrymandering).

[8/] Furthermore, citizens from Senate and House districts favoring term limitations could effectively dictate the electoral options available to citizens from districts opposing such limits.

interest." Eu v. San Francisco Cy. Democratic Central Com., 489 U.S. ___, 109 S. Ct. 1013, 1019-20 (1989) (emphasis added). The Term Limits Initiative cannot meet this test.

The initiative substantially burdens the First Amendment rights of voters because it "limit[s] the field of candidates from which voters might choose," Anderson v. Celebrezze, 460 U.S. 780, 786 (1983), and thereby deprives voters of the ability to elect candidates whose policy positions and personal characteristics will best represent their interests in the legislature. The proposed term limits would also "fall[] unequally on new or small political parties or on independent candidates," Anderson v. Celebrezze, 460 U.S. at 793, because they deprive third parties of the necessary opportunity to organize legislative campaigns around well-known incumbents from the major parties. (Point I.A)

These substantial burdens on constitutionally protected interests are not supported by any compelling state interest. To the contrary, the stated objectives of the Term Limits Initiative are forbidden by the First Amendment. First, these term limits are designed to suppress the political expression of voters who support incumbents in order to enhance the political prospects of voters who support nonincumbents. The First Amendment flatly prohibits suppression of "the rights of some persons to engage in political expression in order to enhance the relative voice

of other segments of our society," Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976), or because a speaker is in a position to "exert an undue influence." First National Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978). (Point I.B.1)

Second, the term limits constitute an effort to suppress expression based on disagreement with the presumed point of view of the speaker. They would be imposed to preclude voters from re-electing incumbents on the ground that incumbents supposedly advance the objectives of unnamed "special interests" and the bureaucracy, rather than the electorate. These are not viewpoint-neutral justifications for regulating expression. To the contrary, the Term Limits Initiative prohibits the reelection of legislators precisely because they vote "the wrong way" in the eyes of term-limit supporters. The measure thus seeks to foster different legislative outcomes by restricting the rights of voters and candidates. The First Amendment flatly prohibits such viewpoint-based discrimination: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." Police Department of Chicago v. Mosely, 408 U.S. 92, 95-96 (1972). (Point I.B.2)

Third, the attempt to justify term limits on the basis of other asserted state interests is unconvincing. No showing can be made that term limits will themselves achieve other goals, such as increased citizen participation, that

they assertedly further. Moreover, the ideal of the citizen-legislator, much touted by term limits devotees, fails to comport with the intent of the Framers of our Constitution, themselves the quintessential citizen-legislators, who expressly decided not to include term limits in the Constitution. (Point I.B.3)

Moreover, these term limits violate the First Amendment even if those limits could conceivably further other, legitimate state interests. Laws burdening expression must, at a minimum, actually advance the interests they purport to advance. See Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 225 (1986). Florida's Term Limits Initiative would not advance legislative accountability, restrict the influence of "special interests," or measurably improve legislative governance.

To the contrary, these term limits would fundamentally alter the representative character of the legislature because such limits invest inordinate power in lame ducks. In the final years of service, senators and representatives would no longer be democratically accountable.

Nor do the term limits offer any serious prospect of regulating the influence of "special interests." Special interests and lobbying groups may well become the most accessible source of information available as well as being attractive sources of campaign funds for new legislators

lacking the independence and stature that incumbency brings.

The Term Limits Initiative would also disserve the legislative process and sap the legislative branch of its vitality. As the Framers of the U.S. Constitution recognized two centuries ago:

> It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments . . . [A] continual change even of good measures is inconsistent with every rule of prudence, and every prospect of success.

The Federalist Papers, No. 62 (J. Madison). (Point I.C.1)

The Term Limits Initiative also fails to grasp the nature of the Florida Legislature. The present system of Florida government already limits the ability of "entrenched" interests to seize illegitimate control of the legislative process. Consideration of the historical turnover rate, the present nature of legislative service, the structure of the Legislature's leadership, campaign and ethics reform efforts and the open process of redistricting all demonstrate that the Term Limits Initiative cannot accomplish any important

state goal and, therefore, cannot be the most narrowly tailored means of political reform. (Point I.C.2)

Even if, under the most benign interpretation, the Term Limits Initiative made some measurable contribution to the goals of preventing a corrupting influence of certain "special interests" -- and it does not -- term limits are nonetheless invalid because they are not narrowly tailored to avoid the unnecessary infringement of protected expression. The proposed measure is extraordinarily overbroad in relation to the stated objective of controlling allegedly "cozy" relations between legislators and "special interests." It bars all four-term incumbents from re-election, irrespective of whether they have supported, or received the support of, "special interests." Moreover, the State has available to it a multitude of less restrictive options for controlling the undue influence of "special interests," including: campaign finance reforms; strict recordkeeping and disclosure of contributions to candidates; voluntary public financing of elections; and direct regulation of the activities of the "special interests" themselves. (Point I.C.3) Accordingly, the proposed term limits must be declared unconstitutional.

ARGUMENT

I. FLORIDA'S TERM LIMITS INITIATIVE VIOLATES THE FIRST AMENDMENT RIGHTS OF VOTERS AND THIRD PARTIES.

Florida's Term Limits Initiative violates the core First Amendment rights of voters and third parties. As the United States Supreme Court recently made clear in Eu v. San

Francisco Cy. Democratic Central Com., a state election law that burdens "rights protected by the First and Fourteenth Amendments . . . can survive constitutional scrutiny only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that interest." 109 S. Ct. at 1019-1020 (emphasis added). This is a strict test that does not permit ad hoc judicial balancing of the burdens and benefits of term limits, or empower this Court to sit as a superlegislature weighing the relative wisdom of the measure.[9/] If Florida's Term Limits Initiative substantially burdens protected rights, it must be invalidated unless the State meets the requirements set forth in Eu v. San Francisco Cy. Democratic Central Com. As will be demonstrated, the Term Limits Initiative fails every element of this test.

A. The Term Limits Initiative Substantially Burdens Fundamental First Amendment Liberties Of Voters And Third Parties.

1. The Term Limits Initiative Substantially Infringes The Rights of Voters.

Because the "right of suffrage is a fundamental matter in a free and democratic society," Reynolds v. Sims, 377 U.S. 533, 561-62 (1964), the United States Supreme Court

---

[9/] It is irrelevant for purposes of this constitutional challenge that term limits are being considered in the initiative process rather than by legislative action. "[T]he voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

has repeatedly made clear that "the existence of barriers to a candidate's access to the ballot" must be examined in terms of "the extent and nature of their impact on voters." Bullock v. Carter, 405 U.S. 134, 143 (1972). The "primary concern" with ballot access restrictions is that they "limit the field of candidates from which voters might choose." Anderson v. Celebrezze, 460 U.S. 780, 786 (1983). Such restrictions can substantially burden the First Amendment rights of voters, who "can assert their preferences only through candidates." Id. at 787.[10/]

[10/] In Legislature of the State of California v. Eu, supra, the California Supreme Court applied a less demanding standard of review to determine whether the term limits initiative recently enacted in California violated the First Amendment. The California Court found that term limits were a form of ballot access restriction, and believed that strict First Amendment scrutiny did not apply to ballot access measures. The court therefore applied a straightforward balancing test drawn from the U.S. Supreme Court's decision in Anderson v. Celebrezze, 460 U.S. 780 (1983).

Respondents respectfully contend that the California Supreme Court made a fundamental error. The U.S. Supreme Court's most recent pronouncement on this issue in Eu v. San Francisco Democratic Central Com., 489 U.S. 214 (1989), made no distinction between ballot access restrictions and other types of laws burdening voters' First Amendment rights. To the contrary, Eu specifically held that strict scrutiny applied, and cited numerous ballot access cases -- including Anderson v. Celebrezze -- in support of that position. 489 U.S. at ___, 109 S. Ct. at 1019-20 (citing, inter alia, Anderson v. Celebrezze).

Furthermore, even if the California Supreme Court were correct that the Anderson v. Celebrezze balancing test should govern, that test was misapplied in Legislature of the State of California v. Eu. The California Supreme Court gave virtually no weight to the voters' interest in selecting the standard bearer of their choice. Nor did the Court grapple with the facial illegitimacy of the primary state interest

(continued...)

Furthermore, as the U.S. Supreme Court has recognized, "candidates' personal qualities" are crucial to the people's choice as to who should represent them. Buckley v. Valeo, 424 U.S. 1, 53 (1976). Voters select a candidate not only because that candidate represents the voters' policy preferences but also because the voter is willing to entrust the important -- and often unforeseen -- issues that will arise in the future to the candidate's experience, wisdom and judgment. That is basic to a republican form of government. Indeed, the substantial increase in registered voters unaffiliated with either major party, and in "ticket-splitting" in the voting booth, reflect the increasing importance of a candidate's personal qualities to voters' electoral choices.[11/]

[10/] (...continued)
supporting term limits: equalizing electoral advantages. As Anderson itself makes clear, the balancing test must give substantial weight to First Amendment interests and will -- as in Anderson -- often require invalidation of measures that impose far less of a burden on those interests than the burdens imposed by term limits such as those at issue here.

[11/] See also, Buckley, 424 U.S. at 15 ("the identities of those who are elected will inevitably shape the course that we follow as a nation") (emphasis added).

In Legislature of the State of California v. Eu, supra, the California Supreme Court wholly failed to acknowledge the importance of this interest. In concluding that term limits imposed no substantial infringement on voters' rights, the California Court held that making experienced and able incumbents ineligible would not affect voters because they could simply vote for other candidates of the same political stripe. That conclusion ignores the importance of experience, wisdom, foresight, courage and other essential
(continued...)

Ballot access restrictions also limit voters' freedom of association. "'Freedom of association'" includes the right "to select a standard bearer who best represents the party's ideologies and preferences." Eu v. San Francisco Cy. Democratic Central Com., 109 S. Ct. at 1021 (quotation omitted). Excluding candidates burdens "voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day," Anderson v. Celebrezze, 460 U.S. at 787-88 (emphasis added), and because a candidate necessarily serves as the focus of supporters' efforts.

The Term Limits Initiative imposes substantial burdens on these fundamental First Amendment rights of voters.[12/] The measure entirely bans a class of otherwise

---

11/ (...continued)
personal attributes to the voters' choice of who should hold the public trust.

12/ The few cases upholding term limitations for state governorships, see State ex rel. Mahoney v. McCartney, 223 S.E.2d 607 (W. Va.), appeal dismissed, 96 S. Ct. 1689 (1976); Maddox v. Fortson, 226 Ga. 71, 172 S.E.2d 595, cert. denied, 397 U.S. 149 (1970), do not govern the present case for several reasons. First, these decisions were rendered well before the U.S. Supreme Court made clear in Eu v. San Francisco Cy. Democratic Central Com. that strict scrutiny must apply to election laws burdening First Amendment rights, and they applied a far more lenient standard than the compelling interest and narrow tailoring requirements of Eu. Second, even under the lenient standard applied in McCartney and Maddox, the state courts were sharply divided on the constitutionality of the term limitations. Third, there are decisive differences between the governorship and a seat in the legislature. A governor alone holds the power to render ineffectual a law validly enacted by a majority of the people's legislative representatives; no individual

(continued...)

qualified candidates from holding office solely on the basis of their status as past officeholders. As a result, voters in many legislative elections will be deprived of the right to select a standard bearer whom they believe best represents their interests. Voters will be deprived of the right to choose incumbent candidates whom they consider highly skilled and experienced in legislative affairs, or who have proven their fidelity to a particular public policy agenda. Furthermore, voters in districts that reject the Term Limits Initiative will be barred from re-electing incumbent candidates because majorities of voters in other districts choose to exclude all eight-year incumbents from the legislature.

By necessity, the close relationship between candidates and their supporters mean that the constitutional right of candidates have been burdened as well. As the U.S. Supreme Court has said, "voters can assert their preferences only through candidates or parties or both." Anderson v. Celebrezze, 460 U.S. at 787. Term limits thus adversely impact the ability of "a candidate [to] serve[] as a rallying point for like-minded citizens." Id.

12/ (...continued)
legislator holds such power. Fourth, because a governor represents the entire State, the voters' decision to impose term limits will lack a key pernicious feature of term limits initiative: voters in one district will not be depriving voters in another from selecting the representative of their choice.

These burdens exceed any that have been upheld by the U.S. Supreme Court. See, e.g., American Party of Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974). Ballot access restrictions were upheld in those cases because they did not foreclose access, but merely conditioned it on compliance with reasonable regulations designed to ensure orderly elections or weed out fraudulent candidacies. See American Party of Texas, 415 U.S. at 772-73 (law required candidate to demonstrate minimal level of public support to gain access to ballot); Storer v. Brown, 415 U.S. at 733, 736 n.7 (law restricted "sore loser" of party primary from running for office as independent, but did not prohibit write-in candidacy).[13/]

[13/] In only one case has the U.S. Supreme Court arguably upheld a ballot access measure that completely foreclosed a candidate from access to the ballot. In Clements v. Fashing, 457 U.S. 957 (1982), the Court upheld a Texas law prohibiting judges from seeking legislative election until their judicial term of office had been completed, and prohibited other state officeholders from seeking a new office without resigning from their elected posts.

The rationale of Clements, however, provides no basis for upholding the Term Limits Initiative, for several reasons. First, as the Court has made clear, the restrictions upheld in Clements were designed to achieve "legitimate state goals which are unrelated to the First Amendment" -- namely, the need to minimize vacancies in important state offices. See Anderson v. Celebrezze, 460 U.S. at 788 n.9 (explaining rationale of Clements); cf. United States v. O'Brien, 391 U.S. 367 (1968). Here, by contrast, is a direct effort to limit voter choice based on incumbents' perceived voting records. Second, the burden imposed on voters' rights was, as the Clements Court stated, minimal. Third, Clements dealt with the special case of the judiciary; the prospect of sitting judges seeking legislative office posed special dangers to the separation of powers.

Indeed, term limits go well beyond ballot access restrictions the U.S. Supreme Court has invalidated. For example, the Term Limits Initiative would impose a substantially greater restriction than the regulation struck down in Anderson v. Celebrezze. That regulation merely excluded a candidate who had not declared independent status eight months before the election the candidate sought to enter. 460 U.S. at 805. This initiative would also impose far greater restrictions than the filing fee requirement invalidated in Bullock v. Carter, 405 U.S. 134, 144-149 (1972). That regulation did not prohibit any candidate from seeking office, but merely conditioned ballot access on payment of a substantial filing fee.[14/]

For First Amendment purposes, term limits cannot be lumped together with far less restrictive ballot access rules such as minimal filing fees or brief durational requirements.

[14/] The existence of the Twenty-Second Amendment to the U.S. Constitution, which imposes a two-term limit on the U.S. Presidency, does not undermine the argument the Term Limits Initiative substantially burdens First Amendment interests. To the contrary that term limit was imposed by means of constitutional amendment precisely because Congress understood that merely legislating to impose such a limit would violate constitutional guarantees, including the First Amendment. Indeed, enactment of the Twenty-Second Amendment required passage by a supermajority in Congress and approval by 3/4 of the States.

Furthermore, the imposition of a term limitation on the head of the executive branch can be compellingly justified by the enormous potential power held by that office by virtue of the veto -- a power that no member of the legislature possesses. See generally 93 Cong. Rec. 850 (1947) (remarks of Congressman Robsion); see also note 12 supra (discussing term limits on gubernatorial service).

The burden on voters' rights imposed by term limits so far exceeds the minimal burdens imposed by such neutral and minimally burdensome requirements imposed to ensure "fair, honest and orderly" elections, see Dixon v. Md. State Administrative Election Laws, 878 F.2d 776, 779 (4th Cir. 1989), that more searching First Amendment scrutiny of term limits is required.

2. The Term Limits Initiative Imposes Particular Hardships On Third Party And Insurgent Candidacies.

Although purportedly adopted to open up the political process, term limits will in fact substantially thwart the political prospects of insurgent groups and third parties. The opportunities for such groups to achieve public respectability and electoral success are closely tied to their ability to recruit politicians who have become well known by virtue of their accomplishments as members of a major political party. Historical examples abound: Theodore Roosevelt and the Bull Moose Party in 1912; Henry Wallace and the Progressive Party, and Strom Thurmond and the States' Rights Party, in 1948; George Wallace and the American Independent Party in 1968; and John Anderson in 1980. In 1990, Walter Hickel and Lowell Weicker were both elected Governor of their respective States as independents, after public service that included holding office as members of one of the major political parties. The Term Limits Initiative restricts the ability of third parties to organize

legislative campaigns around well-known incumbents from the major parties. Instead of opening up the political process, therefore, term limits entrench the dominance of the two major parties.

The U.S. Supreme Court has made clear that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." Anderson v. Celebrezze, 460 U.S. at 793. In that case, the Court invalidated an Ohio law that kept John Anderson off the ballot in the 1980 presidential race, because the law excluded "a newly emergent independent candidate [who] could serve as the focal point for a grouping of . . . voters." 460 U.S. at 791. As the Court explained, "[b]y limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." 460 U.S. at 794.

The Term Limits Initiative burdens the rights of third parties even more substantially than did the law invalidated in Anderson. Whereas that law merely required third party candidates to declare their independence from the major parties more than eight months prior to election day, the Term Limits Initiative precludes Florida legislators from

seeking office as the standard bearer for an insurgent political movement.

* * * *

Because they substantially burden protected First Amendment interests of insurgent groups and third parties, as well as the rights of voters generally, term limits trigger strict First Amendment scrutiny under the analysis prescribed in Eu v. San Francisco Cy. Democratic Central Com.: they must be invalidated unless they serve a compelling state interest and are narrowly tailored to minimize unnecessary infringement of the protected rights of voters, candidates and third parties. As will be demonstrated, the proposed term limits meet neither requirement.

B. The Governmental Objectives Advanced In Support Of The Term Limits Initiative Are Illegitimate.

The Term Limits Initiative must be invalidated because it does not advance "a compelling governmental interest." Eu v. San Francisco Cy. Democratic Central Com., 109 S. Ct. at 1021. This Court is not free to construct hypothetical state interests to justify term limits, but must "identify and evaluate the precise interests put forward . . . as justifications for the burden imposed." Anderson v. Celebrezze, 460 U.S. at 789. The Court must then "determine the legitimacy and strength of each of [the] interests" advanced, and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." Tashjian, 479 U.S. at 214.

The primary governmental objective advanced in support of term limits is the desire to compensate for allegedly unfair incumbent advantages by barring incumbents from seeking reelection. That objective -- which indiscriminately ignores the fair incumbent advantages of experience, skill and knowledge -- is nothing less than the direct restriction of political expression of the voters who seek to re-elect such candidates.

Far from constituting "compelling state interests," the stated objectives of term limits are forbidden by the First Amendment -- irrespective of whether they are narrowly tailored to minimize infringement of protected interests. First, they constitute an impermissible governmental effort to make the political process more "fair" by directly suppressing the expression of a particular class of voters and candidates.[15/] Second, they constitute discrimination based on the perceived political viewpoints and voting behavior of incumbent legislators, and thus of the voters who elect them. Third, they assert the existence of various interests that are either insubstantial or have been rejected by the Framers of our Constitution.

[15/] Indeed, the Respondents acknowledge that Florida may constitutionally seek to offset unfair incumbent advantages by means of measures that are not directly intended to suppress protected expression. See Point I.C infra.

1. The First Amendment Prohibits Government From Seeking To Correct Alleged "Distortions" In The Democratic Process By Curtailing The First Amendment Rights Of Voters And Candidates.

The Term Limits Initiative explicitly "abridge[s] the rights" of voters who support incumbent candidates, "in order to enhance the relative voice of other segments of society" -- namely, voters who support nonincumbents. See Buckley v. Valeo, 424 U.S. at 49 n.55. For this reason, the Term Limits Initiative violates the First Amendment.

In Buckley, the U.S. Supreme Court made clear that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment." 424 U.S. at 48-49. The Court decisively rejected the argument that government could limit the amount expended for political expression by individuals on behalf of candidates, or by candidates personally, in order to compensate for alleged distortions of the democratic process caused by unequal access to resources. Rejecting the legitimacy of the purported governmental "interest in equalizing the relative financial resources of candidates competing for elective office," the Court held that the "First Amendment simply cannot tolerate" direct restrictions of political expression imposed for the stated purpose of making the political process more fair. 424 U.S. at 54.

Core First Amendment values compel this conclusion. As Buckley made clear, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates." 424 U.S. at 49 n.55. See also Anderson v. Celebrezze, 460 U.S. at 797 ("Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues"). Indeed, as the Court made clear in rejecting yet another government effort to regulate "unfair advantages" in the political arena, "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." First National Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.31 (1978)(citations omitted) (rejecting law banning corporations from expressing views on initiative issues).

The Term Limits Initiative is even more intrusive and heavyhanded than the restrictions invalidated in Buckley. In that case, government regulation merely sought to equalize the opportunities of all participants in the political process by limiting expenditures by, or on behalf of, candidates. It did not wholly suppress a particular political point of view in order to make elections more "fair" by increasing opportunities for other points of view. The Term Limits Initiative does not aim to "equalize" political advantage by merely "limiting" expression in support of incumbents; it goes much further and completely

excludes incumbents. Thus, the Term Limits Initiative does not simply increase nonincumbents' opportunities for election, it guarantees that nonincumbents will be elected. That is a fortiori the kind of suppression of "the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society," 424 U.S. at 49 n.55, that "the First Amendment simply cannot tolerate." Id. at 54. See also Bellotti, 435 U.S. at 789 (corporate speech may not be suppressed on ground that it "may drown out other points of view" or "exert an undue influence").[16/]

[16/] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), is not to the contrary. In that case, the U.S. Supreme Court upheld spending limitations imposed by a state government on the political activity of corporations. The opinion of the Court makes clear that such regulation was permissible in the case of corporations only because corporations present special risks of corruption as a result of special state-conferred advantages that permit them to accumulate great wealth. The Court held that corporations can constitutionally be regulated to some extent in their political activities, because their amassed wealth is in no sense reflective of the strength of support for their political views, and because the use of corporate funds for political speech might well infringe the rights of shareholders who disagreed with the substance of that speech. The Court was careful to observe that the state law at issue did not completely ban political activity by corporations; it merely required that activity to be channelled through a separate fund made up of money solicited for political purposes. 110 S. Ct. at 1402.

No such justifications support term limits. These restrictions are not targeted at controlling the risk of corruption posed by amassed corporate wealth, and have no relation to protecting the rights of corporate shareholders who disagree with the use of corporate funds for political activity. Furthermore, unlike the law at issue in Austin, term limits completely ban protected expression. In any

(continued...)

2. The First Amendment Prohibits Restriction Of Expression Based On Antipathy To The Viewpoint Of The Speaker.

The Term Limits Initiative must be invalidated for another reason: it constitutes a direct attempt to ban persons from seeking office on the basis of their presumed political views and past voting behavior. Such laws are facially impermissible because they seek to preclude the vindication of particular political points of view. See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 805 (1985); Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972); Carey v. Brown, 447 U.S. 455 (1980); Niemotko v. Maryland, 340 U.S. 268 (1951).

The first sentence of the Term Limits Initiative makes plain its purpose to suppress the expression of present incumbents and their supporters because incumbents may (i) become beholden to "special interests," not the common good; and (ii) become the captives of "bureaucrats." These stated objectives make no explicit claim that the term limits are necessary to minimize illegal activity such as bribery or other kinds of corruption, which can be prosecuted under existing law. Instead, the proponents of the Term Limits Initiative assert that "[t]erm limits take power away from

---

16/ (...continued)
event, as will be demonstrated in Point I.C infra, the Term Limits Initiative is grossly overbroad as a means to regulate the potential unfair political influence of amassed corporate wealth, and violates the First Amendment for that reason as well.

special interest groups, lobbyists and bureaucrats who have cozy relationships with legislators. . . ." Ft. Lauderdale Sunday Sentinel (July 2, 1991)(quoting the chair of Citizens for Limited Political Terms).

Even this description obfuscates the actual objective of the Term Limits Initiative. A "special interest" is in the mind of the beholder. The charge that incumbents have been captured by "special interests" and "bureaucrats" is not neutral -- it is a claim that incumbent legislators have consistently voted the wrong way, and it assumes a causal relationship between an incumbent's voting record and his or her relationship with "special interests" -- special interests that may simply be the voters of a particular district themselves. Thus, at bottom, the stated objective of the Term Limits Initiative is the removal of legislators who vote the wrong way. As a leading term limits supporter said, the purpose of the initiative is to "open up the process to new people and new ideas." Ft. Lauderdale Sunday Sentinel (July 2, 1991)(quoting the chair of Citizens for Limited Political Terms).[17/]

New ideas are not a bad thing. But a law that is designed specifically to replace old ideas with new ones through legal mandate, rather than through the evolving

---

[17/] See also "Limited Terms for politicians pursued," The Bradenton Herald, B-1 (June 26, 1991)(quoting Rep. J.J. Holland, (R. Holland Beach), a supporter of term limits explaining that "We need fresh ideas. We need new approaches.").

marketplace of speech, is avowedly -- and unconstitutionally -- content-based. Analytically, the use of the law to mandate "new ideas" is no different than barring incumbents because they typically favor the interests of labor unions, minorities or any other identifiable group. The First Amendment flatly prohibits such suppression of political expression based on the viewpoint of the speaker.

The proponents of the Term Limits Initiative have every right to seek to unseat incumbent legislators on the ground that those legislators vote in ways inconsistent with their idea of the public interest. They have the right to campaign in every district and oppose every incumbent. They may not, however, exclude four-term incumbents from the electoral process entirely -- and hence exclude the political views of voters wishing to support incumbent candidates -- because of a disagreement with the substance of incumbents' political behavior.

3. Various, Additional State Interests Are Inapplicable to Legislative Limits, Or Lack Any Substantial Basis in Fact.

The introductory sentence of the Term Limits Initiative asserts that the application of term limits to the Governor of Florida and the President of the United States shows that term limits "can increase voter participation, citizen involvement in government, and the number of persons who will run for elective office." Standing alone, these goals are admirable. But they cannot mask the illegitimate

purposes of the initiative, see text at 24-31 supra, and, in any event, they have no substantial connection to limitations that they would impose.

First, the constitutional bases for limiting the terms of governors or the President provide no constitutional support for this initiative. See nn.12 & 14 supra.

Second, the factual premise that term limits can increase voter participation and, concomitantly, citizen involvement, is not convincingly supported by the facts. The national voter turnout rate in the 1988 election, in which there was no incumbent, was lower than the turnout in the preceding four elections, each of which included an incumbent president.[18/] The turnout rate in Florida has fluctuated in recent elections, but, regardless of whether an incumbent was running, has never again reached the turnout rates that occurred in 1964 and 1970.[19/]

Third, the reference to "citizen involvement" may be a means of referring to the halcyon ideal of a "citizen-legislator." See Ft. Lauderdale Sun Sentinel, July 2, 1991

[18/] The sad fact is that the percentage of the voting age population that has voted in presidential election years since 1960 has continually declined, without regard to whether an incumbent was running for re-election. The relevant years (with corresponding turnout percentage) is: 1960 (62.8%); 1964 (61.9%), 1968 (60.9%); 1972 (55.1%); 1976 (53.6%); 1980 (52.6%); 1984 (53.1%); 1988 (50.2%).

[19/] The turnout rate in 1964 was 45.9% and in 1970, 41.9%. In no subsequent gubernatorial year has the turnout reached 40%. U.S. Census Statistical Abstracts, FL Division of Elections (1991).

(quoting terms limit supporter as saying that "We need citizen government...."). Of course, Florida has retained that ideal. That the Legislature may meet in session only sixty days each year necessarily means that Senators and Representatives do not become full-time politicians.

But, in any event, the wish for simpler times fails to recognize that the Founding Fathers specifically rejected term limitations for members of the legislative branch. The Virginia Plan, from which the Constitution was ultimately derived, originally contained term-limitation provisions that were rejected. See Vol. 1 Max Farrand The Records of the Federal Convention of 1787 at 20 (1937). James Madison considered the longevity of service for some Congressional office holders to be essential:

> A few of the members [of the House of Representatives], as happens in all such assemblies, will by frequent re-elections, become members of long standing; will be thoroughly masters of the public business . . . The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them.

The Federalist Papers, No. 53 (J. Madison). Madison also rejected the "citizen-legislator" ideal:

> It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share

> of the present embarrassments of America is to be charged on the blunders of our governments . . . [A] continual change even of good measures is inconsistent with every rule of prudence, and every prospect of success.

The Federalist Papers, No. 62 (J. Madison).

Fourth, the notion that more persons will run for office if there are term limits -- at least in the general election -- is both true and untrue. Although more people may be general-election candidates, fewer people will be able to run for office because incumbents, one large class of potential candidates, will be disqualified. Like the collision of matter and anti-matter, this asserted state interest simply evaporates upon impact.[20/]

C. To The Extent That The Term Limits Initiative Seeks To Advance Constitutionally Permitted Objectives, It Is Not Narrowly Tailored To Achieve Those Objectives.

As demonstrated, the Term Limits Initiative must be invalidated because its stated objectives are forbidden by the First Amendment. The State has not advanced any other compelling state interest of the kind that has traditionally

---

[20/] The California Supreme Court's recent decision adds no meat to these bones. It proposed that term limits serve the "legitimate" interests of "eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electoral participation." Legislature of the State of California v. Eu, Slip op. at 42. The first three of these are just picturesque attempts to voice the need to make election outcomes "fair," which is constitutionally impermissible. See text at 26-28 supra. Moreover, there is no reason to believe that any of these interests actually exist in Florida. See text at 38-41 infra. The final interest, stimulating electoral participation, is discussed above.

been held sufficient to justify restrictions on ballot access. See text at 20-21 supra.[21/]

Even if the initiative actually advanced any legitimate state interests, however, the Term Limits Initiative would still fail the final step of the analysis prescribed in Eu v. San Francisco Cy. Democratic Central Com. because it is not narrowly tailored to avoid unnecessary abridgement of First Amendment liberties. 109 S. Ct. at 1020; see also FEC v. Nat'l Conservative Political Action Com., 470 U.S. 480, 496 (1985); Buckley v. Valeo, 424 U.S. at 25.

1. The Term Limits Initiative Does Not Accomplish Any Legitimate Objective For Which It May Have Been Intended.

The U.S. Supreme Court has repeatedly invalidated election laws that fail to advance their stated objectives. See Eu v. San Francisco County Democratic Central Committee, 489 U.S. ___, 109 S. Ct. 1013, 1023 (1989) (ban on primary endorsements by political parties did not advance any compelling government interest); Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 225 (1986) (closed primary

---

[21/] The Term Limits Initiative does not even purport to advance governmental interests of the kind that have been found sufficient to support ballot access restrictions in past cases. See Clements v. Fashing, 457 U.S. at 965 ("[T]he States have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections").

provision did not advance any permissible interests adduced in support of the provision); Anderson v. Celebrezze, 460 U.S. 780 (1983) (requiring independent presidential candidate to file a statement of candidacy in March did not advance stated objectives of enhancing party harmony).

The Term Limits Initiative fails this threshold requirement. Instead of breaking alleged links between "special interests" and legislators, the initiative threatens to forge them. Special interests will be able to make particularly attractive offers of employment or other favors to incumbent politicians, who know that their term in office is limited. Special interests may also become more attractive as sources of campaign funds for new and relatively unknown legislators. Indeed, since legislators would be on a definite schedule, special interests could groom a candidate for a date certain without concern that their "investment" might run up against a popular incumbent.

The Term Limits Initiative enhances the power of unelected persons. One inevitable effect of term limits will be higher numbers of newly elected legislators in the Senate and House; indeed, that is a stated objective of the measure. Newly-elected legislators will typically lack experience in most of the complex public policy questions the Senate and House routinely face. Without artificial term limits, new legislators can turn to experienced colleagues to develop the knowledge necessary for sound discharge of legislative

responsibilities. With constant turnover, the very "special interests," whose influence the Term Limits Initiative is intended to diminish, will become more visible sources of information for legislators. And unelected staff become the sole depository of institutional memory.

Nor would the Term Limits Initiative meaningfully advance the objectives of making the legislature more open and responsive. Once an officeholder has been elected to a constitutionally mandated final term, the external incentive to be responsive to constituents is much reduced. Since the incumbent cannot be re-elected, less is to be gained by working long hours or providing the best possible services. Officeholders will have far less incentive to represent the interests of their districts, despite the importance assigned to this function of the office by the residents of the district.

The proposed term limits are particularly ill-suited to achieving the measure's ultimate goal of encouraging legislative action that advances the public welfare. Term limits deprive the electorate of the opportunity to re-elect people with detailed, first-hand knowledge about the history, operations, and programs of state government. The proposed term limits would deprive the

electorate of the opportunity to benefit from the public policy expertise of experienced legislators.[22/]

For all these reasons, therefore, the proposed term limits will not advance their stated objectives.

2. The Nature of Florida Government Itself Diminishes The Concerns That Motivate Term Limits Movements

The Term Limits Initiative is purportedly designed to "break the death grip that entrenched incumbents hold on the reins of political power . . . ." The Tampa Tribune (July 23, 1991)(quoting a prominent terms limit supporter). Even assuming that the state had a legitimate interest in preventing voters from tilting the outcomes of political contests, see text at 26-28 supra, the important point is this: The present system of Florida government already diminishes the ability of incumbents to hold "too much" political power.[23/] That means that the Term Limits Initiative cannot accomplish any important state goal and, by

---

[22/] Indeed, by depriving Florida of legislators of long standing, the Term Limits Initiative threatens to erode further the State's ability to check the national government's persistent encroachments on state powers. The effect is to further cripple the political safeguards of federalism. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The ability of Florida to limit federal congressional terms is subject, in addition, to separate challenge, see Powell v. McCormack, 395 U.S. 486 (1969), and is, we understand, the subject of briefing to this Court by other respondents.

[23/] Indeed, by our count, only 4 of 120 House members have served more than eight consecutive terms. None has the almighty grip on political powers that is feared -- and alleged.

definition, cannot be the most narrowly tailored means of achieving additional political reform.

The facts set forth in the Statement of the Case make this clear. Even without imposition of artificially-mandated term limits, the composition of the legislature is not static. In the ten years from 1979-89, there was an 88% turnover in the Senate, and 83% in the House. That rate of change has surely been assisted by the decennial redistricting process, but the re-appearance of redistricting every ten years itself serves as a limitation on "entrenched" incumbents. And even within the decade of the '80s, between redistricting, more than a majority of legislative seats changed hands.

The internal organization of the legislature also diminishes the ability of any single faction to hold power despite voter wishes. Most notably, the Speaker of the House traditionally steps down (and vacates his or her legislative seat entirely) every two years. Similarly, the Senate President relinquishes that post every two years. Committee assignments change frequently and, in fact, a number of Senate committees have been chaired during the past ten years by members of the minority party. This emphasis on change (rather than strict observance of seniority) also helps to diminish the influence of incumbent interests.

The influence of legislators is also cabined by the comparatively meager resources available to them. To be

sure, legislators have a small budget for mailings to constituents, but this year's budget would not even pay to send a single piece per year to each constituent. State representatives may hire two and some state senators three staff members, but this staffing, and the limited expenditures for office expenses, scarcely resembles a political machine capable of overriding voter opinion. Other legislative staff are hired on a strictly non-partisan basis and no legislative staff time may be used for partisan political purposes. Legislators themselves serve only part-time.

In addition, Florida has taken action to curb the influence of money on politics and the ability of special interests to wield secret influence. The maximum amount of campaign contributions for legislative candidates has been chopped in half. A legislative lobbyist registration program has been established to oversee the activities of those who, on a professional basis, seek to influence the legislature. Public disclosure requirements have been codified.

Finally, the redistricting process, which necessarily affects the ability of incumbents to retain their seats, will proceed through an open process that encourages citizen involvement. In addition to hearings held throughout the State, redistricting software is easily available to any citizen who wishes to draw a map and submit it for legislative review. Dissatisfied voters can bring legal

claims that attack redistricting plans on the basis that they (i) violate the principle of one-person/one-vote, (ii) infringe minority rights guaranteed by the federal Voting Rights Act, or (iii) unfairly favor a single political party. See n.7 supra.

The argument here is not that all possible political reform has already been accomplished. But a frank evaluation of the Florida Legislature demonstrates that many of the concerns on which the Term Limits Initiative is based are already addressed by current practice or law. As shown below, any legitimate state interests that remain can easily be accomplished through means that do not burden the constitutionally-protected interests of voters and candidates.

3. The Term Limits Initiative Is Not Narrowly Tailored To Avoid Unnecessary Burdens On First Amendment Interests.

Even if the Term Limits Initiative did make some contribution to the objectives advanced to justify it -- and it does not -- the measure must still be invalidated because it is not narrowly tailored to minimize infringement of protected First Amendment rights. The U.S. Supreme Court has repeatedly invalidated election laws on the ground that they did not constitute narrowly tailored means of achieving the government's objectives. See Anderson v. Celebrezze, 460 U.S. at 805; Kusper v. Pontikes, 414 U.S. 51 (1973).

Term limits are not a narrowly tailored means of preventing alleged "cozy" relations between incumbents and "special interests. Florida may counter any risk of political improprieties through a number of methods far less restrictive of the basic rights of voters and candidates -- such as limits on campaign contributions, strict recordkeeping and disclosure requirements for campaign funds,[24/] voluntary public campaign financing,[25/] or direct limitations on the activities of the "special interests" themselves.[26/]

More importantly, even if some legislators have developed ties so close to special interests as to be "cozy" -- a dubious claim for which there is no factual support whatsoever -- the Term Limits Initiative is grossly overbroad because it includes all incumbents. Indeed, it includes incumbents even if they consistently voted against the so-called special interests whose influence the Term Limits Initiative seeks to diminish. The State cannot constitutionally exclude all incumbents -- and hence disenfranchise all voters who want to re-elect incumbents --

---

24/ See generally Buckley v. Valeo, 424 U.S. 1 (1976) (upholding contribution limits and record-keeping and disclosure requirements).

25/ See generally Buckley v. Valeo, 424 U.S. 1 (1976) (upholding voluntary public financing of presidential campaigns).

26/ See generally Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990) (upholding some restrictions on political activity by corporate special interests).

on the ground that some undetermined subset of incumbents has become "too close" to the special interests. See Peel v. Attorney Registration and Disciplinary Com. of Illinois, 110 S. Ct. 2281, 2287 (1990) (State may not impose blanket prohibition of protected expression when more precisely drawn restrictions will adequately serve state's interest); In re R.M.J., 455 U.S. 191, 203 (1982) (same). Indeed, the proponents of term limits appear to recognize this fatal defect. The Term Limits Initiative asserts only that legislators "may" become tied to special interests. See n.2 supra.

Nor can the Term Limits Initiative be justified as a narrowly tailored means to control the special dangers of corruption posed by amassed corporate wealth, as was the regulation at issue in Austin v. Michigan Chamber of Commerce, 110 S. Ct. at 1397-98. These term limits do not directly seek to regulate corporations at all. Unlike the restriction upheld in Austin, these term limits are not "precisely targeted to eliminate the distortion caused by corporate spending." 110 S. Ct. at 1398. Moreover, the measure's term limits exclude all incumbents irrespective of whether they supported corporate interests while serving in the legislature. Indeed, the initiative excludes incumbents from the political process even if the "special interests" whose cause they assisted were grass-roots public interest groups favoring issues wholly unrelated to the corporate

agenda, cf. FEC v. Massachusetts Citizens for Life Inc., 479 U.S. 238 (1986), and even if the resources of the groups were "solicited expressly for political purposes" and accurately reflected the extent of public support for their causes. 110 S. Ct. at 1402. Indeed, the precisely targeted regulation upheld in Austin is an example of the kind of narrowly tailored options available to Florida to regulate directly the alleged corrupt influence of special interests.

The Term Limits Initiative is equally overbroad in relation to its stated objective of eliminating allegedly "unfair" incumbent advantages. Even assuming the State could adopt reasonable regulations to address its concerns about incumbent advantages,[27] that objective could be attained by means far less suppressive than the flat ban imposed by the Term Limits Initiative. Indeed, it is difficult to imagine a broader means to accomplish this objective than the one proposed. In addition to equalizing campaign spending by imposing a system of voluntary public campaign financing like that used for gubernatorial campaigns, see HB 2251, the State can restrict the uses of government property by incumbents,[28] make public fora available to nonincumbents

---

[27] The Respondents believe, of course, that regulation to prevent unfair incumbent advantages may not include direct suppression of the political expression of incumbents or their supporters.

[28] See generally United States Postal Service v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); see text at 7 supra (barring campaign activity from government buildings).

on an equal basis with incumbents, or increase the expenditure of state funds to provide information to voters about all candidates. The Term Limits Initiative goes well beyond any effort to lessen the advantages of incumbency. It totally disables incumbents, and prevents them from using any of their own resources -- financial, political and personal -- to seek re-election. That is precisely what the U.S. Supreme Court condemned in Buckley v. Valeo.

On this point, the recent California case upholding the constitutionality of term limits is both factually distinguishable and constitutionally flawed. First, the California Supreme Court concluded, on the record before it, that the imposition of term limits was necessary "to eliminate the 'class of career politicians' that assertedly had been created by virtue of the 'unfair incumbent advantages' referred to in that measure." Legislature of the State of California v. Eu, slip op. at 45.

Whatever the facts in California, the same assertion cannot be made in Florida. The Florida legislature is part-time, enjoys limited staff benefits, demonstrates significant turnover, replaces legislative leadership on an on-going basis, is subject to campaign finance and ethics reform, and must be re-constituted every ten years through an open process of redistricting. See text at 38-41 supra. It is not clear that any class of "career" politicians can

survive these circumstances.[29/] But if, in some weakened state, a few "career" legislators remain, it cannot be said that their presence makes it absolutely necessary to impose term limits on all legislators (and all voters), even assuming that the state has a legitimate interest in their removal.

Second, the California decision is flawed as a matter of constitutional analysis. The First Amendment requires that limits on the right to vote be as narrowly tailored as possible to advance a legitimate state interest. See Dunn v. Blumstein, 405 U.S. 330 (1972)(declaring unconstitutional a three-month county waiting period imposed on a new voter because a less restrictive means, that is a shorter residence period, would serve the state interest just as well). But the California Supreme Court concluded that a life-time ban from legislative service was justified merely because it could imagine some circumstances in which career politicians or spouses would swap seats back and forth between them. Legislature of the State of California v. Eu, slip op. at 46-48.

The Constitution does not, however, permit such speculation. Many methods exist to restrict the "unfair" advantages of incumbency. See text at 44-45 supra. Those must be tried before term limits can be imposed because, as

---

[29/] They cannot survive, that is, unless they enjoy widespread and real public support. In that case, they serve because the voters wish them to serve.

the U.S. Supreme Court has explained, "[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." Kusper v. Pontikes, 414 U.S. 51, 59 (1973).[30/]

4. Summary

As demonstrated, the Term Limits Initiative violates every element of the test set forth in Eu v. San Francisco Cy. Central Democratic Com. The measure's term limits:

> (i) impose unprecedented burdens on the rights of voters to choose experienced, wise and committed candidates to represent their interests in the legislature;
>
> (ii) were imposed for the facially illegitimate purpose of suppressing the expression of those who support incumbents in order enhance the political prospects of those who support nonincumbents; and
>
> (iii) represent the least narrow option available to Florida to address any hypothetical state interest in reducing possible corruption arising from "cozy" relationships between incumbents and "special interests."

30/ It cannot be reiterated too often that the Constitution only permits the restriction of incumbent advantages that are "unfair." It is not legitimate to punish incumbents merely for their electoral success. See text at 26-28 supra. Nor would it be legitimate to impose term limits simply because incumbents are better known as a result of their legislative service. Public officials are, after all, supposed to report to the public. See Regulations On The Use Of All House Newsletters, Their Production and Mailing, supra. ("It is the fundamental policy of this advisory board that the public has the right to be kept informed by their elected officials as to what their government is doing").

At bottom, the Term Limits Initiative amounts to a paternalistic and antidemocratic attempt to change the substantive outcomes of the electoral process and the legislative process by depriving voters of their fundamental rights to choose who will best represent their interests. In seeking these outcomes, it severely damages the accountability, efficacy and integrity of the Legislature. The First Amendment does not tolerate such a result.

CONCLUSION

For all the foregoing reasons, this Court should declare that the Term Limits Initiative violates the First Amendment to the U.S. Constitution.

Respectfully submitted,

Jonathan B. Sallet
Donald B. Verrilli, Jr.*
Scott Sinder
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400

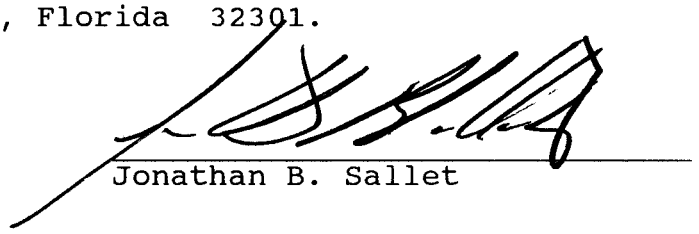
Counsel for Respondents
National Conference of State Legislatures and Southern Legislative Conference of The Council of State Governments

*Pro Hac Vice

October 18, 1991

Certificate of Service

I certify that a true copy of the Initial Brief of Respondents National Conference of State Legislatures and Southern Legislative Conference of The Council of State Governments was delivered by hand on October 18, 1991 to The Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301.



Jonathan B. Sallet