IN THE SUPREME COURT OF FLORIDA

Case No. 78,647

Upon A Request From The
Attorney General For An
Advisory Opinion As To The
Validity Of An Initiative Petition

IN RE:

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

REPLY BRIEF OF CITIZENS FOR LIMITED POLITICAL TERMS IN SUPPORT OF LIMITED POLITICAL TERMS INITIATIVE

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INTRODUCTION

Pursuant to the Court's Interlocutory Order of October 2, 1991, Citizens For Limited Political Terms ("Citizens") file this reply brief in support of their position that the Limited Political Terms initiative complies with the single subject and ballot summary requirements, and thus qualifies for submission to the voters. Although three parties have filed briefs opposing placement of the proposal on the ballot because of alleged federal constitutional infirmities, only two -- Let The People Decide - Americans For Ballot Freedom ("Americans") and Representative Lawrence J. Smith ("Smith") -- address the single subject and ballot summary questions.[1] Citizens maintain that the federal constitutional issues are not properly before the Court in the present proceeding (see Point (c) below); therefore, this reply is directed solely to the arguments of Americans and Smith ("the opponents") regarding the single subject and ballot summary requirements.

ARGUMENT

As explained in Citizens' initial brief, the Court's role in reviewing an initiative proposal for compliance with the single subject and ballot summary requirements is limited in scope. The Court "must act with extreme care, caution, and restraint before it removes a constitutional amendment from the

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[1] The remaining respondent, National Conference of State Legislators and Southern Legislative Conference of the Council of State Governments, assails the validity of the initiative solely on federal constitutional grounds. The federal constitutional issues are addressed in the reply brief of the Term Limits Legal Institute.

vote of the people," and should not strike a proposal from the ballot unless the opposing party shows that the amendment is "clearly and conclusively defective." Askew v. Firestone, 421 So.2d 151, 154-56 (Fla. 1982). For purposes of that narrow inquiry, "[n]either the wisdom of the provision nor the quality of its draftsmanship is a matter for [judicial] review." Weber v. Smathers, 338 So.2d 819, 822 (Fla. 1976). Analysis of the limited terms initiative in light of established standards and without regard to the political merits of the measure -- which is properly a matter for the people to judge -- reveals that the opponents have failed to prove the proposal is clearly and conclusively defective.

(a) The Proposed Amendment Complies With The Single-Subject Requirement.

The parties agree that the test for determining compliance with the single-subject requirement is whether the proposed amendment has "a logical and natural oneness of purpose"; that the rule is intended "to place a functional as opposed to a locational restraint" on initiative amendments so as to "protect against multiple precipitous changes in our state constitution"; and that the principal purpose of the limitation is to prevent "logrolling" -- i.e., "the aggregation of dissimilar provisions in one law in order to attract the support of diverse groups to assure its passage." Fine v. Firestone, 448 So.2d 984, 988-90 (Fla. 1984). While the opponents here emphasize the Court's recognition in Fine that it "should require strict compliance with the single-subject rule in the

initiative process," as compared to the more lenient "one subject" limitation on legislative enactments, Id. at 989, they do not dispute the Court's subsequent reaffirmance of the traditionally tolerant standard that even though an amendment "could have broad ramifications," it is not invalid if "on its face it deals only with one subject." In re Advisory Opinion to the Attorney General English -- The Official Language of Florida, 520 So.2d 11, 13 (Fla. 1988).

Unquestionably, the term limitation amendment on its face deals only with one subject and serves only one function or purpose -- to prohibit incumbents who have served eight consecutive years from appearing on the ballot for re-election to the same office. The opponents nonetheless contend that because of its potential political ramifications, the proposal "substantially affects" multiple constitutional provisions and governmental functions to a degree not permissible under the single-subject rule. Specifically, the opponents argue that the amendment is invalid because (1) it fails to identify for voters provisions of the state and federal constitutions with which it directly conflicts or that it substantially affects; and (2) it substantially affects three discrete functions of government, and thus constitutes "logrolling." These contentions are demonstrably meritless.

(1) The proposal does not conflict with or substantially affect other constitutional provisions.

Relying on language from Fine that "an initiative proposal should identify the articles or sections of the

constitution substantially affected," 448 So.2d at 989, Americans argue that although the term limitation initiative purports to amend only article VI, section 4, it "dramatically affects" other constitutional provisions that prescribe the terms and qualifications of state executive branch officeholders (art. IV, §5, Fla. Const.), state legislators (art. III, §15, Fla. Const.), and federal legislators (U.S. Const. art. I, §§2,3). Americans contend that the term limitation proposal constitutes "the most direct form of conflict," because it "adds a new disqualifying limitation" to the "present, more limited and exclusive listing" of qualifications in the other cited provisions. Furthermore, Americans suggest that the proposed amendment violates the single-subject rule by virtue of "misplacement," because it "creates an absolute, unchangeable, re-election ban" that belongs with the age and residency requirements, rather than a "temporal and correctable" disqualification like mental incompetence or a felony adjudication under article VI, section 4.

The initial problem with Americans' analysis is that it misconceives the effect of the proposed amendment. By its terms, this initiative only prohibits incumbents who have served eight consecutive years from <u>appearing on the ballot</u> for re-election. It does not prevent them from running for re-election as a write-in candidate and serving if they succeed; nor does it preclude them from returning to the ballot after sitting out a term.

While exclusion from the ballot is undoubtedly a formidable obstacle to re-election -- though some may regard it as a welcome counterweight to the customary advantages of

incumbency -- it is not "an absolute, unchangeable, re-election ban." Because an individual can remove the disqualification by stepping aside (or serving in another office) for one term, it is no less "temporal and correctable" than the other disqualifications contained in article VI, section 4. Thus, even if there were some authority to support Americans' "misplacement" argument, the objection is without merit in this case--particularly since the single-subject requirement is no longer a locational restraint. Fine, 448 So.2d at 990.

On the principal point, Americans have failed to demonstrate how the proposed amendment "directly conflicts with or substantially affects" any existing provisions other than article VI, section 4, including those sections that presently prescribe the terms and qualifications of the affected offices. If the initiative passes, the terms of state and federal representatives will still be two years; the terms of state senators and executive branch officers will still be four years; the terms of United States senators will still be six years; and the age and residency requirements for all will remain unchanged. The kind of conflict contemplated by Fine would arise only if another constitutional provision currently prescribed a different limitation on the number of consecutive years that those officers could serve before they are barred from appearing on the ballot for re-election.

The purpose of the identification requirement revived in Fine is to protect against undisclosed conflicts with or changes to existing constitutional provisions, and thereby ensure

that voters do not unknowingly adopt in the guise of a single proposal some measure that would effect "multiple precipitous changes in our state constitution." 448 So.2d at 988. This proposal does not violate that principle because it has a singular purpose that is plainly understandable to the voters. Limiting the number of consecutive times that a person can appear on the ballot for re-election to the same office would not conflict with any existing provision, would not require any further amendments, and would not necessitate any judicial construction or redrafting of other sections. Because the proposal "substantially affects" only the section it amends, it cannot be condemned for failure to identify any other constitutional provisions.

(2) The proposal does not substantially affect different government functions so as to constitute "logrolling."

To the extent that it can be separated from their political reasons for opposing term limitations, the opponents' next argument focuses on the fundamental concern of the single-subject requirement -- whether the amendment affects different functions of government in a way that forces diverse groups of voters to accept an unpalatable proposal in order to obtain a desirable change.

The opponents assert that (1) the term limitation amendment affects "officeholding" in three "branches" of government; (2) due to "significant functional distinctions" between the three branches, there are "vastly different policy considerations" for limiting the terms of officeholders in each

branch; and (3) the differing policy considerations might cause some voters to favor the amendment as applied to officeholders in one branch but not as to officeholders in another branch. From these premises, the opponents conclude that because "voters are deprived by this monolithic proposed amendment of the opportunity to preserve the values of continuity in one branch while willingly abandoning them in the other," the initiative's "attempt to 'reform' multiple branches of government ... embodies the essence of the primary evil properly vilified and condemned by the one-subject rule: 'logrolling.'" In this regard, the opponents contend that the proposal "is indistinguishable from the constitutional deficiencies found in Evans [v. Firestone, 457 So.2d 1351 (Fla. 1984)]," but is "readily distinguishable from other cases" where there "could be no doubt about the one-subject issue."

Two fundamental flaws in the opponents' reasoning are evident. First, they erroneously assume that "officeholding" is a "governmental function." The term limitation amendment does not "substantially affect" any governmental functions; it only affects the individual officeholders who perform those functions. The fact that the functions of officeholders in various branches of government may differ does not mean that they cannot be subject to a singular change in the constitution that limits their "officeholding" rights. Indeed, that is precisely what occurred in Weber v. Smathers, 338 So.2d 819 (Fla. 1976), where this Court refused to invalidate the "Ethics In Government" initiative that included a uniform anti-lobbying limitation

applicable to any "member of the legislature or statewide elected officer." Art. II, §8(e), Fla. Const.

For purposes of the single-subject requirement, a proposed amendment is not objectionable simply because its effects cut across different branches of government. See, e.g., In re Advisory Opinion to the Attorney General, Limitation of Non-Economic Damages In Civil Actions, 520 So.2d 284 (Fla. 1988) (judicial and legislative); Carroll v. Firestone, 497 So.2d 1204 (Fla. 1986) (executive and legislative). The rule adopted by this Court in Evans, and relied upon here by the opponents themselves, is that "where such an initiative performs the functions of different branches of government, it clearly fails the functional test." 457 So.2d at 1354 (emphasis added). Because the term limitation amendment clearly does not perform the function of any branch of government, it does not fail the functional test of the single-subject requirement.

The second fallacy in the opponents' theory is their misconception as to the meaning of "logrolling" in this context. According to the opponents, the differing policy considerations for limiting the terms of state executive officers, state legislators, and federal legislators could pose a dilemma for many voters -- some may favor the restriction for executive officers but not for legislators, while others may favor the restriction for state officials but not for federal legislators; because the presentation of the amendment in one initiative deprives voters of the opportunity to decide separately for each category, the opponents charge that the proposal "embodies the

essence of ... "logrolling.'" As previously noted, however, this Court has defined "logrolling" as "the aggregation of dissimilar provisions in one law in order to attract the support of diverse groups to assure its passage." Fine, 448 So.2d at 988 (emphasis added).

A proposal cannot be condemned as "logrolling" simply because individual voters might be ambivalent about its consequences. To constitute "logrolling," it must be apparent that the proposal combines two or more subjects that (a) are "dissimilar provisions" bearing no natural relation to one another; (2) are deliberately wedded to attract votes from diverse groups with distinct political identities; and (3) include a controversial measure that would likely be opposed by supporters of the associated issue if considered separately -- i.e., the "sugar-coated pill." Those circumstances clearly do not exist in this case, because there are no "dissimilar provisions" in the initiative, no "diverse groups" at which the proposal is targeted, and no clear disparities in the desirability of applying term limits to one branch over another.

If the "individual voter ambivalence" test advocated by the opponents here were to be adopted, virtually no measure could pass muster, including those previously sustained by this Court and characterized by the opponents as cases where there "could be no doubt about the one-subject issue." For example, some voters might favor the mandatory use of English in public schools (to ensure that children are adequately prepared to function in American society), but oppose a requirement that public signs and

documents be printed only in English (to avoid disadvantaging non-English-speaking residents and discouraging tourism from foreign countries). Likewise, due to "differing policy considerations," some voters may favor limiting non-economic damages in certain cases (medical negligence), but oppose such protection for other defendants (drunk drivers); and other voters may believe that a homestead valuation limitation should apply to protect citizens owning homes of modest value, but should not afford tax relief to the wealthy. There is certainly no doubt that, under this analysis, prior initiative proposals for ethics in government, casino gambling, and state lotteries would have been invalidated as attempts at logrolling.

The danger of the "strict scrutiny" standard advocated by the opponents here is that it would require the Court in future cases to look far beyond the familiar question of whether the initiative has a "logical and natural oneness of purpose," or appears to be a contrived coalition of dissimilar proposals designed to forge an alliance of diverse political factions. If the test of individual voter ambivalence is adopted, the Court will be compelled to undertake the very analysis that it has consistently foresworn -- examining the policy considerations that go to the wisdom of a proposal. In that event, the Court will inevitably find itself being asked to make judgments that should properly be left to the people.

Proposed constitutional amendments will frequently entail difficult policy dilemmas for "thoughtful voters." With respect to the policy arguments raised by the opponents here,

someone will have to decide whether seniority, experience, and continuity is more desirable than accountability to constituents; whether power should depend on longevity or leadership skills; and whether it is better to have legislators making reapportionment decisions based on concern for their "political lives" or on an objective commitment to assuring fair representation. The fact that those choices may be difficult for some does not, however, justify this Court denying the people the right to decide -- or, worse yet, making the decision for them -- by striking this initiative from the ballot on the ground that it violates the single-subject limitation.

(b) The Ballot Summary Complies With Section 101.161(1).

As discussed in Citizens' initial brief, this Court has made it clear that the ballot summary requirement of section 101.161(1) is satisfied if the summary as a whole "fairly reflects the chief purpose of the amendment." English -- The Official Language, 520 So.2d at 13. The ballot summary need not "explain in detail what the proponents hope to accomplish," Id., and it is "not necessary to explain every ramification of a proposed amendment." Carroll v. Firestone, 497 So.2d at 1206. A ballot summary will not be deemed defective unless it misleads voters by affirmative deception or omission of material facts that are essential to an understanding of the changes effected. E.g., Wadhams v. Board of County Commissioners, 567 So.2d 414, 416-17 (Fla. 1990).

The opponents here contend that the ballot summary for the term limitation initiative suffers "three glaring defects."

First, Americans argue that the summary fails to advise voters of the status quo or how existing law is being changed, and thus is void under Wadhams, Askew, and Kobrin v. Leahy, 528 So.2d 392 (Fla. 3d DCA), rev. denied, 523 So.2d 577 (Fla. 1988).[2] Analysis of those cases reveals, however, that a ballot summary is deemed defective for insufficient information only where it misleads voters by concealing a conflict with existing provisions--i.e., where there is an undisclosed existing provision on the same subject, and the summary implies that the proposal would produce a change in the law that is actually contrary to its true effect on the undisclosed existing provision.

In this case, there is no existing provision of the constitution that imposes a different limitation on the number of consecutive years or terms these officials may serve and still appear on the ballot for re-election; rather, the proposed amendment "writes upon a clean slate." This Court has never suggested that a ballot summary must advise voters of the status quo when the proposed amendment is creating entirely new law rather than changing an existing provision. Section 101.161(1) simply requires a ballot summary, not a civics lesson.

The second alleged infirmity in the ballot summary is its failure to advise voters that the provisions of the proposed amendment could possibly be severed. No supporting authority has been cited for this premise, but there is clear precedent to the contrary. In both the Homestead Valuation Limitation and

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[2] But see Palm Beach County v. Hudspeth, 540 So.2d 147, 150-52 (Fla. 4th DCA 1989).

Limitation of Non-Economic Damages cases, this Court approved ballot summaries that made no reference to the severability provisions of the proposed initiative amendments. As the Court observed in Grose v. Firestone, 422 So.2d 303, 305 (Fla. 1982), "[i]nclusion of all possible effects ... is not required in the ballot summary."

Finally, pointing to language on the petition form that they characterize as being "packed with innuendo," Americans assert that the summary violates the requirement of "neutrality on a ballot" because it "places a one-sided argument on the ballot itself, with the goal of persuading voters in the voting booth, not informing them." The problem with this argument is readily apparent: it mistakenly assumes that language from the petition form is placed on the ballot itself. Under section 101.161(1), however, all that appears on the ballot in the voting booth is the summary, which in this case has been drafted with scrupulous neutrality. The fact that promotional language may be included on the petition form -- a paid political advertisement-- is irrelevant. See Carroll, 497 So.2d at 1206-07.

In conclusion, it bears repeating that the question here is whether the term limitation proposal complies with the single subject and ballot summary requirements, not whether the amendment could possibly be broken down into separate propositions or whether the ballot summary could possibly be drafted with greater detail. This Court has consistently refused to remove initiative amendments from the ballot except in cases where there is an egregious breach of the one-subject limitation

or it is obvious that a ballot summary was drafted so as to purposefully mislead the voters. Under the broad standards established by this Court's prior decisions, there is no basis for a finding that the term limitation initiative is "clearly and conclusively defective." Accordingly, it should be submitted to the voters as contemplated by the constitution.

(c) The Federal Constitutional Issue Is Not A Proper Subject For Consideration In This Proceeding.

Citizens maintain that it is inappropriate and unnecessary for the Court to consider in this proceeding whether the proposed amendment would conflict with the federal constitution. The Florida constitutional and statutory provisions authorizing this preliminary review process contemplate that the Court will confine its inquiry to the single subject and ballot summary questions, together with any associated factual issues that require determination in order to resolve the two legal questions. As the Supreme Court of Washington concluded in the same context, the federal constitutional issues are too complicated for consideration in an expedited procedure of this nature; more time must be allowed for a thorough briefing and deliberation on those issues, the resolution of which will have nationwide repercussions.

In addition, it is significant that the issues framed by the Court's Interlocutory Order are limited to the single subject and ballot summary questions. Citizens assume that the Court would have made reference to the federal constitutional issues if it anticipated a need to resolve the issues here.

Deferring consideration of those issues is consistent with the Court's longstanding policy of declining to address constitutional questions unless it is necessary to do so; in this case, the issues are premature until the voters have passed upon the proposal. Just as the Court should not offer advisory opinions on pending legislation prior to enactment, it should not adjudicate the constitutionality of an initiative proposal before it becomes law.

The opponents have presented no compelling reason for the Court to reach the federal constitutional issues now. Indeed, Americans' contention that the provisions of an initiative provision cannot be severed prior to its placement on the ballot is a forceful argument for awaiting the outcome of the election before considering whether severance would be required. It follows that the Court should refrain from addressing the federal constitutional issues in this proceeding.

CONCLUSION

The opponents have failed to show that the proposed term limitation amendment is clearly and conclusively defective. Accordingly, Citizens request that the Court issue an advisory opinion declaring that the initiative proposal complies with the single subject and ballot summary requirements, and thus qualifies for submission to the voters.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by Hand Delivery to Arthur J. England, Jr., Esq., Fine Jacobson Schwartz Nash Block & England, P.A., First Florida Bank Tower, 215 South Monroe Street, Suite 804, Tallahassee, FL 32301; to The Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida 32301; and by United States mail to Jonathan B. Sallet, Esq., Jenner & Block, 21 Dupont Circle, N.W., Washington, D.C. 20036; James S. Portnoy, Esq., Arnold & Porter, 1200 New Hampshire Ave. N.W., Washington, D.C. 20036; Cleta Deatherage Mitchell, Attorney at Law, Three Chopt Square, 6108 N. Western, Oklahoma City, OK 73118; Richard N. Friedman, Esq., Suite 612, 9200 South Dadeland Blvd., Miami, FL 33156; and Steven R. Ross, Esq., General Counsel to the Clerk, U.S. House of Representatives, The Capitol, H-112, Washington, D.C. 20515, this 1st day of November, 1991.

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