ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. 94,653

DONALD G. RAY, LOUIS P. KALIVODA, SYBIL C. MOBLEY, DAVID W. BOWERS, and CLARENCE FORT,

Plaintiffs/Appellants,

v.

SANDRA B. MORTHAM, Florida Secretary of State, in her capacity as Florida's Chief Elections Officer,

Defendant/Appellee.

After an Opinion by the District Court of Appeal, First District (Case No. 98-4705)

On Appeal from the Circuit Court of the Second Judicial Circuit, In and for Leon County, Florida (Case No. 98-1024, Honorable P. Kevin Davey, Judge)

AMENDED BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF SANDRA B. MORTHAM

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IDENTITY AND INTEREST OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation ((PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF has offices in Sacramento, California; Bellevue, Washington; Honolulu, Hawaii; and Miami, Florida. PLF's Florida office, known as the Atlantic Center, is staffed by a full-time attorney who is a member of the Florida Bar.

Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The PLF Board evaluates the merits of any contemplated legal action and authorizes such action only where PLF's position has broad support within the general community. The PLF Board has authorized the filing of a brief amicus curiae in this matter. PLF has participated in numerous cases involving the constitutionality of term limits for elected officials including: *Legislature of the State of California v. Eu*, 54 Cal. 3d. 492 (1991) *cert. denied*, 503 U.S. 919 (1992); *U.S. Term Limits, Inc. v. Thornton*, 51 U.S. 779 (1995); and *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997).

PLF considers this case to be of special significance in that it concerns the fundamental issue of whether the people of a state may set reasonable limits on access to the ballot in order to encourage more public participation in the electoral process. PLF seeks to augment the argument of Appellee Mortham in this case. PLF believes that its public policy perspective and litigation in support of term limits will provide an additional needed viewpoint on the issues presented by this case.

INTRODUCTION

The people of Florida amended their state constitution in 1992 to adopt Article VI, Section 4(b), with 3,625,000 votes in favor and 1,097,127 votes against. Exhibit D to Defendant's Motion to Dismiss. This is a margin of approximately 80%. The newly adopted provision specified:

(b) No person may appear on the ballot for reelection 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.

Florida Constitution, Article VI, Section 4(b).

The purpose of the amendment was set forth in the initiative petition, quoted by this Court in the *Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices,* 592 So. 2d 225-26 (Fla. 1991) (*Advisory Opinion*):

> The people of Florida believe that politicians who remain in office too long may become preoccupied with re-election and become 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.

It should be noted that the amendment's restrictions apply only to the ability of an affected candidate to appear on the ballot. The candidate may nonetheless run as a write-in candidate and, if elected, may serve. To the extent that these ballot access restrictions are denominated term limits, they are a mild form compared to those in other states. For example, in California, affected officials may not run for office even as write-in candidates and, if

elected, may not serve. *Legislature of the State of California v. Eu,* 54 Cal. 3d at 505 (describing California's term limits initiative as a "lifetime ban from office." *Id.*)

Term limits have been adopted in a variety of forms by voters across the country. They may well be the only type of electoral reform that long-term incumbents cannot manipulate to their own advantage. By limiting the ability of incumbents to run for reelection in perpetuity through use of all the inherent advantages of incumbency, term limits provide an opportunity for public-spirited citizens to seek public office on a level playing field. Term limits such as those at issue guarantee open seat elections, creating competition among candidates, invigorating the political debate and engaging voters in the political process.

For all these reasons, the people of Florida chose to enact ballot access restriction on long-term office holders. In so doing, they did not discriminate against any legislator on the basis of race, ethnicity, gender, age, wealth, or political viewpoint. Voters maintain the right to vote for any qualified candidate, including long-term incumbents who choose to run write-in campaigns. Any qualified candidate who is elected may serve. Thus the ballot access restrictions impose only minimal burdens on voters and

candidates that are fully justified by the overriding public concerns set forth above. For these reasons, the term limits on Florida senators and representatives should be upheld as fully in conformance with the First and Fourteenth Amendments to the United States Constitution and the Florida Constitution.

STATEMENT OF THE CASE

PLF adopts the statement of the case set forth in the brief of the Appellee.

SUMMARY OF ARGUMENT

The circuit court properly granted summary judgment for Appellee Mortham. Plaintiffs' key argument is in Count III of the complaint, alleging violation of the First and Fourteenth Amendment. The balancing test adopted by the United States Supreme Court makes clear that the Florida term limits amendment does not violate the Federal Constitution. There is no constitutional right to vote for any particular candidates and the courts have frequently upheld ballot access limitations or even outright prohibition of classes of candidates. Limiting terms of elected state officials is a policy choice reserved to the voters of the state.

The complaint's Count I (challenging term limits for federal legislators) failed to meet the requirements for a declaratory action in that there was no showing of an actual dispute regarding the application of term limits to United States Representatives and senators. As to Count II (severability), the provisions regarding federal legislators are severable. The severability clause in the amendment showed the voters' intent to sever any unconstitutional provisions and the valid provisions as to state legislators are entirely capable of standing on their own. Plaintiffs' theory in Count IV (denial of equal protection to remove rural senators) would prohibit *any* challenge to rural senators in primary or general elections and would create an antidemocratic political system. Plaintiffs' Count V argument (violation of the constitutional provision reserving all political power to the people) ignores the fact that the people have exercised their plenary power to limit the terms of state legislators and further ignores Florida law that the most recent constitutional amendment prevails over any conflicting provision of the Constitution.

ARGUMENT

I

THE FLORIDA BALLOT ACCESS LIMITATION WITHSTANDS FIRST AND FOURTEENTH AMENDMENT CHALLENGES UNDER THE *ANDERSON v. CELEBREZZE* TEST

The key portion of Plaintiffs' case is Count III of the complaint. Plaintiffs therein contend that Article VI, Section 4(b), restricts Plaintiffs' fundamental right to vote and to associate with the candidates of their choice for the Florida Legislature. On that basis, plaintiffs contend that the provision violates the First and Fourteenth Amendments to the United States Constitution. Plaintiffs further contend that in enforcing the provision defendant Secretary of State is violating those federal civil rights under color of state law and is thereby liable to them under 42 U.S.C. § 1983.

One starts with the basic premise that "legislative acts are presumed constitutional and that courts should resolve every reasonable doubt in favor of constitutionality." *Martinez v. Scanlan,* 582 So. 2d 1167, 1172 (Fla. 1991). The United States Supreme Court has held that because every election law invariably imposes some burden upon voting and associational rights of individual voters, such burdens need not be subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 432-33 (1992). Instead, the courts apply a

balancing test derived from the following language in *Anderson v. Celebrezze,* 460 U.S. 780, 789-90 (1983) (internal citations omitted):

> Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any litmus-paper test that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiffs' rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

In validating its state's term limits measure, the California Supreme Court succinctly paraphrased this test, identifying three prongs of analysis: (1) the nature of the injury to the rights affected, (2) the interests asserted by the state as justification for that injury, and (3) the necessity for imposing the particular burden affecting the plaintiffs' rights, rather than some less drastic alternative. *Legislature v. Eu*, 54 Cal. 3d at 517. This analysis applies whether the regulations govern the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself. *Burdick, supra*, 504 U.S. at 433 (quoting *Anderson*, 460 U.S. at 788).

An excellent summary of the First and Fourteenth Amendment issues is set out in *Bates v. Jones,* 131 F.3d at 846-47. The Ninth Circuit noted that if the measure severely burdens the plaintiffs' rights, the courts, apply strict scrutiny. "If, however, the law 'imposes only reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* at 846 (citations omitted). *Bates,* went on to find:

> The rights which the Plaintiffs seek to vindicate in this case are the right to vote for the candidate of one's choice and the asserted right of an incumbent to again run for his or her office. Proposition 140's impact on these rights is not severe. As argued by the State, term limits on state officeholders is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose. *See Burdick*, 505 U.S. at 433. . . . With regard to incumbents, they may enjoy the incumbency of a single office for a number of years, and, as pointed out by the California Supreme Court, they are not precluded from running for some other state office.
>
> Most important, the lifetime term limits do not constitute a discriminatory restriction. Proposition 140 makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender. Nor does the Proposition 'limit [] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.' *Anderson*, 460 U .S. at 793.
>
> Proposition 140's minimal impact on the plaintiffs' rights is justified by the State's legitimate interests. As the Proposition

> itself states, a lack of term limits may create 'unfair incumbent advantages.' Long-term entrenched legislators may obtain excessive power which, in turn, may discourage other qualified candidates from running for office or may provide the incumbent with an unfair advantage in winning reelection. As the Supreme Court stated in *Thornton*,
>
> > 'Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents.' *Thornton*, 514 U.S. at 837.

Id. at 847.

It is critical to note that the right to hold public office, by itself, is not a fundamental right. *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972); *Clements v. Fashing*, 457 U.S. 957, 963 (1982). Thus these federal and state court holdings are appropriate because any less deference to state election or candidacy requirements would invalidate innumerable election laws across the nation. States routinely constrain voters' choices in elections by placing eligibility requirements on candidates for office. These restrictions, which are often based on the status of the candidate rather than compliance with procedures, range from prohibitions on felons serving in office, to minimum and maximum age requirements, to durational residency requirements, to

antinepotism statutes. As shown below, these status-based restrictions, like restrictions on long-term office holders, are fully constitutional under the First and Fourteenth Amendments.

A. Most States Prohibit or Severely Restrict Felons from Seeking or Holding Public Office

Florida disqualifies felons and mental incompetents from holding office. Fl. Const. art. VI, § 4(a). Indeed, in more than half the states, ex-felons are statutorily disqualified from ever holding state elective office. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & Pol. 543 (1987). Thirty-one states permanently prevent ex-felons from serving in public office. Nineteen states disqualify directly ex-felons. Some states, however, disqualify for only specific crimes. *See, e.g.*, N.H. Const. Pt. 2, art. 96 (disqualifying anyone who uses bribery or corruption to obtain office); Utah Const. art. IV, § 6 (disqualifying anyone convicted of election crimes).

Other states disqualify with broader sweep. Alabama, for instance, permanently bars individuals who have been convicted of a felony or a crime involving moral turpitude from participating in the political process. Ala. Const. art. VIII, §§ 182, 183. Arizona disqualifies persons who have been

convicted of a felony at any time. Ariz. Const. art. VII, §§ 2, 15. Mississippi bans persons who have been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy from holding public office. Miss. Code Ann. § 99-19-35 (1972). Twelve states disqualify ex-felons indirectly by disenfranchising ex-felons and requiring elected officials to be qualified electors. Snyder, 4 J.L. & Pol. at 544. Seven states disqualify only for the period of a felon's jail and parole term. For example, Alaska disqualifies its felons from voting until their unconditional discharge from state control, Alaska Stat. § 15.05.030 (1982), while the Alaska Constitution, Article II, Section 2, requires that members of the state legislature be qualified voters. California requires that its public officers be qualified electors, Cal. Elec. Code § 75 (1980), but authorizes disenfranchisement only while the felon is imprisoned or on parole. Cal. Const. art. II, § 4. Montana allows the election of any qualified elector, but no person convicted of a felony shall be eligible to hold public office until his final discharge from state supervision. Mont. Const. art. IV, § 4. Some states disqualify persons convicted in other jurisdictions than the home state. N.M. Const. art. VII, §§ 1,2: Miss. Code Ann. § 99-19-35 (1972); *Bruno v. Murdock*, 406 S.W.2d 294, 297 (Mo.

1966). Others disqualify individuals convicted of a felony in another state only if the crime is a felony in the home state. N.C. Const. art. VI, § 8(3); Snyder, 4 J.L. & Pol. at 544.

In *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), the United States Supreme Court held that, consistent with the Equal Protection Clause of the Fourteenth Amendment, California may exclude from the franchise convicted felons who have completed their sentences and paroles. The Court relied on the language of the Fourteenth Amendment itself, as well as the historical and judicial interpretation of that Amendment's applicability to state laws disenfranchising felons. *Id.* at 54. Using these interpretive tools, the Court distinguished the law from those state limitations on the franchise which have been invalidated under the Equal Protection Clause. *Id.* (Referring to *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one year residency requirement for voters), *Bullock v. Carter*, 405 U.S. 134 (discrimination against the poor), *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (discrimination on the basis of property ownership), and *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (same)).

Richardson v. Ramirez further acknowledged the policy issues at stake. It noted that the respondents in that case contended that the policy of

disenfranchising felons to protect the body politic is outmoded, and that the more modern view is that it is essential to the process of rehabilitating ex-felons that they be returned to their role in society as fully participating citizens after completing their prison terms. 418 U.S. at 55. The Court stated that these arguments are more properly addressed to the legislative forum, which may properly weigh and balance them against those advanced in support of disenfranchisement. *Id.*

> It is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Id. at 55.

In the case before this Court, Florida voters made the policy choice that the body politic is improved when long-term office holders are encouraged periodically to seek another office or return to the private sector. While there may be two sides to the argument whether this is a wise policy choice, that ultimate decision is for the Florida voters.

B. States Often Disqualify Candidates for Public Office on Account of Age, Whether It Be Youth or Advanced Years

In some states a person may be deemed too young or too old to be a candidate for public office. On the question of youth, courts have consistently upheld minimum requirements for officeholding against challenges brought under the First and Fourteenth Amendments. *Manson v. Edwards*, 482 F.2d 1076 (6th Cir. 1973), upheld a requirement that city council candidates be 25 years of age, and *Blassman v. Markworth*, 359 F. Supp. 1 (N.D. Ill. 1973), upheld a minimum age requirement for school board members.

In *Stiles v. Blunt*, 912 F.2d 260 (8th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991), an underage office-seeker sued to have his candidacy certified for the office of Missouri state representative. Under the Missouri Constitution, Article III, Section 4, candidates must be at least 24 years of age. 912 F.2d at 266. The Eighth Circuit held that the age requirement does not deprive voters of their right to vote for, associate with, or speak out on behalf of candidates representing minor parties or unusual viewpoints. *Id.* (Citing *Anderson*, 460 U.S. at 787, and *Blassman,* 359 F. Supp. at 7 (minimum age requirement does not preclude or substantially narrow the field of candidates who espouse any given political, ideological, and/or socio-economic views)).

The court further held the requirement constitutional under *Anderson* because:

> Although the right to vote is fundamental, citizens do not have a fundamental right to vote for any particular candidate. Moreover, the age requirement does not favor or disfavor particular viewpoints or political parties. . . . . The minimum age requirement serves Missouri's interest in insuring that its legislators have some degree of maturity and life experience before taking office.

Id. at 266 n.10.

The Eighth Circuit was also cognizant of the policy decisions inherent in an age restriction on candidacy:

> This issue of whether the minimum age should be 18, 21, 24, or some other age is a classic example of legislative line-drawing that we must leave undisturbed. The minimum age requirement is also not irrational even if it restricts the pool of qualified candidates and makes it more difficult to recruit candidates, thus resulting in more uncontested elections which weaken the vitality of the political process. While contested elections may indeed enhance the responsiveness and robustness of our political system, we believe that these arguments are best made to the Missouri legislature or the Missouri citizens in the context of an effort to amend the Missouri Constitution.

Id. at 267; *see also Blassman,* 359 F. Supp. at 8.

At the other end of the age spectrum, courts have similarly upheld maximum age restrictions on candidacy. In *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989), the Sixth Circuit upheld an Ohio constitutional provision precluding election of any person over the age of 70 to state judicial

office. *Zielasko*, applied the *Anderson* test, holding that no one is guaranteed the right to vote for a specific individual and that the voters who supported Zielasko did not suffer a violation of the right to associate with a particular party or with a candidate professing certain political views. *Id.* at 961-62. As no rights were severely burdened, the court accepted the state's rationale for imposing this reasonable, nondiscriminatory requirement. *Id.* (the rationale included making way for younger judges, creating a pool of part-time judges to ease courtroom congestion, and preventing harm caused by some older and no longer competent judges). In the present case, the voters' choice to restrict ballot access to long-term office holders must be upheld, just as the permanent restriction on candidates who exceed a certain age was upheld in *Zielasko*.

C. The Courts Have Upheld Durational Residency and Other Requirements on Officeholding

1. Durational Residency Requirements for Candidates Are Valid

Residency, like a felony conviction or age, reflects the status of an individual and is also a constitutional restriction on candidates that violates neither the candidate's nor the voters' First and Fourteenth Amendment rights. The United States Supreme Court granted summary affirmances of durational

residency statutes in *Sununu v. Stark*, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd. mem.*, 420 U.S. 958 (1975) (seven year residency requirement for state senator); and *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H.), *aff'd. mem.*, 414 U.S. 802 (1973) (seven year residency requirement for governor).

In *Sununu*, (a pre-*Anderson* case), the District Court applied strict scrutiny and held that the state had the power, reserved by the Tenth Amendment to the United States Constitution, to impose eligibility requirements upon those who seek state elective office. 383 F. Supp. at 1290. The state interests found compelling were (1) to ensure that the candidate is familiar with his constituency; (2) to ensure that the voters have been thoroughly exposed to the candidate; and (3) to prevent political carpetbagging. *Id.* The court further noted that the people of New Hampshire had clearly stated their policy preference for a seven-year requirement and that it was the people themselves who had the power to change the requirement should their policy preferences change:

> It would be presumptuous for this court to engage in judicial hypothesizing in order to hold unconstitutional a provision of the New Hampshire Constitution which has been unchallenged since 1784, considered and rejected by the voters in 1966, and will again be presented to them in 1978. If the durational residency requirement for State Senator is to be eliminated, it should be

> accomplished by the voters through the constitutional amending process.

Id. at 1291 (citations omitted).

Finally, relying on *Chimento v. Stark*, 353 F. Supp. at 1218, the *Sununu* Court rejected voter-plaintiffs' claims that the durational residency requirement unconstitutionally infringed their right to vote for their preferred candidate, namely Sununu:

> The right of qualified voters . . . to cast their votes effectively referred to in *Williams v. Rhodes* [393 U.S. 23, 31 (1968)], remains inviolate. While an isolated few may be temporarily precluded from seeking the office of (Senator), this cannot be said to adversely affect the democratic election process or the voters' participation therein.

Sununu, 383 F. Supp. at 1292.

Thus, durational residency requirements, like the ballot access restrictions in this case, are constitutionally valid restrictions on candidate eligibility.

2. Antinepotism Statutes Have Been Held Valid

In *Chapman v. Gorman*, 839 S.W.2d 232 (Ky. 1992), the Kentucky Supreme Court upheld an antinepotism statute against a First and Fourteenth Amendment challenge. The statute prohibited persons who are related to school district employees from running for election to, or serving on, the

Board of Education. *Id.* at 234. Applying *Anderson v. Celebrezze*, the court noted that the provisions neither favored nor disfavored particular viewpoints or political parties. *Id.* at 238. Moreover, the court noted that most candidates are not excluded from the voters' consideration, only those persons who fall within the parameters of the challenged statutes. *Id.* Additionally, the court held that no substantial segment of the community is barred from the ballot by these provisions and the challenged statutes do not inhibit the free exchange of ideas. *Id.* Thus, in yet another case in which the electors could not vote for whomever they wished, the court concluded that there was no severe burden on candidates or voters.

In summary, the ballot access restrictions that Florida voters chose to impose upon their own state representatives do not violate the First and Fourteenth Amendments. Those restrictions permit eight years of service before the restrictions have any effect on any individual and do not discriminate against any protected class or fundamental right. Nor do they function as an absolute bar to election of longtime office holders since they permit such individuals to be elected through the write-in process. On the other hand, the ballot restriction serves the public policy of encouraging

qualified candidates to seek public office by limiting the powers of incumbency.

Since Plaintiffs failed to show that term limits are a constitutional violation, Appellee Mortham's enforcement of the Florida Constitution's term limits provision does not violate 42 U.S.C. § 1983.

II

PLAINTIFFS' OTHER CLAIMS FAIL TO SHOW CONSTITUTIONAL VIOLATIONS

A. Count I Fails to Allege That Defendant Disputes the Claim and Therefore Fails to Meet the Requirements of Declaratory Relief

Count I of the complaint is a nominal challenge to the provisions of Article VI, Section 4(b), regarding members of Congress. Plaintiffs state the undisputed fact that these provisions are facially unconstitutional pursuant to the decision of the United States Supreme Court in *U.S. Term Limits, Inc. v Thornton*, 514 U.S. 779 (1995), and seek declaratory relief to this effect. However, the Florida Declaratory Judgment Act, Chapter 86, Florida Statutes, requires that there be an actual dispute in order to invoke the Court's jurisdiction. Although a court may entertain a declaratory action regarding the validity of a statute or constitutional provision, there must be a bona fide need

for such a declaration based on present, ascertainable facts or the courts lack jurisdiction. *Martinez v. Scanlan,* 582 So. 2d 1167, 1170 (Fla. 1991).

> This Court has long held, however, that individuals seeking declaratory relief must show that
>
> > there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; . . . that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.

Id. (citation omitted).

Under *Martinez,* because there is no controversy as to the validity of term limits for United States Representatives and Senators, Count I fails to meet the elements of a declaratory judgment action, the courts lack jurisdiction, and this count was therefore properly dismissed by the circuit court.

B. The Portion of the Initiative Concerning Federal Legislators Is Severable from the Remainder of the Initiative

Count II of the complaint alleges that the provisions of Article VI, Section 4(b), which purport to limit the terms of Florida state legislators, are not severable from the language in that same section that purports to limit the terms of United States Senators and Representatives from Florida. However, the language of the initiative petition for the subject constitutional amendment contained a severability provision that stated:

> 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.

Advisory Opinion, 592 So. 2d at 226.

Plaintiffs argue that this severability clause was not contained in the ballot title and summary that was presented to the voters at the polls and therefore the average voter was not aware that portions of the constitutional amendment could be severed and the remaining portion given full force and effect. Plaintiffs, in effect, claim that no portion of a constitutional initiative, which is not contained in the summary, is valid because the electors or the legislators did not realize what they were voting on. This is patently absurd.

The voters did not adopt merely the ballot title and summary. They adopted the entire text of the initiative. If the Plaintiffs' rationale were adopted, the ballot title and summary would be redundant because everything in the text would have to be included in the ballot title and summary in order to be valid. Plaintiffs cite no authority requiring such an absurdity.

To the contrary, this Court addressed this issue in *Advisory Opinion, id.* at 228:

> The ballot title and summary must state 'in clear and unambiguous language the chief purpose of the measure.' However, it need not explain every detail or ramification of the proposed amendment.

(Citations omitted.)

This Court then held:

> The chief purpose of the proposed amendment is to limit the terms of incumbents in certain elective offices. The proposal seeks to achieve this, as the ballot summary indicates, by prohibiting an incumbent who has held the office for the preceding eight years from appearing on the ballot for reelection. The language of the summary and ballot title are clear and unambiguous.

Id.

This Court specifically found that the lack of reference to the severability provision in the ballot summary was not misleading, noting that it

has approved other ballot summaries that did not refer to severability provisions in the proposed amendment. *Id.* at 228-29. This finding comports with the law on severability set forth in *Smith v. Department of Insurance*, 507 So. 2d 1080, 1089 (Fla. 1987):

> When part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions; (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Here, (1) the provisions regarding the federal legislators are easily separated from those provisions regarding state officials in that they are separate subsections of Article VI, Section 4(b); (2) the legislative purpose of limiting the terms of state officials can be accomplished independently of the provisions concerning federal legislators; (3) term limits for federal legislators and for state officials are not so inseparable that the people would not have passed one without the other; indeed, the possibility that some portion might be found invalid was the reason for the severability clause in the amendment; and (4) after excluding United States Representatives and Senators from term limitations, an act complete in itself remains, although now applying only to

state officers. The invalid portion of the amendment is therefore severable and the remainder of the amendment is valid.

C. Plaintiffs' Theory That Removing Rural Senators from Office Is a Denial of Equal Protection Would Preclude Any Challenge to Rural Senators in Primary or General Elections

Count IV of the complaint alleges that Florida Constitution Article VI, Section 4(b), violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and that in enforcing this state constitutional provision Secretary of State Mortham is violating Section 1983 of Title 42, United States Code. The theory of Count IV is that in rural areas, Florida Senators are often the sole Senate representatives of entire counties. Because of the term limits provision, these rural counties will acquire new and inexperienced senators every eight years. By contrast, urban counties often have more than one senator who may represent that county by representing different areas within the county. When these urban senators are "termed out", there will be other experienced senators from the same county who will represent the financial and overall interests of the entire county during the legislative budget process. *Id.*

The problem with the premise of Count IV is that it assumes facts not in evidence. Specifically, it assumes that only experienced senators can represent properly the interests of their constituencies and it is a constitutional violation if such senators are turned out of office. If Plaintiffs' premise were true, any time a rural senator was defeated in a primary or general election, the senator's supporters would have a constitutional cause of action to overturn the election because the newly elected senator could not represent the constituency as ably as experienced urban senators. In Plaintiffs' view, a sitting rural senator could never be defeated by the voters. This antidemocratic policy puts a whole new twist on the idea of "incumbent advantage."

What Plaintiffs fail to understand is that 80% of the Florida voters believe that longtime "experienced" senators and representatives will not represent their constituencies as ably as "new blood." This is a policy judgment that has been made by the people of Florida. As set forth in the preceding sections, there is nothing unconstitutional about this policy choice. Since Plaintiffs failed to show that term limits is a constitutional violation, Appellee Mortham's enforcement of the Florida Constitution's term limits provision does not violate 42 U.S.C. § 1983.

D. The Term Limits Amendment Should Be Read So as Not to Conflict with Other Constitutional Provisions; But in the Event of Any Conflict It Would Prevail as the Most Recent Expression of the Will of the People of Florida

Plaintiffs' Count V alleges that Article VI, Section 4(b), of the Florida Constitution violates Article I, Section 1, of the Florida Constitution which provides that all political power is inherent in the people. On the most basic level, this contention ignores the fact that the people have exercised their inherent plenary political power to amend their constitution to provide for term limits for their elected representatives to the Florida Legislature.

On a more technical level, Florida law requires that provisions of the Constitution be read in harmony and to avoid conflict. But if conflict is unavoidable, the most recent amendment to the Constitution prevails.

> It is a fundamental rule of construction that, if possible, amendments to the Constitution should be construed so as to harmonize with other constitutional provisions, but if this cannot be done, the amendment being the last expression of the will of the people will prevail. An amendment to the Constitution, duly adopted, is the last expression of the will and intent of the law-making power and prior provisions inconsistent therewith or repugnant to the amendment are modified or superseded to the extent of inconsistency or repugnancy.

State of Florida v. Division of Bond Financing of the Department of General Services, et al., 278 So. 2d 614, 617 (Fla. 1973).

Thus, the rules of constitutional interpretation requires that Article VI, Section 4(b), be construed *in pari materia* with Article I, Section 1, as an exercise of the people's plenary political power. However, if these two provisions conflict, Article VI, Section 4(b), would prevail as the last expression of the will of the people.

CONCLUSION

For the reasons set forth above, the ballot access restrictions that Florida voters chose to impose upon their elected representatives to the State Legislature are constitutional in every respect. This Court is therefore

respectfully urged to affirm the summary judgment granted by the circuit court.

DATED: March 26, 1999.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief Amicus Curiae of Pacific Legal Foundation in Support of Sandra B. Mortham, to which this certificate is attached, is proportionally spaced, uses the time new roman font, has a typeface of 14 points, and contains 7,031 words.

DATED: March 26th, 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to Laura Boyd Pearce and Robert J. Boyd, Boyd Law Firm, P.A., 106 East College Avenue, Suite 900, Tallahassee, FL 32301; George Waas, Assistant Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050; Daniel Walker, 221 East Seventh Avenue, Tallahasee, FL 32303; Stephen Safranek, 651 East Jefferson Street, Detroit, MI 48226, this 26th day of March, 1999.

Frank Shepherd

FRANK A. SHEPHERD