ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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

Appellants,

vs.

KATHERINE HARRIS, Florida Secretary of State, in her official capacity as Florida's Chief Elections Officer,

Appellee.
_____/

CASE NO. 94,653

DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NO. 98-4705

CIRCUIT COURT
CASE NO. 98-1024

APPELLEE'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellants shall be referred to as Ray throughout this brief. Katherine Harris is substituted for former Secretary of State Sandra Mortham by operation of Fla. R. App. P. 9.360(c)(2). This brief is prepared in 14 pt. Times New Roman type.

SUMMARY OF ARGUMENT

Florida's constitutional terms limits provision for certain state officers, Art. VI, Section 4(b)(5) and (6), Fla. Const., is valid under both federal and state organic law. The doctrine of severability, invoked by Ray because of the invalidation of term limits for congressional offices, U. S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995), is inapplicable to state constitutional provisions. Moreover, even assuming the doctrine's relevance here, the conditions precedent to its application have not been met.

The initiative process and, specifically, the ballot language, have already passed scrutiny for clarity by this Court in Advisory Opinion to the Attorney General-Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991).

Challenges to state term limits on severability, equal protection and due process grounds have been uniformly rejected. In addition, Florida already has term limits in place for the governor and judicial offices.

Finally, the citizens are free under the Tenth Amendment to the United States Constitution to amend their state constitution, even if by so doing they choose to restrict their right to vote. This is what has occurred here, and there is no federal constitutional impediment to such public action.

ARGUMENT

FLORIDA'S CONSTITUTIONAL TERMS LIMITS PROVISION FOR STATE OFFICERS PASSES CONSTITUTIONAL MUSTER; THERE IS NO VIABLE SEVERABILITY CLAIM, AND THE EQUAL PROTECTION CLAUSE IS NOT IMPLICATED.

The United States Supreme Court, in U. S. Terms Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995), declared unconstitutional state-imposed terms limits on candidates for re-election to the United States House of Representatives and Senate. The terms limits language of Art. VI, Sections 4(b)(5) and (6) of the Florida Constitution, includes the offices of U.S. Representative and U.S. Senator from Florida. Accordingly, these provisions of the state constitution cannot be enforced.

From this foundation, Ray contends that the doctrine of severability precludes enforcement of those provisions pertaining to Florida representative and senator. (Ray does not challenge the remaining provisions addressing the lieutenant governor or cabinet officers.) Ray also contends that the application of the challenged provisions restricts their right to vote and associate with candidates of their choice; places them at a rural county disadvantage; and severely restricts and impairs their inherent political power and right to participate in the political process.

As demonstrated below, the judicially created doctrine of severability has never been applied to Florida constitutional provisions; a state constitutional provision

cannot be in violation of the state constitution; and constitutional challenges to term limits for non-federal officers on First and Fourteenth Amendment grounds have been uniformly rejected.

I. Background

The challenged language is contained in Art. VI, Sec. 4(b) of the Florida Constitution, which reads in full as follows:

> (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.

At the outset, what must be taken into account here is that Florida's provision only prohibits ballot placement; it has no effect on write-in candidacies, or candidacies by former incumbents who have had a break in service. Thus, all present incumbents who will complete eight consecutive years in their respective offices at the end of their next term under this provision can run as write-ins or, after a break in service, run again under this amendment.

This constitutional language was adopted overwhelmingly--approximately 80% approval--(See Exhibit A to Motion to Dismiss, R30-33) by the Florida voters in 1992 through Florida's constitutional initiative process set out in Art. XI, Sec. 3 of the Florida Constitution.[1] The process includes, as a condition precedent to ballot placement, a review by the Supreme Court of Florida. In Advisory Opinion to the Attorney General---Limited Political Terms in Certain Elective Offices, 592 So. 2d 225 (Fla. 1991), this Court found that this initiative met the constitutional single-subject requirement. Pointedly, this Court also found that the summary and ballot title were "clear and unambiguous." 592 So. 2d at 228. Thus, when the voters passed judgment on this ballot provision, they knew they were amending the State Constitution to provide for term limits for six discrete, independent public offices, and that, at the time, term limits for congressional offices were constitutional.

II. Constitutional Framework

A state's regulations of voting and elections are born of the Tenth Amendment to the United States Constitution, which expressly reserves to the states these powers, recognizing that a state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions that do not

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[1]In Biddulph v. Mortham, 89 F. 3d 1491 (11th Cir. 1996), cert. denied, 137 L. Ed. 2d 220 (1996), a constitutional challenge to the state's initiative process was rejected.

unreasonably burden citizens' rights. Pestrak v. Ohio Elections Commission, 670 F. Supp. 1368 (S. D. Ohio 1987), opin. clarified, 677 F. Supp. 534 (S. D. Ohio 1988), aff'd in part ,rev. in part, 926 F. 2d 573 (6th Cir. 1991), cert. dism., 112 S. Ct. 672 (1991), 112 S. Ct. 673 (1991). See also Evans v. Cornman, 90 S. Ct. 2417 (1970).

In Gregory v. Ashcroft, 111 S. Ct. 2395, 2402 (1991), the Court, in discussing the Tenth Amendment, stressed "the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at 'the heart of representative government.'" Because of this, the Court, in considering the impact of the Equal Protection Clause on Tenth Amendment-protected activities, said "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. . . . This rule 'is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.'"

III. Examples Of Valid Term Limits In Florida And Beyond

From this foundation, it is easy to see why term limits in Florida and elsewhere have survived. Indeed, term limits is not a new or novel concept; executive and judicial officials have served under term limits long before this concept was applied to the legislative branch of government.

By Art. IV, Sec. 5, the governor is limited to two terms. And by Art. V, Sec. 8, judges must retire when they reach a certain age. Indeed, a state's mandatory judicial retirement provision was upheld by the United States Supreme Court in Gregory v. Ashcroft based on the Court's analysis of the relationship between the Tenth and Fourteenth Amendments.

The fact that Ray---or anyone else for that matter---might want to vote for a particular governor for a third term, or elect or retain judges[2] who are beyond mandatory retirement age, is of no constitutional consequence under both the Tenth Amendment and Florida's Constitution.

Term limits challenges have been rejected in other jurisdictions as well. For example, in League of Women Voters v. Diamond, 965 F. Supp. 96 (D. Me. 1997), the court found that a state law providing for term limits for legislators was a legitimate exercise of the state's regulatory interests and outweighed any First or Fourteenth Amendment rights of incumbent candidates and voters.[3] Pointedly, the law was in the form of a legislative enactment, and not a constitutional provision, as is the case here. In Dutmer v. City of San Antonio, 937 F. Supp. 587 (W. D. Tex.

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[2]Florida's system of merit retention of judges was upheld as against Equal Protection claims in Holley v. Askew, 583 F. 2d 728 (5th Cir. 1978).

[3]In footnote 6, 965 F. Supp. at 103, the court cites to five cases as examples of the "(n)umerous federal and state courts (that have) upheld term limits as constitutional."

1996), the court upheld a city ordinance against both federal and state constitutional claims. In Miyazawa v. City of Cincinnati, 45 F. 3d 126 (6th Cir 1995), the Court upheld a city charter amendment, declaring that it serves a legitimate, and perhaps compelling, public policy interest in incumbency reform.

IV. Ray's Fundamental Analytical Failure

A. The non-issue of severability.

The gist of Ray's argument is that, while the state terms limits language for legislative offices was valid both when adopted in 1992--and for three years thereafter--it became unconstitutional the day the U.S. Supreme Court decided U. S. Term Limits, Inc. v. Thornton. Ray's argument is that, on the date Thornton was decided, the voters became confused as to what precisely it was that they adopted three years earlier, and therefore the voters would not have adopted this language in 1992 had they known then what the U.S. Supreme Court did in 1995.

In short, according to Ray, the voters' adoption of a constitutional amendment remains forever subject to invalidation should the United States (or Florida) Supreme Court, at some indeterminate time, construe that provision in a manner which years later allows a few voters to claim they were confused as to what they adopted, or otherwise voice disagreement with the Court's construction of that amendment.

The fatal flaw in Ray's argument lies in its logical extension; Ray's argument

simply collapses under its own oppressive weight.

This can easily be demonstrated by asking several rhetorical questions. First, would the voters have adopted Art. II, Sec. 7, Fla. Const., if, for example, a few voters contend today that they are confused and in disagreement with this Court's decision in Advisory Opinion to the Governor--1996 Amendment 5, 706 So. 2d 278 (Fla. 1997), holding that this constitutional provision is not self-executing? Second, would the voters have approved Art. II, Sec. 8, Fla. Const., if, again for example, a few voters disagreed with, and voiced confusion over the holding in State ex rel. Clayton v. Board of Regents, 635 So. 2d 937 (Fla. 1994), that public officers' conduct is not governed by common law? Both of these provisions were adopted through the initiative process set out in Art. IX, Sec. 3, Fla. Const., which itself was amended by way of this process. The question therefore arises as to whether the voters would have approved this amendment had they known then how the judiciary has interpreted the entire provision over the years, and if a few of those voters disagreed with, or voiced confusion about, any judicial decision. Of course, this same inquiry can be made, and similar examples given, for other initiative provisions, such as Art. VII, Sec. 4; Art. X, Sec. 16; and Art. X, Sec. 3, Fla. Const.

As to constitutional amendments not adopted by way of the initiative process, a more graphic illustration of the fundamental flaw in Ray's argument is

demonstrated by asking whether the voters would have adopted the privacy amendment, Art. I. Sec. 23, Fla. Const., had the voters known then that, for example, this amendment does not give landowners an untrammeled right to use their land regardless of the state's putative legitimate environmental interests. Department of Community Affairs v. Moorman, 664 So. 2d 930 (Fla. 1995), reh. denied, cert. denied, 117 S. Ct. 79 (1996).

Finally on this point, the same question can be posed as to those voter-approved constitutional amendments that nevertheless require legislative implementation, such as Art. X, Sec. 15, Fla. Const. Are those amendments subject to challenge when a few disgruntled voters claim disagreement with, or confusion over, implementing legislation, or amendments to implementing legislation enacted many years after the adoption of the amendment?

The obvious answer to these questions demonstrates that Ray's argument is alien to Florida constitutional jurisprudence.

The absence of any merit to Ray's claims is most recently demonstrated by the decisions in Bates v. Jones, 131 F. 3d 843 (9th Cir. 1997), cert. denied, 118 S. Ct. 1302 (1998); Massey v. Secretary of State, 579 N. W. 2d 862 (Mich. 1998)(specifically upholding term limits for state officers, and rejecting the same type of voter confusion claim rejected by the trial court in this cause); and Citizens for

Legislative Choice v. Miller, 144 F. 3d 916 (6th Cir. 1998). Pointedly, in Citizens for Legislative Choice, the Court synthesized all of the arguments posed against term limits for state officers and rejected each of them as follows:

> A voter has no right to vote for a specific candidate or even a particular class of candidates. Miyazawa v. City of Cincinnati, 45 F.3d 126, 128 (6th Cir.1995); Zielasko v. Ohio, 873 F.2d 957, 961 (6th Cir.1989). Therefore, a state may permanently bar voters from voting for particular classes of candidates. Zielasko, for example, upheld age limits on municipal judges, even though the limits forever barred citizens from voting for an entire class of candidates, elderly judges. Zielasko, 873 F.2d at 961. Other lifetime bans on entire classes of candidates are also legitimate. See, e.g., Chimento v. Stark, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1973) (upholding residency requirements); Nevada Judges Ass'n v. Lau, 112 Nev. 51, 910 P.2d 898, 902 (1996) (upholding lifetime term limits for judges); Dutmer v. City of San Antonio, 937 F.Supp. 587, 589 n. 4, 592 (W.D.Tex.1996) (upholding lifetime term limits for city councilmen).
>
> **Indeed, many courts have addressed the precise issue in this case. Twenty-four federal judges or state supreme court justices have reached the merits of whether lifetime term limits for state legislators violate the First and Fourteenth Amendments. While legal reasoning is more about quality than quantity, we are, nonetheless, impressed by the overwhelming number of judges who have voted to uphold these term limits. Twenty-three out of the twenty-four judges voted to uphold them: nine judges on the Ninth Circuit**

Court of Appeals; seven justices on the Supreme Court of Arkansas ; six justices on the Supreme Court of California; and the district court judge in this case. Only one lone district court judge has found these term limits unconstitutional--and he was reversed. All twenty-three judges, including the district court judge in this case, found that lifetime term limits impose only an incidental, neutral burden. Bates v. Jones, 131 F.3d 843, 847 (9th Cir.1997) (en banc panel) (" Bates II "), cert. denied, --- U.S. ----, 118 S.Ct. 1302, 140 L.Ed.2d 468 (1998); U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349, 360 (1994) ("Hill "); Legislature v. Eu, 54 Cal.3d 492, 286 Cal.Rptr. 283, 297, 816 P.2d 1309, 1323 (1991); Citizens for Legislative Choice v. Miller, 993 F.Supp. 1041 (E.D.Mich.1998). (Emphasis added.)

Most importantly for the Anderson-Burdick analysis, lifetime term limits impose a neutral burden, not a content-based burden. Section 54 burdens no voters based on "the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender." See Bates II, 131 F.3d at 847. It burdens no voters based on their views on any of the substantive "issues of the day," such as taxes or abortion. Citizens for Legislative Choice, 993 F.Supp. at 1046-47. Apart from the term limits issue, voters who favor experience are not in any sense a recognized "group," and we are aware of no historical bias against incumbent politicians or their supporters. See League of Women Voters v. Diamond, 965 F.Supp. 96, 102 (D.Me.1997) (term limits have no regard "to the law maker's ideas, gender, race, religion, or any other classification");

Dutmer v. City of San Antonio, 937 F.Supp. 587, 592 (W.D.Tex.1996) (under term limits, "no identifiable group ... is adversely or uniquely impacted").

Furthermore, the plaintiffs have many other avenues to express their preferences. They can, in fact, vote for experience. They can vote for the term-restricted candidates for other offices. For the legislature, they can vote for former city councilmen, legislative aides, and many other candidates with political experience. Indeed, the plaintiffs may elect anyone who has served less than three terms in the state house. Citizens for Legislative Choice, 993 F.Supp. at 1045-46. Moreover, nothing prevents them from overturning § 54 through Michigan's constitutional processes, and thereby convincing others that experience counts.

Although the plaintiffs contend that § 54 burdens them severely, their theory proves too much. They argue that lifetime term limits burden an identifiable group of voters, those who favor candidates with significant legislative experience, for the benefit of another group of voters, those who favor novice legislators. To accept their view, however, every restriction would burden some identifiable group. For example, age ceilings permanently bar voters from electing another class of candidates, those with significant life experience. Under the plaintiffs' theory, voters who favor significant life experience are an identifiable group of voters, and age ceilings permanently, and unfairly, burden their voting choices.

While the plaintiffs concede that a state may impose age limits, they fail to persuasively distinguish age

limits from term limits. They merely brand age limits "reasonable" and term limits "unreasonable." For example, they assert that "[a] reasonable qualification as to age, citizenship, [and] residency, ... precisely because it is reasonable, does not impose a 'severe restriction.' " Next, they point out that states have traditionally imposed age and the other "reasonable" qualifications. While we applaud this nod to tradition, term limits also enjoy a historical pedigree. See Bates v. Jones, 958 F.Supp. 1446, 1453-54 (N.D.Cal.1997) (noting that Pennsylvania enacted consecutive term limits soon after independence), rev'd, 131 F.3d at 847. Finally, Judge Fletcher distinguishes another type of age restriction, minimum age requirements, by arguing that they "help to ensure that a candidate can fully appreciate ... the most basic interests of his constituency." Bates II, 131 F.3d at 871. We see no such clear distinction. Term limits, like minimum age requirements, may help ensure that a candidate will "fully appreciate" his constituency's basic interests.

Apart from its overly broad sweep, the plaintiffs' argument deteriorates even on its own terms. On the one hand, they complain that lifetime term limits prevent them from electing an entire class of candidates, those with experience. They then offer consecutive term limits as a more reasonable alternative. Consecutive term limits, however, would prevent voters from electing another class of candidates, those with recent experience. The plaintiffs do not explain why a state may restrict candidates based on recent experience but not overall experience.

We also reject the plaintiffs' final argument. They contend that § 54 burdens another identifiable group, racial minorities and inner-city residents. They note that, in all of the districts with a majority of black voters, a majority of voters voted against the amendment. They also note that many representatives from these districts hold important leadership positions. Based on these facts, the plaintiffs hypothesize that § 54 disproportionately burdens blacks, because blacks must rely on experienced legislators to garner support for their policy preferences.

None of this evidence supports the plaintiffs' theory. They do not allege that § 54 was intended to hurt minorities. They present neither empirical nor anecdotal evidence that term limits hurt minority voters. On the contrary, § 54 burdens white suburban voters in the same manner as black inner-city voters. The fact that many blacks voted against § 54 proves neither discriminatory intent nor impact. Nothing indicates that term limits will prevent their future representatives from obtaining leadership positions, or that current legislative leaders obtained their positions solely through longevity. Finally, some authority indicates that term limits may help minority interests: "[m]eretricious policies which sacrifice the well-being of economic, social, racial, or geographical minorities are most likely where a political figure ... can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine." State ex rel Maloney v. McCartney, 159 W.Va. 513, 223 S.E.2d 607, 612 (1976).

144 F. 3d at 921-23 (headnotes and footnotes omitted.)

This Court's findings of language clarity and unambiguity here fly in the face of Ray's claim that voters might not have approved the proposal had they known that congressional officers would be stricken from the amendment's coverage. The Supreme Court's findings as to ballot clarity, coupled with the overwhelming vote in favor of the proposal, demonstrate that the voters knew exactly what they were voting for.

Moreover, the affidavit of Marta Hummel, Research Director, U. S. Term Limits, attached to the Motion for Summary Judgment (R-187), debunks the mythical claim here that voters would not have approved limits on the terms of state officials had they known then that such limits for congressional offices would be stricken by the United States Supreme Court.

As the Hummel affidavit demonstrates, the average approval vote for federal term limits is 65.4%; the average approval vote for state legislative term limits is 66.5%; and the average approval vote for combined initiatives is 65.4%. The demonstrated consistency of voter patterns belies Ray's bare voter confusion claim.

Against this factual backdrop, it strains the commands of logic to aver that ballot language which the Florida Supreme Court said was as clear as a bell when the voters approved it by 80% of the total vote, somehow became vague, ambiguous and confusing the day the United States Supreme Court decided U. S. Term Limits. In

reality, there is nothing vague, ambiguous or confusing about the specific, concrete offices set out in Art. IV, Sec. 4(b) (1)-(4), and the prohibition against certain incumbents from having their names appear on the ballot.[4]

Despite the overwhelming vote for the term limits provision, and the fact that the voters knew each of the offices affected by the proposal, Ray continues to make the argument that (1) the intent of the voters is irrevocably destroyed by the removal of Congressional offices, and (2) it cannot be said that the voters would have approved the proposal had they known that Congressional offices would not forever be included.

Remarkably, Ray divines the voters' intent without offering any evidence **from any voter** to support these assertions. Ray's efforts to shift the burden of proof is clear evidence of his failure to meet his burden of proof and most graphically demonstrates the fatal flaw in his arguments.

Ray's flawed arguments further fail to evince a comprehension of the profound impact his claims have on voters throughout the state. In essence, what Ray seeks is the jettisoning of an election amending the Florida Constitution without even

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[4]Of course, as previously noted, unlike some of the term limits provisions already validated by courts throughout the nation, Florida's provision does not prohibit incumbent candidates from running as write-in candidates. Thus, if Ray truly wants to support his incumbent senator, the write-in mechanism is readily available to him.

having to prove what is necessary to make out an election contest claim under Sec. 102.168, Fla. Stat. To successfully contest an election, a plaintiff must, within an extremely limited time frame, show fraud, and that the fraud was so pervasive as to demonstrate a reasonable probability that, but for this widespread fraud, the results would have been changed. Smith v. Tynes, 412 So. 2d 925 (Fla. 1st DCA 1982). The reason for the fast-tracking of such a case is to give paramount significance to the will of the people as expressed by their vote. Id.

(Parenthetically, even if Ray were to have pressed his case under Smith v. Tynes, he would have to show that more than 1.25 million voters may well have been defrauded and would have voted against the amendment had they known then what they know now. Needless to say, parading voters before the trial court to make out such a claim would have been quite an enterprise; the point here is that Ray fails to state a cause of action under any credible, cognizable theory.)

In the case sub judice, Ray wants the election--- conducted almost six years ago---set aside without even alleging fraud. This he cannot do.[5]

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[5]To further demonstrate the extraordinary relief Ray seeks here, even a chapter law passed by the Legislature is no longer subject to a single subject violation challenge under Art. III, Sec. 6 of the Florida Constitution, once reenacted as a part of the Florida Statutes. State v. Johnson, 616 So. 2d 1 (Fla. 1993), reh. denied. Ray does not even accord a constitutional provision adopted by the people the same dignity as a law with a single subject defect. And he seeks to strike a provision of organic law without even meeting the stringent standard for an election contest.

As to Ray's reliance on the doctrine of severability, this judicially created doctrine, 49 Fla. Jur. 2d, Statutes, Sec. 98, applies to acts of the legislature; neither any party nor the trial court is aware of any case in which a Florida constitutional provision was challenged and stricken based on severability. And for a good reason: such a challenge cannot be made.

In essence, Ray is asking this Court to declare a provision of the Florida Constitution unconstitutional. To accomplish this, Ray must prove that the subject provision violates the United States Constitution. See 10 Fla. Jur. 2d, Constitutional Law, Secs. 2-3, 18-19, discussing the supremacy of the Florida Constitution and its relationship with the federal constitution. Ray cannot succeed by alleging that a provision of the state constitution violates a principle (severability) established by the state courts to address acts of the state legislature that violate the state constitution. Severability is not a cognizable claim when directed at a constitutional provision, for it is axiomatic that the Florida Constitution cannot be in violation of itself.

As previously demonstrated, this Court already has found the language to be clear and unambiguous, and therefore free from actionable voter confusion. Accordingly, even if Ray's claim were cognizable under Florida law, it would be barred by the doctrine of stare decisis. In Putnam County School Board v. Debose, 667 So. 2d 447 (Fla. 1st DCA 1996), the court held that under this doctrine, lower

courts are bound to adhere to rulings of higher courts when considering similar issues. Against this backdrop, this Court is now being asked to find a lack of clarity and ambiguity to such an extent that the voters did not know what they were approving, and thereby conclude in a manner contrary to that of this same Court several years ago! The realization of what Ray seeks would turn state constitutional jurisprudence on its ear.

The reason for this is self-evident. This Court is being asked to sit in judgment of this Court's determination that the amendment's wording is as clear as a bell. In an effort to avoid the import of the Supreme Court's previous decision, Ray contends that the only thing the Supreme Court did is find that the language passed single-subject muster; it did not address a vagueness claim. But a single-subject determination is a declaration as to language clarity. The Supreme Court has declared the challenged language sufficiently clear to be presented to the voters. It strains credulity to maintain that what was clear when the voters cast their ballots is now vague, ambiguous and confusing solely because of the U.S. Term Limits decision three years later. Ray's demand that this Court sit in judgment of itself and reverse its earlier view on the clarity of the same language then before it should be summarily rejected.

Although severability has never been applied to a Florida constitutional

provisions, even if this doctrine were to be applied to constitutional provisions adopted by initiative, it would not apply in the case at bar under the doctrine's principles as applied to statutes.

As thus applied, it is well-established that "(w)hen a part of a statute is declared unconstitutional, the remainder will 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 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) the act complete in itself remains after the invalid portions are stricken."

Cramp v. Board of Public Instruction of Orange County, 137 So. 2d 828, 830 (Fla. 1962); State v. Tirohn, 556 So. 2d 447, 449 (Fla. 5th DCA 1990). See also Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) and State v. Physical Therapy Rehabilitation Center of Coral Gables, 665 So. 2d 1127 (Fla. St. DCA 1996).[6]

Because the challenge here is not to a statute, but a constitutional provision

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[6]This is easily accomplished by simply deleting subsections (5) and (6) of Art. VI, Sec. 4(b).

born of the initiative process, a claim as to severability must take into account the critical fact that Ray's claim is directed to a vote of the statewide citizenry. It is axiomatic that the right to vote is among the most fundamental of constitutional guarantees, see Jones v. Kirkman, 138 So. 2d 513, 516 (Fla. 1962), State ex rel. McLeod v. Harvey, 170 So. 153, 166 (Fla. 1936); Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974). Also fundamental is the constitutional right for people to petition their government. Art. I, Sec. 5. Krivanek v. Take Back Tampa Political Committee, 603 So. 2d 528, 531 (Fla. 2d DCA 1992). The initiative process impacts both fundamental rights. Ray's complaint seeks to undo the will of the voters at the polls, and the citizens' right to petition government to address grievances, solely because the nation's highest court found conflict with the federal constitution's Qualifications Clause as to state-imposed term limits on congressional incumbents. Neither the federal nor Florida Constitution sanctions throwing out the baby with the bath water.

In recognition of this Court's finding that the term limits provision is clear, and the overwhelming vote in favor of the constitutional amendment, Ray cannot make out a severability claim even if one could be asserted so as to defeat the will of the voters who approved the measure, and the citizens who petitioned their government to address grievances.

B. Ray's equal protection argument, and its offshoots, lack merit.

For his final argument, Ray represents that the term limits provision violates equal protection because urban voters and rural voters are treated in a disparate manner in that there is some vote dilution as a result of the election process affecting the terms served by senators in odd-numbered districts and the terms served by senators in even-numbered districts. Of course, what Ray is actually challenging here is the constitutionality of Art. III, Sec. 15(a), Fla. Const. 1968, which specifically provides for this type of election system for state senators. Although this argument attacking this provision was not raised below, it nevertheless demonstrates the weakness of Ray's challenge to the term limits provision.

Simply stated, Florida can provide for the election of its senators in the chosen manner without violating any federal constitutional principle. Only where reapportionment and truncation come into play is a federal question presented. See In re Apportionment Law, etc., 414 So. 2d 1040, 1047-48 (Fla. 1982). As to a deprivation of Ray's right to vote and associate with candidates of their choice, the same claim could be made with regard to voting for the President of the United States, whose term is limited by the 22nd Amendment to the United States Constitution, as well as Florida's Governor, members of the Florida Cabinet, and state judges, whose terms are limited as described above.

The point here is that the United States Constitution does not prohibit the voters in the several states from choosing to impose term limits on state offices. The Tenth Amendment simply forbids such a construction. The constitutional analysis set out above vitiates Ray's claim here.

It is already established that term limits and incumbency of office holders are matters of great public importance. Miyazawa, supra. The Equal Protection Clause, in addressing legislative classifications, does not forbid them, but simply keeps government from treating differently persons who are in all relevant aspects alike. Nordlinger v. Hahn, 112 S. Ct. 2326, 2331 (1992). Legislation that does not impinge on fundamental rights or employ suspect classifications, such as race, sex or ethnicity, is presumed valid and will be upheld if the legislation is related to a legitimate state interest. Alamo Rent-A-Car v. Sarasota-Manatee Airport Authority, 825 F. 2d 367 (11th Cir. 1987).

The above description of equal protection considerations demonstrates two additional fatal flaws in Ray's claim. First, the challenged constitutional provision contains no classifications. Second, to be sure, voters in a rural community may have different interests than voters in large, urban communities. But that is a feature of where people choose to live and work. The fundamental right involved in voting is the one-person, one-vote principle. Reynolds v. Sims, 377 U. S. 533 (1964). That

the one-person, one-vote principle is steeped in Florida jurisprudence is without question. For recent historical support, see, for example, Johnson v. Mortham, 926 F. Supp. 1460 (N. D. Fla. 1996); Scott v. U. S. Department of Justice, 920 F. Supp. 1248 (M. D. Fla. 1996).

Equal protection is afforded to Ray here by the singular fact that his vote counts just as much as anyone else's in Florida. Ray's senator represents a constituency that is within a constitutionally permissible population deviation. The fact that more people live in urban areas than in rural communities is a statement about the state's demographics---and indeed about the population dynamics nationwide---and not of constitutional infirmity.

Finally, Ray argues that the challenged language severely restricts Ray's inherent political power and right to participate in the political process in violation of Article I, Sec. 10 of the Florida Constitution. Once again, it is elementary that a provision of the state constitution cannot be in violation of the state constitution; as demonstrated above, a state constitutional provision can only be stricken if it violates the federal constitution. See 10 Fla. Jur. 2d, Constitutional Law, Secs. 22, 27. Accordingly, there is no principled basis for this claim.

To the extent Ray is pressing a due process argument, then it too must fail. The general principle underlying due process is that legislation must bear a reasonable

relationship to a permissible legislative objective, Department of Insurance v. Southeast Volusia Hospital District, 438 So. 2d 815 (Fla. 1983), appeal dism., 466 U. S. 901 (1984); and must not be discriminatory, arbitrary, or oppressive. Johns v. May, 402 So. 2d 1166 (Fla. 1981). The above-described constitutional foundation of the challenged provision, the state's interest in term limits (an interest recognized elsewhere around the country), and the overwhelming vote for a provision that is as clear now as it was when reviewed and found to be constitutionally sound by this Court, vitiate any semblance of a claim of a due process violation.

Perhaps Ray would not have voted for the term limits proposal in 1992 if he and the named others knew then what they know now. And perhaps they waited since the 1995 decision in U. S. Term Limits to bring their action because they did not know what their respective senator's re-election intentions were at that time. It may be assumed that voters, after electing a candidate to office, may find out things about that person that cause them to reconsider their vote. And the same may be said about the passage of a referendum once the full scope of its operation becomes known. History is replete with examples of people who would have voted differently had then known then what they know now. While these concerns are legitimate, they are part of the sobering reality of the electoral process which is, after all, to succeed at the polls. Promises are made but not kept; representations are made, but are not

wholly accurate. That these circumstances occur may be regrettable, but they are part of the imperfect human experience. These types of concerns, however, even if present here, do not implicate the constitutionality of the term limits amendment.

Of course, appellee Harris and the trial court are aware of isolated instances where term limits for state officers were implicated. Moreover, both are aware of isolated instances in which the doctrine of severability was considered in connection with state constitutional provisions. These cases are found at 16 Am. Jur. 2d, Constitutional Law, Sec. 54, fn. 93. Of these cases, most deal with state reapportionment plans. In contrast, in Florida's reapportionment litigation, the defective districts were severed from the rest of the plan. See Scott v. U.S. Department of Justice, 920 F. Supp. 1248 (M. D. Fla. 1996). It does not appear that in any case did severability preclude enforcement of the valid portions of a constitutional provision declared partially invalid, nor does it appear that a constitutional provision was stricken on grounds of nonseverability.

In only one case did a court find a state constitutional term limits provision unconstitutional. In Duggan v. Beerman, 544 N. W. 2d 58 (Neb. 1996), the Court was presented with an amendment adopted through Nebraska's initiative petition process. That amendment, combining both federal and state offices, is far more pervasive and convoluted than Florida's provision. See 544 N. W. 2d at 72-73. The

Nebraska Court found the ballot measure was replete with drafting errors, 544 N. W. 2d at 79-80, 82, thereby precluding any meaningful way to determine the intent (of those signing petitions or voting on the measure)." 544 N. W. 2d at 80. The Nebraska Court thus found the provision incapable of severance. Pointedly, unlike Florida, Nebraska has no procedure for judicial review of an initiative proposal prior to ballot placement for voter consideration. And unlike Nebraska, Florida's highest court approved the challenged proposal's clarity and unambiguity before the voters were asked to consider it. The stark differences between Florida's and Nebraska's experience preclude placing any reliance on the Nebraska case.

The trial court, after carefully considering each of Ray's arguments, rejected all of them as follows:

> First, the court finds that the Thornton decision fully disposes of any claim directed to term limits placed by states on congressional offices. Therefore, there is nothing further for this court to address on this issue.
>
> Second, the severability doctrine has never been applied to a Florida constitutional provision. The court finds this to be so because the principles of severability set out in Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), do not lend themselves precisely to constitutional provisions. The court recognizes that ours is a democratic form of government in which the power to govern is inherent in the people. But by adopting the term limits amendment in 1992 through Florida's constitutional initiative process, Art. XI, Sec. 3, the citizens themselves

voted to restrict this power in electing state officers. The people can amend the constitution to restrict their own right to vote; such action is consistent with the Tenth Amendment to the United States Constitution and constitutes a valid exercise under our democratic form of government. The court notes that the vote for the term limits amendment exceeded 80 % of the total vote on this provision.

The court further finds that the Florida Supreme court's review of the initiative language in Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 228 (Fla. 1991), finding that the language met the single-subject requirement and that the summary and ballot title were "clear and unambiguous," to be stare decisis as to plaintiffs' claim of ballot confusion or voter uncertainty. Indeed, it is speculative at most whether the voters would have approved the initiative in 1992 had they known then that state term limits provisions could not apply to congressional offices, but such speculation cannot support plaintiffs' challenge here. Furthermore, plaintiffs offered no evidence directed to this claim.

The court further finds that there is no constitutional consequence that the language approved by the Supreme Court did not contain a severability clause. All that is required is a summary, and the summary was found by the Supreme Court to pass constitutional muster. Once the Supreme Court approved the summary, and the voters thereafter approved the proposal, that proposal became part of the Florida Constitution. It is without question that a section of the Florida Constitution cannot be in violation of that constitution. It is circuitous to say that a provision that has become an expression of the will of the people violates the organic document that expresses the will of the people.

The court further finds that plaintiffs' reliance on Duggan v. Beerman, 544 N. W. 2d 58 (Neb. 1996), to be unpersuasive. The ballot confusion evidenced in that case stands in stark contrast to the ballot clarity as found by the Florida Supreme Court as noted above. Moreover, Nebraska, unlike Florida, does not have a provision which allows for Supreme Court review prior to ballot placement. Finally on this point, Duggan is at variance with literally every other court that has considered and upheld state term limits. See Citizens for Legislative Choice v. Miller, 144 F. 3d 916, 921-23 (6th Cir. 1998). While Miller and the cases cited therein address lifetime bans on term limits, the court notes that Florida's provision contains no such ban. In fact, Florida's provision has no effect on write-in candidacies, or candidacies by former incumbents who have had a break in service.

As to Count III's associational rights claim, the court finds no constitutional infirmity, as the same argument could be made for those offices for which there are already term limits, such as governor and judges. This demonstrates that term limits are not new; prior to 1992, the Florida Constitution already contained term limits for governor, and judges must retire upon reaching mandatory retirement age. Finally, the citizens exercised their inherent power by choosing the system they want. There is no associational infirmity demonstrated by this democratic exercise of power.

With regard to Count IV, the court finds no violation of the Fourteenth Amendment. Similar claims have been previously rejected, see Miller, supra. Count V similarly is rejected for the reasons set out above regarding the citizens' exercise of their inherent power.

CONCLUSION

The above analysis demonstrates without reservation that Ray's constitutional challenge to term limits for state officers is fundamentally flawed, without merit, and has been soundly rejected wherever made. Ray's challenge must be similarly rejected here.

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, Esq., and Robert J. Boyd, Esq., MacFarlane, Ferguson & McMullen, 106 East College Avenue, Suite 900, Tallahassee, FL 32301; Daniel Walker, 221 East Seventh Avenue, Tallahassee, FL 32303; Stephen Safranek, 651 East Jefferson Street, Detroit , MI 48226; this 5th day of March, 1999.

George Waas