OA 6-11-99

IN THE SUPREME COURT OF FLORIDA

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

Appellants,

vs.

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

Appellee.

CASE NO: 94,653

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

CIRCUIT COURT CASE NO. 98-1024

APPELLANT'S INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

The Plaintiffs in the case below Donald G. Ray, Louis P. Kalivoda, Sybil C. Mobley, David W. Bowers and Clarence Fort, shall be referred to herein as the Appellants. The Defendant in the case below, Sandra B. Mortham, Florida Secretary of State in her capacity as Florida Chief Elections Officer, shall be referred to herein as Appellee or Florida Secretary of State.

Cites to the Record on Appeal shall appear herein as (R-).

STATEMENT OF CASE AND FACTS

The case underlying this appeal was initiated by the Appellants filing a Complaint (R-1) with the Second Judicial Circuit Court in and for Leon County on February 24, 1998. The Complaint sought declaratory and injunctive relief by requesting the circuit court to declare unconstitutional the language of Article VI, Section 4(b) of the Florida Constitution, which imposes term limits on Florida representatives and Florida senators, and to enjoin the enforcement of such language. The Appellee filed a Motion to Dismiss (R-12) which was granted by the circuit court along with leave for the Appellants to amend (R-158). Thus, the Appellants filed an Amended Complaint on August 11, 1998 (R-160).

Thereafter, the Appellee filed a Motion for Summary Judgment on August 12, 1998 (R-170), and the Appellants filed a Response and Counter-Motion for Summary Judgment on November 2, 1998 (R-193). On November 17, 1998, the circuit court entered a Final Summary Judgment (R-224) in favor of the Appellee and denied the Appellants' Counter-Motion for Summary Judgment. The Appellants filed a Notice of Appeal with the First District Court of Appeal on December 15, 1998 (R-229), and then, on December 22, 1998, the Appellants filed, with the First District Court of Appeal, a Suggestion that the Order to be Reviewed be Certified to the Florida Supreme Court.

On January 6, 1999, the First District Court of Appeal entered an Order granting the Appellants' Suggestion stating that the "order of the trial court is hereby certified to the Supreme Court as a matter of great public importance." On January 28, 1999, this Court accepted jurisdiction of the case at hand as "a question of great public importance requiring immediate resolution by this Court."

SUMMARY OF ARGUMENT

The language of Article VI, Section 4(b) of the Florida Constitution which imposes term limits on Florida representatives and Florida senators cannot be severed from the unconstitutional language in that same section which limits the terms of U.S. Representatives and U.S. Senators from Florida, and therefore, the former language cannot be permitted to stand and cannot be enforced. The U. S. Supreme Court in 1995, held that term limits imposed upon Congressional office holders are unconstitutional. Thus, in upholding the decision of the U. S. Supreme Court, this Court must apply the severability test to Florida's constitutional term limits provision to determine whether the remainder of the language in that provision can stand and can be enforced in light of the fact that some of the language is unconstitutional.

In applying the severability test to the language of Article VI, Section 4(b) of the Florida Constitution, this Court must find that the purpose or intent of the language at issue cannot be accomplished when the unconstitutional language is stricken. The voters of the State of Florida, who adopted the language at issue by initiative petition, voted for term limits for both state and federal office holders as part of a single, dominant plan and scheme. By striking the language regarding term limits for federal office holders (U. S. Representatives and U. S. Senators from Florida), the intent of the voters and their single, dominant plan and scheme cannot

be carried out. In addition, it cannot be said, nor has the Appellee proven, that the voters still would have voted for term limits on Florida representatives and Florida senators had they known that term limits on U. S. Representatives and U. S. Senators would be declared unconstitutional. Thus, two conditions of the severability test cannot be met, and therefore, this Court cannot sever the language at issue and must hold that the language of Article VI, Section 4(b) of the Florida Constitution which imposes term limits on Florida representatives and Florida senators cannot be permitted to stand and cannot be enforced.

The language of Article VI, Section 4(b) of the Florida Constitution also violates the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution by inequitably impacting rural voters as compared to urban voters. Florida senators representing rural areas of Florida are often the sole senate representatives of entire counties. By subjecting these senators to term limits, these rural counties will inevitably acquire new and inexperienced senate representation every eight years. On the other hand, more populous urban counties often have more than one and even several senators who may represent that county by representing different areas within that county. When these senators are subjected to term limits, there will inevitably be other experienced senators with institutional knowledge from the same county who will still be able to effectively represent the overall interests of

the county with as much seniority, and therefore influence, as senators from other counties not being term limited, particularly in the area of statewide appropriations which are made in the legislature on a per county basis.

Therefore, because Article VI, Section 4(b) of the Florida Constitution is applied to all senate districts within Florida, citizens and voters of rural districts are not affected and impacted by its application on an equal basis as compared with citizens and voters of the urban counties. Equal protection requires that the votes of citizens be of equal weight and not reduced in valued based on where the voter resides. Overweighting or diluting a citizens right to vote cannot be compromised, infringed upon, or given away even by a majority vote of the people. Thus, the language of Article VI, Section 4(b) of the Florida Constitution applies in an unequal manner to dilute, debase and restrict the right to vote of residents of rural counties in Florida and therefore, it violates the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution.

Finally, the Appellants' right to vote and the weight of their vote is further unequally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution by the fact that in application of the term limit language in 2000, senators in Florida's odd numbered districts will have served eight consecutive years while senators in Florida's even numbered districts will serve out

their term until 2002, thus those senators will have served ten consecutive years. The Appellants' vote is not of equal weight and has been reduced in value in comparison to the votes of citizens in even numbered districts who will have the advantage of representation by an experienced senator with seniority and institutional knowledge (especially in the legislative appropriation process) for an extra two years due to Florida's staggered terms of office for senators.

In considering an equal protection challenge to Article VI, Section 4(b) of the Florida Constitution which abridges a fundamental right, this Court must use Florida's strict scrutiny test because fundamental rights to which strict scrutiny applies includes the right to vote. This strict scrutiny test employed in equal protection analysis requires determination of whether the government's interest is substantial and compelling, and whether the means adopted to achieve the legislative goal or interest are necessarily and precisely drawn and advance this compelling interest through the least intrusive means. However, the term limit language miserably fails Florida's strict scrutiny test. There are relatively simple and less intrusive ways to achieve the objectives and intentions of the term limit language and it is questionable whether the term limit language will even serve the compelling interest as stated by the initiative petition. But even so, it cannot be said that this language is narrowly tailored or that it advances the state interest through the least

intrusive means and thus this Court should declare the language in question invalid and of no force and effect.

ARGUMENT

I. THE LANGUAGE IN ARTICLE VI, SECTION 4(b) OF THE FLORIDA CONSTITUTION WHICH LIMITS THE TERMS OF FLORIDA REPRESENTATIVES AND FLORIDA SENATORS IS NOT SEVERABLE FROM THE UNCONSTITUTIONAL LANGUAGE IN THAT SAME SECTION WHICH LIMITS THE TERMS OF CONGRESSIONAL OFFICE HOLDERS AND THEREFORE, TERM LIMITS IMPOSED UPON FLORIDA REPRESENTATIVES AND FLORIDA SENATORS CANNOT BE PERMITTED TO STAND AND CANNOT BE ENFORCED.

Article VI, Section 4(b) of the Florida Constitution provides:

> (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.

This language of the Florida Constitution was adopted by the voters of the State of Florida by constitutional initiative petition in 1992. Later, in 1995, the United States Supreme Court, in the case of U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), declared that state-imposed term limits on candidates for re-election to the U. S. House and U. S. Senate are unconstitutional because they violate the Qualifications Clause of the Tenth Amendment to the U. S. Constitution. Therefore, as a matter of

law, the language in Florida's Constitution which imposes term limits on such congressional office holders is unconstitutional and cannot be enforced.

As a result of the ruling in U.S. Term Limits, Inc. v. Thornton, the language in Article VI, Section 4(b) of the Florida Constitution which purports to limit the terms of Florida representatives and Florida senators also is unconstitutional and cannot be enforced, because it cannot be severed from the language which limits the terms of U. S. Representatives and U. S. Senators from Florida.

In the case below, the Appellee has argued that in order to declare a provision of the Florida Constitution unconstitutional, the Court must find that the subject provision violates the U. S. Constitution (R-179). The Appellants agree with this argument and in fact, the Appellants contend that by following the U. S. Supreme Court's ruling in U. S. Term Limits, Inc. v. Thornton, this Court must find that the language in Article VI, Section 4(b) of the Florida Constitution, limiting the terms of U. S. Representatives and U. S. Senators from Florida is unconstitutional. Therefore, the question which remains is how much of the language in Article VI, Section 4(b) must be stricken or declared null and void and unenforceable due to the blatant unconstitutionality of at least some of the language in that Section. In order to answer this question, the Court must consider the doctrine of severability.

Although the doctrine of severability has not been applied in Florida to a

Florida constitutional provision, it has been applied, in numerous cases, to acts of the Florida Legislature. See, Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987); and Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828 (Fla. 1962). Moreover, the doctrine of severability has been applied to constitutional provisions in many other states. See, Davis v. Synhorst, 225 F.Supp. 689 (S.D. Iowa 1964), supplemented by 231 F.Supp. 540 (S.D. Iowa 1964) and judgment affirmed, 378 U.S. 565 (1964); Long v. Avery, 251 F.Supp. 541 (D.Kan. 1965); Faubus v. Kinney, 239 Ark. 443, 389 S.W.2d 887 (1965); Kruidenier v. McCulloch, 258 Iowa 1121, 142 N.W.2d 355 (1966), cert. denied, 385 U.S. 851 (1966) and opinion supplemented, 261 Iowa 1309, 158 N.W.2d 170 (1968); Carpenter v. State, 179 Neb. 628, 139 N.W.2d 541 (1966); and McWhirter v. Bridges, 249 S.C. 613, 155 S.E.2d 897 (1967). In fact, there are at least two cases where the severability doctrine has been applied by the courts in considering whether any portion or language of a state's constitutional amendment which provides term limits for both state and federal elected officials is valid and enforceable. See, Duggan v. Beerman, 249 Neb. 411, 544 N.W. 2d 68 (1996); and U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349 (1994), cert granted, 512 U.S. 1218 (1994), and judgment affirmed, 514 U.S. 779 (1995). Furthermore, it appears that the framers of numerous Florida constitutional amendments and this Court have anticipated severability arguments with regard to

Florida constitutional amendments because many initiative petitions for such amendments and their ballot summaries contain severability provisions. Therefore, it seems appropriate for this Court to apply the doctrine of severability to the Florida constitutional provision at issue here.

In applying the doctrine of severability to the constitutional amendment language embodied in Article VI, Section 4(b) of the Florida Constitution, the Court must consider the following test:

> When a 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 one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken. (Emphasis added).

See, Smith v. Department of Insurance, supra. Of course, the test quoted above is written to apply to a review of a statute enacted by the Legislature, and in the instant case, the people or voters of the State of Florida are the enacting entity, not the Legislature.

With respect to the language set forth in Article VI, Section 4(b) of the Florida Constitution, it appears that pursuant to the above-mentioned severability test, conditions (1) and (4) can be met; that is, the unconstitutional language probably can

be separated from the remaining language and upon separation an act (or provision) complete in itself still remains. However, the Appellants contend that conditions (2) and (3) above cannot be met and therefore, the unconstitutional language and the remaining language of Article VI, Section 4(b) are not severable.

Condition number (2) deals with the purpose or intent of the enactment. In the instant case, the purpose of the term limits language set forth in Article VI, Section 4(b) of the Florida Constitution can be found in the language of the initiative petition which was the vehicle for the adoption of the constitutional amendment language. The initiative petition stated: "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." See, Advisory Opinion to the Attorney General - Limited Political Terms in Certain Elective Offices, 592 So.2d 225, 226 (Fla. 1991). Because of the above reference to the President of the United States and the Governor of Florida and because of the specific office-holders referenced in the constitutional amendment language, it is clear that the people of Florida intended to impose term limits on politicians both at the state and federal levels. Moreover, the

Florida Supreme Court agreed in its Advisory Opinion to the Attorney General, supra, that the language of the constitutional amendment has a "logical and natural oneness of purpose" and that it "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Id. at 227. Thus, the people intended, as part of a single dominant plan or scheme, to impose term limits on both U. S. Representatives and U. S. Senators from Florida and state representatives and senators. This intent cannot continue to be carried out by removing or not enforcing the language pertaining to federal office holders and leaving only the language pertaining to state office-holders. Therefore, condition number (2) of the severability test which provides that the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, cannot be met.

Condition number (3) deals with whether it can be said that the people would have voted for the subject constitutional amendment even if the unconstitutional language had been removed from the amendment. This, the Appellee must prove in order to successfully argue that the provisions can be severed, and of course, the Appellee cannot and has not proven such. In fact, as previously stated, it is clear that the people intended to limit terms for both state and federal office-holders; that is, Florida representatives and senators and U. S. Representatives and Senators from

Florida. Moreover, the Florida Supreme Court found that the constitutional amendment language regarding term limits comprises a single dominant plan, even though such language limits terms for office holders in different branches of government. Thus, it cannot be said that had the people known that term limits for U. S. Representatives and U. S. Senators were or would become unconstitutional, they still would have voted for term limits for state representatives and senators. This was not their intent, nor part of the single dominant plan. In fact, it is more likely that the people would not have voted for term limits for state representatives and senators had they known of the unconstitutionality of term limits for U. S. Representatives and U. S. Senators. Thus, condition number (3) of the severability test cannot be met.

The circuit court in the case below held that the Florida Supreme Court found the constitutional amendment language regarding term limits to be clear and unambiguous, and therefore, the Appellants could not raise an issue of voter confusion (R-225). However, the Florida Supreme Court simply found the ballot title and summary language to be clear and unambiguous, not all of the language comprising the constitutional amendment. See, Advisory Opinion to the Attorney General at p. 228. Moreover, the Appellants do not claim that the voters were confused when they voted for this constitutional amendment. In fact, the Appellants claim that the voters knew exactly what they were voting for - term limits for both

state representatives and senators and U. S. Representatives and U. S. Senators from Florida, as part of one single dominant plan and scheme. The Appellants also contend that in accordance with the voters' knowledge of the amendment language and their intent, it cannot be said that the voters would have voted for term limits on state representatives and senators without also being able to vote for and impose term limits on U. S. Representatives and U. S. Senators from Florida. For these reasons, condition number (3) of the severability test cannot be met.

It should be noted that the language of the initiative petition for the subject constitutional amendment contained a severability provision which stated that:

> 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 to the Attorney General at p. 226. However, this severability provision was not contained within the ballot title and summary which was presented to voters at the polls. Id. at p. 228. Therefore, the average voter was not aware that portions of the constitutional amendment language could be severed, and that the remaining portion could still be given full force and effect. In fact, the average voter by reviewing the ballot title and summary language, simply believed that he was voting for term limits for all of the officer-holders listed, together and as part of one single dominant plan and scheme.

The case of Duggan v. Beerman, 249 Neb. 411, 544 N.W.2d 68 (1996) supports this conclusion. There, the Nebraska Supreme Court found that the portion of a proposed state constitutional amendment limiting the terms of state elected officials was so interwoven with the portion unconstitutionally limiting the terms of federal elected officials that it was not severable from the unconstitutional portion, even though the initiative (but not the ballot summary language) contained a severability clause. Id. at p. 431 and p. 80. Similar to the instant case, the Nebraska Supreme Court also found that the initiative petition setting forth an amendment to the Nebraska Constitution regarding term limits for state and federal elected officials presented a single concept that was not severable and that the unconstitutional portion of the initiative petition/amendment language (term limits on federal elected officials) was a substantial inducement to the enactment of the entire amendment, and thus, the entire amendment should be declared unconstitutional. Id. At p. 433 and p. 81.

The circuit court has stated that the Nebraska case (Duggan v. Beerman) is unpersuasive because Nebraska has no procedure for judicial review of an initiative proposal prior to ballot placement for voter consideration and that the case is simply a judicial review of the constitutionality of the initiative proposal, after-the-fact (R-226). Moreover, the Appellee has argued that Florida, in contrast to Nebraska, has such a procedure for judicial review of an initiative petition prior to ballot placement

and that this Court must follow its earlier ruling in that regard (R-173). The Appellants could not agree more. In Advisory Opinion to the Attorney General, supra, this Court ruled that the initiative petition/constitutional amendment language imposing term limits on both state representatives and senators and U. S. Representatives and U. S. Senators from Florida comprised a logical and natural oneness of purpose, and a single dominant plan and scheme. How can this Court now disagree with its own determination and hold that the unconstitutional portion of that language be severed from the rest? The people and voters of the State of Florida did not vote for these term limits as separate concepts. They voted for an entire package. Now that a portion of the language has been declared unconstitutional, the rest should be unenforceable as well and the voters should be given a chance to vote for or against the separate and distinct concept of imposing term limits on state representatives and senators.

In conclusion, because condition numbers (2) and (3) of the severability test cannot be met, this Court must declare that the remaining language in Article VI, Section 4(b) of the Florida Constitution, which imposes term limits on Florida representatives and Florida senators, is not severable from the unconstitutional portion of the language (term limits on U. S. Representatives and U. S. Senators from Florida) and therefore, cannot be permitted to stand and cannot be enforced.

II. THE LANGUAGE IN ARTICLE VI, SECTION 4(b) OF THE FLORIDA CONSTITUTION WHICH LIMITS THE TERMS OF FLORIDA REPRESENTATIVES AND FLORIDA SENATORS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U. S. CONSTITUTION AND THEREFORE IS UNCONSTITUTIONAL AND CANNOT BE ENFORCED.

The language in Article VI, Section 4(b) of the Florida Constitution which imposes term limits on Florida state representatives and Florida state senators, violates the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution. Florida senators representing rural areas of Florida, such as Senator Pat Thomas, often are the sole senate representative of entire counties. Senator Thomas represents seven entire counties. By subjecting these senators to term limits pursuant to Article VI, Section 4(b) of the Florida Constitution, these rural counties will inevitably acquire new and inexperienced senate representation every eight years.

On the other hand, more populous urban counties often have more than one and even several senators who may represent that county by representing different areas within that county. Dade County currently has seven senators representing different areas within the county. The senators currently include Senators Forman, Gutman, Meek, Diaz-Balart, Silver, Casas and Jones. When some of these senators are subjected to term limits, there will be other experienced senators remaining with institutional knowledge from the same county who will still be able to effectively represent the overall interests of the county with as much seniority, and therefore

influence, as senators from other counties not being term limited.

This is particularly important from a financial point of view. Most of Florida's legislative appropriations are made on a per county basis. For example, Public Education Capital Outlay, or PECO, funds are appropriated on a per county basis. State transportation funding is allocated on a per county basis. This list goes from family and health services funding to economic development funding to all K-12 education funding. In short, this is how Florida allocates its resources or revenue, i.e. on a per county basis.

To let the language of Article VI, Section 4(b) of the Florida Constitution stand will assuredly, and without question, shift the currently equal balance of power to the urban and highly populated counties at the expense of rural counties due to the fact that urban counties will consistently, without interruption, have experienced, senior senators, probably holding key committee chairmanships, representing the interests (particularly the financial interests during the legislative budget process) of urban counties each year, regardless of term limits. Therefore, because Article VI, Section 4(b) of the Florida Constitution is applied to all senate districts in the state of Florida, voters and citizens of the rural counties are not affected and impacted by its application on an equal basis as compared with the voters and citizens of urban and more densely populated urban counties. In other words, the language of Article VI,

Section 4(b) of the Florida Constitution applies in an unequal manner to restrict the right to vote of residents of rural counties, the effect being an unequal and indefensible shift of political power from their home county to those voters in more populous urban counties, and therefore, it violates the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution.

The right to vote is a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, Givorns v. City of Valley, 598 So.2d 1338 (Ala. 1992). Equal protection requires that votes of the citizens be of equal weight; no person's vote may be reduced in value compared to the votes of others because of where he or she happens to live in the electoral district. See, Cunningham v. Municipality of Metropolitan Seattle, 751 F.Supp. 885 (W. D. Wash. 1990).

But that is precisely what is happening in the case at bar if the term limit language is allowed to stand, i.e. the vote of citizens of rural counties will be reduced in value or weight as compared to the vote of citizens of Florida's urban counties because of the rural voters' inability to re-elect an experienced, senior senator to assist their county in Florida's legislative budget process.

In Reynolds v. Sims, 377 U. S. 533 (1964), the United States Supreme Court struck down Alabama's method of selecting its state legislature, stating:

> To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason to overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominately urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged - the weight of a citizen's vote cannot be made to depend on where he lives.

While that statement by the United States Supreme Court was dealing with a system where the rural areas of the state probably had a much more disproportionate share of political power, our situation is just the opposite and just as analogous. In the instant case, the urban counties will have much more political power and clout, and thus more adequate funding of state dollars, than their rural counterparts. But the bottom line is as true today as when the Reynolds Court said it in 1964, and that is that the weight of a citizen's vote cannot be made to depend on where he lives.

A voting regulation which discriminates against residents of populous counties in favor of rural sections lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment. Id. at 563. Thus the inverse must be also true. If Article VI, Section 4(b) of the Florida Constitution discriminates against residents of rural counties in favor of populous ones, the language must logically also lack the equality to which the exercise of political rights is entitled under the Fourteenth Amendment. In calculating the deviation among election districts, the

relevant inquiry is whether the vote of any citizen is approximately equal to that of any other citizen, with the goal being to provide fair and effective representation for **all** citizens. See, Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989).

Moreover, the United States District Court in Cunningham went on to state that efficiency and acceptance by the public cannot justify a denial of equal protection of the laws, and that the constitutional issue cannot be decided by a show of hands. Id. at 888. In other words, the passage of Article VI, Section 4(b) of the Florida Constitution cannot justify a dilution of any citizen's right to vote and of a citizen's right to equal protection and equal application of the laws as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution. As the United States Supreme Court held in Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713 (1964), affirmed by 379 U.S. 693 (1965), an individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate.

Finally, the Appellants' right to vote and the weight of their votes is further debased and unequally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution by the curious, inescapable and inequitable fact that in the application of the term limit language in the year 2000,

term limited senators in Florida's odd numbered districts will have served eight consecutive years since term limits were adopted, while senators in Florida's even numbered districts will be able to serve out their terms until the year 2002. Those senators in even numbered districts that have been continuously re-elected since 1992 will have served ten consecutive years since term limits were adopted. When Article VI, Section 4(b) of the Florida Constitution was passed as a constitutional ballot initiative in 1992, senators in even numbered districts were either in mid-term or were just elected to two year terms because of reapportionment, and then in 1994 and again in 1998, they were re-elected to four year terms. Because the term limit language states " . . . 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.", (emphasis supplied.) it does not apply in the year 2000 to the senators in even numbered districts who will not finish their "term of office" until 2002, giving them until 2002 before they are term limited. This does not give the Appellants, who are supporters and who will be voters of senators in odd numbered districts, an equal basis on which to vote as compared to citizens of even numbered districts, and thus violates the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution.

As stated above, equal protection requires that votes of the citizens be of equal

weight and that no person's vote may be reduced in value compared to the votes of others because of where he or she happens to live in the electoral district. Cunningham at 887. As the Reynolds Court held, diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status. Id. at 565. In decision after decision, the United States Supreme Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. Dunn v. Blumstein, 405 U.S. 330 (1972).

But this is precisely what is happening in this case. The Appellant's vote is not of equal weight and has been reduced in value in comparison to the votes of citizens in even numbered districts who will have the advantage of representation by an experienced senator with seniority and institutional knowledge (especially important in the legislative appropriation process on a county basis as mentioned supra) for an extra two years (ten versus eight years) due to the staggered terms of office of Florida senators. In short, the bottom line is that their senators get two more years, a politically powerful advantage for the senatorial district in which they reside.

In considering an equal protection challenge to a legislative classification, this Court must initially determine the appropriate level of judicial scrutiny to apply.

Florida High School Activities Association v. Thomas, 434 So.2d 306 (Fla. 1983). When this Court is considering a statute that abridges a fundamental right, strict scrutiny is required to determine whether the statute denies equal protection. Lite v. State, 617 So.2d 1058 (Fla. 1993). Fundamental rights to which strict scrutiny applies include the right to vote. Dunn at 337; and See, In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), overruled in part on other grounds by Shriners Hospital for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990). The test, therefore, that this Court must use to determine whether or not the language in Article VI, Section 4(b) violates the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution is the strict scrutiny test because this language abridges the fundamental right to vote. Id. at 43.

Florida's strict scrutiny test employed in equal protection analysis requires careful consideration of the governmental interest in order to determine whether that interest is substantial and compelling, and it requires inquiry as to whether the means adopted to achieve the legislative goal or interest are necessarily and precisely drawn and advance this compelling interest through the least intrusive means. State v. Dodd, 561 So.2d 263 (Fla. 1990). This strict scrutiny test, which imposes a heavy burden on the state, is almost always fatal in its application. In re Estate of Greenberg at 42 and 43.

As discussed in Argument I and as set forth in the initiative petition, it appears that the drafters of the term limits language believed that politicians who remain in office too long become preoccupied with re-election and become beholden to special interests and bureaucrats and therefore, they believed that term limits would resolve this problem. However, imposing term limits on state representatives and state senators will invariably result in new, inexperienced legislators relying more on experienced staff and lobbyists. The unelected staff and the lobbyists, who are particularly beholden to special interests, will become more powerful, and of course, neither staff nor lobbyists are held accountable to the people of Florida for their actions and decisions. Thus, it appears that term limits may actually worsen the problem instead of resolving it. It is logical, however, for the people of Florida to be concerned about their representatives in the State Legislature who do not adequately represent their interests. Of course then, it is logical to assume that through the election process itself (every two years for state representatives, and every four years for state senators) the people would choose not to return these incumbents to office. In other words, it is up to the people and the voters of the State of Florida to ensure, through the election process, that politicians who remain in office "too long" do not become re-elected. Consequently, constitutionally imposed term limits are not even necessary to resolve this problem. And in fact, academic research has found that state

legislators are more likely to follow the wishes of their constituents when they face re-election. See, Kuklinski, 72 American Political Science Review 165-177 (March, 1978).

Even if the people believe that the election process, by itself, is not enough to make their representatives accountable and to prevent the concentration of political power, there are other, less intrusive ways to accomplish this. For example, it is possible to impose (through amendment to the Florida Constitution or by statute or by Florida Senate or Florida House rules) restrictions and limits on the selection of legislative committee chairmanships and leadership positions, so that the powerful politicians are regularly rotated throughout the system. For instance, a senator could only serve as Senate Ways and Means Committee Chair for two years out of every eight. The same could be done for any committee chairmanship or leadership position. This would break up the fiefdom of political power which the term limit language was intended to do, and would neutralize the influence of special interests. This would also assist in making these politicians accountable to a variety of individuals and groups in their districts, on a wide variety of issues, while limiting the stranglehold of political power and influence that, for example, a legislator might possess as a long time chair of a powerful appropriation committee or as the majority leader or in any leadership role.

As a general matter, before the right to vote can be restricted (as the term limit language does here in this case), the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny. Dunn at 337. As the United States Supreme Court went on to hold in the Dunn case, the State, in pursuing the important interest, cannot choose means that unnecessarily burden or restrict constitutionally protected activity, and that language affecting constitutional rights must be tailored to serve their legitimate objectives, and if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means" Id. at 344. But the term limit language is the way of greatest interference. It is the way of ultimate interference, abridging a fundamental right afforded to every citizen, the right to vote and, taking away that freedom every eight years, even when there are relatively simple and less drastic means as mentioned supra to achieve the objective.

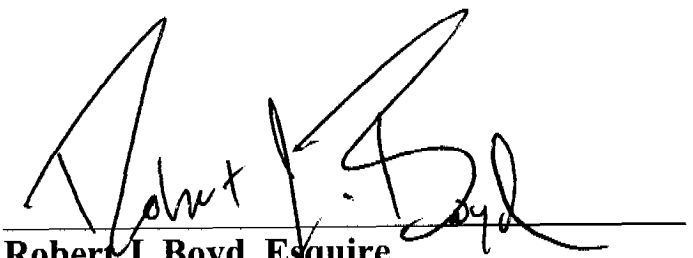
In conclusion, it is questionable whether the language of Article VI, Section 4(b) of the Florida Constitution which imposes term limits on state representatives and state senators when applied will even serve the compelling state interest as stated by the initiative petition. But even so, it cannot be said that this language is narrowly tailored or that it advances the state interest through the least intrusive means. Thus,

the language fails the strict scrutiny test and therefore violates the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution. The Court should therefore declare this language invalid and of no force and effect.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Final Summary Judgment of the Circuit Court in the case below be reversed and the language of Article VI, Section 4(b) of the Florida Constitution which limits the terms of Florida representatives and Florida senators be declared by this Court to be unconstitutional and unenforceable.

Respectfully submitted this 26TH day of February, 1999.



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CERTIFICATE OF SERVICE
AND SIZE AND STYLE OF TYPE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to George Waas, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, to Daniel Walker, 221 East Seventh Avenue, Tallahassee, Florida 32303 and to Stephen Safranek, 651 East Jefferson Street, Detroit, Michigan 48226, this 26th day of February, 1999, and I HEREBY CERTIFY that the size and style of type used in this brief is 14 point proportionately spaced Times New Roman, which meets the criteria set forth by this Court.

ROBERT J. BOYD