IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE REV. DR. JAMES ARMSTRONG, et al.,	)	
Appellants,	)	
v.	)	Case No. 95,223
KATHERINE HARRIS, in her official capacity as Secretary of State, et al.,	)	
Appellees.	)	

BRIEF OF THE SOLICITOR GENERAL IN RESPONSE TO QUESTIONS RAISED BY THE COURT

On Certification from the District Court of Appeal, First District of Florida

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On behalf of
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL, and the
STATE OF FLORIDA and on behalf of Appellees

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STATEMENT CERTIFYING SIZE AND STYLE OF TYPE

Pursuant to the Administrative Order of July 13, 1998, I hereby certify that the following brief is in 12 point proportionately spaced Courier New.

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Tom Warner

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INTRODUCTION

At oral argument on September 2, 1999, several Justices of this Court posed questions regarding important constitutional concerns presented by this case which were not previously addressed by the parties nor the lower court. Specifically, the questions raised by the Justices were 1) whether the Court has jurisdiction in this declaratory judgment proceeding to invalidate a constitutional amendment approved by the people, and if so what constitutional standard of review should be applied by the Court in a proceeding seeking to strike a provision of the state constitution; and 2) whether the statutory requirements of section 101.161, Florida Statutes, could constitutionally be applied to the Legislature in the exercise of the Legislature's constitutional prerogative to propose an amendment to the state constitution pursuant to Article XI, section 1, Florida Constitution.

These questions clearly implicate the "separation of powers" doctrine and the parallel principle of the mutual respect that one branch of government must have for the powers and responsibilities of another branch under the constitution. As a result, this court needs to squarely address these issues in its decision. The answer provided by this court will have far reaching and significant

effects that extend beyond the immediate merits of this cause.

The Solicitor General submits that the Court's jurisdiction to invalidate a constitutional amendment is strictly limited and that once a proposed amendment has been adopted and ratified by the people it is the organic law of the state, and should not be invalidated by the Court on the basis of alleged failures to comply with a statute. Moreover, the provisions of Article XI, section 1 of the Florida Constitution which empowers the Legislature to propose amendments to the Constitution is self-executing and should not be construed to permit a former Legislature to restrict by prior statute the prerogative of any future Legislature in the exercise of a constitutional power specifically conferred upon the Legislature.

I. CONSTITUTIONAL STANDARD OF REVIEW

This Court has long recognized that the standard of review applicable to challenges to constitutional amendments is strictly limited. In West v. State, 39 So. 412 (Fla. 1905), this Court upheld the validity of a constitutional amendment over objections that the Legislature had failed to follow constitutional procedures, not just statutory provisions, in proposing the challenged amendment, stating:

> . . . [we] agree with the Kansas and other courts in the doctrine there announced that in

> constitutional changes the popular voice is the paramount act; that where a proposed amendment to the Constitution receives the affirmative votes of three-fifths of all the members elected to each house, and such proposed amendment is published and submitted to the vote of the people as required, and at the election is approved and adopted by a majority of the votes of the people cast thereon, then it becomes a valid part of the organic law, notwithstanding the fact that the Legislature may have failed to have such proposed amendment entered at length upon the journals of the two respective houses.

The Court again reaffirmed this principle in Collier v. Gray, 157 So. 40 (Fla. 1934), stating:

> Constitutional provisions derive their force not from the Legislature, but from the people in whom, under our theory of government, the power is inherent, and in the exercise of such power to make changes in the Constitution there are practically no limits except those contained in the Federal Constitution when such proposals are made in the prescribed manner. Even in case some required form of procedure has been omitted by the Legislature in submitting a proposal to amend the Constitution, but the same had been advertised or the notices published and the people have approved it at an election the amendment becomes a valid part of the Constitution. See West v. State, 50 Fla. 154, 39 So. 412.

Also in State ex rel Landis v. Thompson, 163 So. 270 (Fla. 1935), this Court went on to hold:

> In upholding the ratified amendment as against the attack so made upon it, this Court in the West case, supra, definitely and conclusively aligned itself with the doctrine of a majority

> of the American courts that in ruling upon the validity of constitutional changes after the popular voice has been expressed in favorably voting upon such changes proposed in the form of constitutional amendments agreed to by the Legislature, the popular voice is the paramount act, and that mere formal or procedural irregularities in the framing, manner, or form of submission or balloting, will not be held fatal to the validity of such amendment after it has been actually agreed to by three-fifths vote of all the members elected to each House, and such amendment thereafter duly published submitted to and affirmatively approved by a majority vote of the electors cast thereon.

Clearly, this Court has refused to invalidate a constitutional amendment adopted and ratified by the people even when the Court has recognized that constitutional irregularities (much less statutory irregularities as argued here) occurred in the submission of the proposal to the electorate. The focus of the Court's prior decisions is on the fact that the challenged amendments were properly advertised and published. There is no dispute that the full text of the challenged amendment in this case was properly advertised and published.

No case has been cited to the Court, and the Solicitor General can find no case, in which this Court has invalidated a constitutional amendment based upon allegations of failure to follow a statute. Askew v. Firestone, 421 So.2d 151 (Fla. 1982), is not on point and did not involve a challenge to a constitutional

amendment after its adoption and ratification by the people. Furthermore, it is not clear from the decision in that case, whether the parties or the Court ever considered whether Fla. Stat. 101.161 could be properly applied to a constitutional amendment proposed by the Legislature, or that the statute might conflict with the express provisions of the Florida Constitution. (The Solicitor General does not contest the Court's power to review a constitutional amendment **ballot proposal**, prior to the ratification election to determine whether the proposal was enacted in accordance with the constitution, or whether the **proposal** violates other constitutional provisions).

Nevertheless, this Court should not now adopt a standard of review in this case that permits the Legislature to control by statute the manner in which the Court reviews a constitutional provision. The only appropriate standard by which a challenge to an adopted constitutional provision should be considered is whether the adopted constitutional provision is violative of another paramount state or federal constitutional provision. Gray v. Winthrop, 156 So. 270 (Fla. 1934); State ex rel. Sovereign Camp, W.O.W. v. Boring, 164 So. 859 (Fla. 1935). Such a challenge may be properly raised and presented in due course by a party with appropriate standing. See, Grose v. Firestone, 422 So. 2d 303

(Fla. 1982).

Moreover, the restrictions set forth in section 101.161, Florida Statutes, should not be construed to limit the Legislature's constitutional powers under Article XI, section 1, of the Florida Constitution.

II. THE PROVISIONS OF ARTICLE XI, SECTION 1 OF THE FLORIDA CONSTITUTION ARE SELF-EXECUTING

Article XI, section 1, of the Florida Constitution, states:

> Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The full text of the joint resolution and the vote of each member voting shall be entered on the journal of each house.

In this case, the proposed constitutional amendment incorporated in the 1998 House Joint Resolution 3505 was approved by a *unanimous* Legislature 3505 for submission to the voters in the 1998 general election. As required, and such is uncontested, the text of the amendment and the vote was entered on the journal of each house. 1998 House Journal 01944; Senate Journal 01709. The amendment was signed by the Officers, the Speaker of the House and the President of the Senate, and filed with the Secretary of State on May 5, 1998.

The relevant organic law **mandated** that HJR 3505 be submitted

to the voters, under the following conditions:

> (a) A proposed amendment to or revision of this constitution, or any part of it, *shall be submitted* to the electors at the next general election held more than ninety days after the joint resolution, . . . proposing it is filed with the secretary of state
>
> (b) Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, *with notice of the date of election at which it will be submitted to the electors,* shall be published in one newspaper of general circulation in each county in which a newspaper is published.
>
> (c) If the proposed amendment or revision is approved by vote of the electors, *it shall be effective as an amendment to or revision of the constitution* of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

Article XI, section 5, Fla. Const. The Solicitor General notes that the *entire proposed constitutional amendment, not a summary,* must be published in each journal of the Legislature and in newspapers of general circulation.

The Solicitor further notes that the founders designed this process to allow the electorate sufficient time to and opportunity to be informed as to the content and the merit of a proposed constitutional amendment approved by the legislature, both through the extensive attention of the legislative process itself and

publication of the entire amendment not once, but twice, with the date of the election, before the election occurs. This extensive process does not contemplate nor anticipate that additional substantive requirements must be met before the voters are assumed to be on notice of the proposed constitutional amendment.

These constitutional procedures for legislative approval of a proposed constitutional amendment to be submitted to the voters are clearly self-executing. Gray v. Bryant, 125 So.2d. 846 (Fla. 1960). In Bryant, this Court stated the test for determining whether a constitutional provision is self-executing in construing organic law that authorized the creating of judicial appointments. In addition, this Court recognized the fundamental rights of the people to obtain the benefits and use of self-executing constitutional provisions:

> The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing.

Unquestionably Section 6(2), Article V lays down a sufficient rule by which the number of circuit judges which the people have dictated shall be furnished to them may be readily determined without enabling action of the legislature.

* * *

It seems clear to us that the subject provision meets the test and should be construed to be self-executing and as not requiring legislative action to activate the effect of its provisions as to number of judges.

There are other reasons why we feel that the section must be so construed.

The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.

* * *

The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfil the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

* * *

> Where there is a choice as here such a constitutional provision must always be construed to be self-executing for such construction avoids the occasion by which the people's will may be frustrated.
>
> * * *
>
> We therefore hold that Section 6(2), Article V, is self-executing and that upon certification of the 1960 federal census vacancies would exist in the office of circuit judge not only in the circuits for which the legislature has provided enabling legislation, but also in those circuits in which the legislature has not provided such legislation, if the 1960 federal census figures indicate the presence of such vacancies.

125 So.2d. at 851-53.

The Solicitor General respectfully submits that the detailed constitutional procedures Article XI for legislatively-sponsored proposed constitutional amendments are self-executing under this test. State of Florida ex Rel. Citizens Proposition for Tax Relief v. Firestone, 386 So.2d 561 (Fla. 1980). In Proposition for Tax Relief, this Court accurately described the initiative process for constitutional amendments, stating:

> This is a self-executing constitutional provision. *It clearly establishes a right to propose by initiative petition a constitutional amendment which may be implemented without the aid of any legislative enactment*. In this regard, this initiative process has already produced a constitutional amendment which was adopted without the benefit of the subject statute or rule. Art.

> II, s. 8 (Ethics in Government).[Citation omitted; emphasis supplied.]

386 So.2d at 566. In Citizens Proposition for Tax Relief this Court invalidated a rule adopted by the Secretary of State which purported to impose additional substantive requirements, an expedited date for submission of a verified initiative petition preceding a general election.

The command in the constitution that if certain steps are taken the proposed amendment *shall be submitted to the electors* is mandatory. If the constitutional requirements are met, this Court has no authority to strike the proposed amendment from the ballot or remove it from the constitution, once approved. Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934). In Moss, this Court stated that:

> If a duly proposed amendment to the state constitution does not specifically violate some provision of the Federal Constitution and is not wholly void or inoperative, its submission to the electorate of the state for approval or rejection as required by . . . [the state] constitution should not be enjoined, since the courts are not authorized to interfere with the processes prescribed by the Constitution for proposing and adopting amendments to the Constitution, even by controlling ministerial duties incident to the submission of a duly proposed organic amendment . . . ."

As was said in Pope v. Gray, 104 So.2d 841 (Fla. 1958): " Sovereignty resides in the people and the electors have a right to *approve or reject* a proposed amendment to the organic law of the

state, limited only to those instances where there is an entire failure to comply with a plain and essential requirement *of the organic law. . . .*" 104 So.2d at 842. Obviously, if a proposed constitutional amendment does not comply with provisions of *organic law,* this Court is empowered to intercede. For example, if a proposed joint resolution did not pass by three-fifths vote of the membership of each house, was not published in the journals of both houses, was not published in a newspaper of general circulation of each county in which a newspaper was published, or violated any other relevant provision of Article XI, this Court would be required to strike the proposed amendment from the ballot before the election.

On November 3, 1998, 2,676,043 voters, 72.8% of those voting, approved Amendment Two, the highest popular vote and second-highest percentage of all thirteen proposed constitutional amendments. **Under the provisions of the controlling organic law, HJR 3505** is the law of the Florida Constitution, as no one has ever alleged, much less demonstrated, that the joint resolution did not comply with any relevant constitutional requirement or violate any provision of the superior federal constitution.

The state constitution does not permit litigants such as the challengers to HJR 3505 here, who have never even demonstrated

standing to bring an unauthorized legal action, to wield an extra-constitutional prerogative to thwart the will of the legislature and 2.67 million voters, by claiming the right to invalidate HJR 3505 on the basis of an alleged violation of a general law, Section 101.161, Fla. Stat. See, Gray v. Bryant, 125 So.2d. 846 (Fla. 1960). In Bryant, this Court properly interpreted a statute which apparently contradicted Article V, Fla. Const., noting that:

> [i]f construed literally, the second sentence of Section 26.02(1) [Fla. Stat.] is in conflict with the first sentence thereof and with Section 6(2), Article V and is therefore *unconstitutional and void*. If construed to mean that there will be one circuit judge resident in each county of the circuit before more than one is resident in any county, the sentence can be held to be valid and gives effect to what we find to be the legislative intent. We so construe its meaning. [Emphasis supplied.]

125 So. 2d at 850. Such a process would violate a fundamental principle of state constitutional law and representative democracy. Such a procedure would grant a few disgruntled citizens a power superior to the state's organic law and the elected representatives.

Nothing enacted by general law can possibly be interpreted to grant this right without doing grave injury to the body politic and possibly violating the voters' right to a representative democracy. See State ex.rel. Citizens Proposition for Tax Relief v. Firestone,

386 So. 2d 561, 566 (Fla. 1980) (right to amend state constitution through initiative is a fundamental right). To the extent that Section 101.161, Florida Statutes, purports to implicitly confer any judicial review that would allow such a result, that statute must be invalid as it is unconstitutional. Citizens Proposition for Tax Relief, 386 So.2d at 566 (Fla. 1980): "The delicate symmetric balance of this constitutional scheme must be maintained, and any legislative act regulating the process should be allowed only when necessary to ensure ballot integrity." In noting the legislature's authority to proposed constitutional amendments to the electors for approval, in Proposition for Tax Relief, this Court described that authority as "the power of the legislature to propose amendments by its legislative action *without executive check.*" 386 So. 2d at 566 (emphasis supplied). Clearly, this same self-executing constitutional process that does not authorize an "executive check" to block the legislature's power to propose constitutional amendments, does not grant a "judicial check" to invalidate a legislature's proposed amendment based on an alleged violation of an inferior general law not authorized by the self-executing constitutional process.

CONCLUSION

It is axiomatic that a state statute cannot contradict a controlling provision of constitutional law or a court decision interpreting the controlling constitutional provision. The Solicitor General respectfully asserts that this Court must interpret that provision of general law as clearly inferior to self-executing constitutional procedures. Section 101.161, Fla. Stat, must be read as essentially a ministerial provision which provides for a convenient manner in which the voter may briefly recall a proposed amendment *which has been debated in the legislative process, published in the journals of both houses, and published twice, within a four-week period before the election.* Under the Florida Constitution, the voter is assumed by organic law to have notice of the proposed amendment. The superior state-constitutional provision requires no more, and no provision of general law can be interpreted to impose additional notice requirements that would authorize a substantive analysis of the "merits" of the ballot title and summary.

The Solicitor General further urges this Court to recognize a standard of review of a constitutional amendment proposed by the Legislature that has complied with all relevant provisions of self-executing constitutional requirements, to wit: Absent a conclusive

demonstration that the manner in which the Legislature has prepared a ballot title and summary in a joint resolution demonstrates fraud, deceit or trickery in violation of the federal constitution or the fundamental constitutional political rights of the electorate, the courts must defer to the Legislature's determination that its ballot title and summary is valid.

Finally, while the Solicitor General also asserts that this case can be distinguished from Askew v. Firestone, that decision, to the extent that it interprets Section 101.161, Fla. Stat. to allow a broader power of judicial review under general law of a proposed constitutional amendment that is in compliance with self-executing provisions of Article XI of the Fla. Const., should be modified or no longer followed. To do otherwise would violate the people's fundamental rights to amend their organic charter. The "merits" or flaws of the Legislature's proposed ballot title and summary involve political questions, not justiciable issues, absent blatant misrepresentations or fraud.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to RANDALL C. BERG, Jr., Esq., and PETER M. SIEGEL, Esq., Florida Justice Institute, Inc., 2870 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2309 this _____ day of September, 1999.

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TOM WARNER