FILED
DEBBIE CAUSSEAUX
JAN 12 2000
CLERK, SUPREME COURT
BY

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EDUCATION — CASE NO. 97,086

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC EMPLOYMENT — CASE NO, 97,087

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: AMENDMENT TO BAR GOVERNMENT FROM TREATING PEOPLE DIFFERENTLY BASED ON RACE IN PUBLIC CONTRACTING — CASE NO. 97,088

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: END GOVERNMENTAL DISCRIMINATION AND PREFERENCES AMENDMENT — CASE NO. 97,089

AMENDED RESPONSE BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

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The Leadership Conference on Civil Rights files this brief in response to the Initial Brief of the Florida Civil Rights Initiative ("FCRI") and the Brief of Amici Campaign for a Color-Blind America, Initiative & Referendum Institute, and Pacific Legal Foundation ("CCBA, et al."). Our initial brief and those of other interested parties demonstrate that the titles and summaries of the proposed amendments are ambiguous and misleading and that the initiatives raise multiple subjects. The language used forces the average voter to engage in unacceptable guesswork as to the initiatives' intent and consequences. Voters are not given sufficient information to understand what conduct, classifications, or entities could be affected by the proposed amendments. As such, the initiatives violate Section 101.161, Florida Statutes, and the single-subject rule of Article XI, Section 3, of the Florida Constitution.

The briefs of FCRI and CCBA, et al. further demonstrate that the initiatives encompass multiple subjects and that the titles and summaries create questions to which there are no readily available answers. Many of the matters raised in the briefs of FCRI and CCBA, et al. have already been addressed

in our and others' initial briefs. Thus, in this response, we will focus on three aspects of the submissions of FCRI and CCBA, et al.

I. SUMMARY OF ARGUMENT

The briefs of the initiatives' supporters demonstrate that the initiatives address multiple subjects, of which the voters are not appropriately apprised by the summaries and titles.

First, the briefs demonstrate conflict and confusion as to the purpose and effect of the initiatives, with FCRI asserting that the initiatives concern only beneficial treatment, while CCBA, et al. argue that the initiatives concern both preferential and adverse treatment.

Second, the supporters' briefs demonstrate confusion as to the protected categories at issue, with FCRI and CCBA, et al. seeking in different ways to condense the number of potential categories. But "race," "color," "ethnicity," and "national origin" are not completely congruent, and they are not all fairly described by the use of the term "race" in the initiatives' titles. Voters' treatment of each category could well vary. The supporters' arguments are thus mistaken and underscore that each initiative concerns multiple subjects, much

as did the initiative at issue in Advisory Opinion to the Attorney General - Restricts Laws Related to Discrimination, 632 so. 2d 1018 (Fla. 1994).

Third, the CCBA, et al. brief includes a discussion of consistency with federal law that is irrelevant -- because conflict with federal law is not justiciable now -- and wrong. CCBA, et al. acknowledge, for example, that race-conscious actions are permissible in certain circumstances, but they are wrong to say that narrowly tailored remedies may never be required as a matter of federal law. The initiatives' summaries, however, do not properly inform voters that the initiatives could be construed to preclude Florida governmental entities from adopting such remedies and the implications of such a construction. For all these reasons, the initiatives should be stricken from the ballot.

II. ARGUMENT

THE SUPPORTERS' BRIEFS HELP DEMONSTRATE THAT THE INITIATIVES DO NOT SATISFY THE REQUIREMENTS OF ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION, OR OF SECTION 101.161, FLORIDA STATUTES.

Because the initiatives encompass multiple subjects, and because their titles and summaries are vague and ambiguous and do not adequately apprise the voters of the purposes and

effects of the initiatives, all as shown in the supporters' briefs, they should be stricken from the ballot.

1. The initiatives, and their titles and summaries, fail to make clear their purpose and effect. As was demonstrated in the initial briefs, the initiatives fail to explain that the Florida Constitution already mandates equal treatment under law and prohibits discrimination based on race, religion, national origin, or disability, and they fail to explain how, if at all, the proposed amendments would affect those protections.[1] Attempting to evade this fundamental flaw, FCRI argues, contrary to the texts of both Article I, Section 2, of the Florida Constitution and of the initiatives, that the existing provision prohibits only disadvantageous treatment, while the initiatives concern only beneficial treatment. See FCRI's Initial Brief at 28-30. In contrast, CCBA, et al. argue that the initiatives are broad proscriptions of treatment that takes account of race or gender, whether granting benefits or depriving of rights. See, e.g., CCBA, et al.'s Brief at 13.

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[1] See Revised Initial Brief of the Leadership Conference on Civil Rights at 30-31 (hereafter "Leadership Conference's Initial Brief"); Initial Brief of the Florida Board of Regents in Opposition to Initiatives at 27-28; Florida Conference of Black State Legislators Brief at 12-13; Initial Brief of Floridians Representing Equity and Equality at 12-13, 17-19; Consolidated Initial Brief of the Florida Chapter of the National Bar Association at 26-29, 40.

That the initiatives' two sets of supporters have such widely divergent views of the purpose and effect of the initiatives demonstrates their fundamental invalidity.

2. The supporters' briefs demonstrate the initiatives' ambiguity as to what classifications form an impermissible basis for treatment. By their terms, the initiatives identify race, color, ethnicity, and national origin, and in one case, gender, separately, reflecting that each is a separate category. Yet, FCRI argues that race and color, on the one hand, and ethnicity and national origin, on the other, are the same. See FCRI Brief at 18, 34-35, 44, 51. If true, then it only furthers confusion among the electorate to list separately four rather than two categories.

But FCRI is wrong The terms "color," "race," "ethnicity," and "national origin" are not synonymous. For example, discrimination might occur based solely on color, but not on race. See Walker v. Secretary of Treasury, 713 F. Supp. 403, 406 (N.D. Ga. 1989) (holding that Title VII prohibits discrimination based on "color" and not just race: "when Congress and the Supreme Court refer to race and color . . . 'race' is to mean 'race', and 'color' is to mean 'color'."), dism'd on other grounds, 742 F. Supp. 670 (N.D. Ga. 1990), aff'd

mem., 953 F.2d 650 (11th Cir.), cert. denied, 506 U.S. 853 (1992). Conceptions of race, color, ethnicity, and national origin are susceptible to change. See, e.g., Hernandez v. Texas, 347 U.S. 475, 478 (1954) (although "differences in race and color have defined easily identifiable groups . . . community prejudices are not static"); Saint Francis College v. Al-Khazraii, 481 U.S. 604, 610-13 (1987) (although 19th century concepts of race are broader than contemporary, all are subject to protection); Cardona v. American Express Travel Related Services Co., 720 F.Supp. 960, 962 (S.D. Fla. 1989) (holding that "[m]erely because he is a member of a larger group of Spanish speaking peoples that have come to be known as Latins does not remove from plaintiff his ethnicity as Colombian."). As CCBA, et al. note, many Americans increasingly have mixed ancestries, leaving them subject to discrimination based on race or color or national origin or ethnicity. See CCBA, et al.'s Brief at 18-19. The issue is not, as CCBA, et al. suggest, whether one has to "choose sides" as to one's ancestry, but whether one can have a remedy for discrimination based on color as well as race or ancestry, all of which are odious.

CCBA, et al. have demonstrated the difficulty of treating these multiple characteristics as one, despite their

protestations that the initiatives have a "oneness of purpose." After six pages of argument and approximately 13 references to race, CCBA, et al. casually drop a footnote stating that "[f]or purposes of discussion in this brief, 'race' includes color, ethnicity, and national origin." CCBA, et al.'s Brief at 8-14, 14 n.3. This attempt to lump these characteristics together demonstrates why these initiatives fail to meet the established requirements for placement on the ballot. The use of only the term race in the titles of the initiatives -- like the repeated use of the term race in CCBA, et al.'s brief -- could mislead a voter to believe that race-conscious measures are the only ones at issue. Similarly, CCBA, et al.'s apparent inability to present an argument with respect to all of the categories at issue, without resorting to shorthand, helps demonstrate that the initiatives in fact embrace multiple subjects.

Indeed, the supporters' briefs reflect that the proposed amendments are a vain effort to repackage concepts this Court rejected in Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination, 632 So. 2d 1018 (Fla. 1994). CCBA, et al. argue, for example, that these initiatives are supposedly distinguishable because they limit the classifications at issue to ones involving immutable

characteristics. CCBA, et al.'s Brief at 16-17. The argument fails, however, because such characteristics as **age** and handicap, at issue in the prior initiative, are every bit as immutable as race or gender. Perhaps the proponents believe that by creating a different bundle of characteristics, they would be able to slip it through this review process. "This Court has emphasized, however, that 'enfolding disparate subjects within the cloak of broad generality does not satisfy the single-subject requirement."' Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination, 632 so. 2d at 1020 (quoting Evans v. Firestone, 457 So. 2d 1351, 1353 (Fla. 1984)). Asking the voters to answer four or five questions with a single "yes" or "no" in this instance is no better than asking them to answer ten questions with a single vote, as was the case with the earlier initiative. For example, some voters may support the initiatives as to ethnicity but not as to race but feel compelled to vote for the entire initiative to achieve the portion they support. This Court's precedent makes clear that they should not have to make such a compromise. "Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment,

defies the purpose of the single-subject limitation." Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination, 632 So. 2d at 1020.

3. CCBA, et al. have included a lengthy but legally irrelevant discourse claiming that the proposed amendments are consistent with the federal constitution and federal laws. The issue before the Court is whether the initiatives comply with the requirements for a single subject and a clear title and summary. This Court has established that a conflict with federal law is not grounds for review in this type of proceeding. See, e.g., Advisory Opinion to the Attorney General Re: Term Limits Pledge, 718 So. 2d 798, 801 & n.1 (Fla. 1998) (declining to rule on federal constitutional issue because exceeds jurisdiction); Advisory Opinion to the Attorney General re Limited Political Terms in Certain Offices, 592 So. 2d 225, 227 & n.2 (Fla. 1991) (same); Grose v. Firestone, 422 So. 2d 303, 306 (Fla. 1982) (same).

In addition to being irrelevant, CCBA, et al.'s arguments are misleading and demonstrate again the ambiguities in the initiatives. CCBA, et al. concede, for example, that race- or gender-based classifications may be permissible if used for narrowly tailored remedies for past discrimination. E.g.,

CCBA, et al.'s Brief at 18 (Diversity goal "cannot justify racial preferences that are nonremedial in nature. . . . Racial classifications . . . are irrelevant to almost every governmental decision.") (emphasis added). Voters are not properly informed, however, that the initiatives could be construed to prohibit Florida's legislature, executive branch, and every other part of government from considering such remedies, and they are not advised of the great inefficiencies this prohibition would create. See Leadership Conference's Initial Brief at 16-18.

CCBA, et al. incorrectly argue that such remedies may be permitted but are not required. See, e.g., CCBA, et al.'s Brief at 21, 31. Their argument is inconsistent with the case law of the United States Supreme Court. See, e.g., United States v. Paradise, 480 U.S. 149 (1987). It is also inconsistent, in some respects, with the requirement that measures that take account of race, for example, be narrowly tailored, which contemplates consideration and rejection of race-neutral means to accomplish the compelling governmental interest. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-38 (1995). Withstanding strict scrutiny thus suggests that strictly race-neutral relief would not suffice.

If non-race or gender conscious relief would be insufficient to accomplish the remedial goal, there is no reason to believe that courts are the only entities empowered -- or required -- to provide remedies. See, e.g., Johnson v. Transportation Agency, 480 U.S. 616 (1987) (sustaining county agency's voluntarily adopted affirmative action plan); United States v. Fordice, 505 U.S. 717, 729 (1992) (rejecting view that race-neutral policies alone sufficed to show that the state had abandoned its dual system). The proposed amendments offer no hint to the voters about the implications for these federally guaranteed rights and obligations.

In short, CCBA, et al. are urging the Court to endorse their political views that voters should in fact impose limitations on the State's ability and mandate to address the lingering effects of discrimination. To do so in this proceeding is not the Court's role. The issues are whether the initiatives are each limited to a single subject and whether each has a clear and unambiguous title and summary that adequately advises the voters of its content. For all the reasons others and we have identified, these initiatives fail those tests.

CONCLUSION

The initiative petitions and ballot summaries should be stricken from the ballot for failure to comply with the requirements of Article XI, Section 3, of the Florida Constitution and Section 101.161 of the Florida Statutes.

Respectfully submitted,

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