IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC00-1644

DENNIS G. KAINEN, GERALD F. RICHMAN,
JOHN L. (JIM) HAMPTON, DON L. HORN,
REBEKAH J. POSTON, and NORMAN DAVIS,

Petitioners,

v.

KATHERINE HARRIS,
as Secretary of State of the State of Florida,

Respondent.

A PETITION FOR WRIT OF MANDAMUS
DIRECTED TO A STATE OFFICER,
INVOKING THE COURT'S ORIGINAL JURISDICTION

RESPONSE TO PETITION FOR WRIT OF MANDAMUS BY DIAZ AMICI CURIAE

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CERTIFICATE OF TYPE STYLE AND SIZE

In this brief, the Diaz Amici Curiae utilize a (14) point Goudy Old Style proportionately spaced font.

INTRODUCTION

This proceeding is about the right of Florida citizens to cast meaningful votes. No right is more precious, more fundamental, or more basic. The right to vote is the very essence of our democratic society, and it is this Court's responsibility to guard against the impingement of that right. In a case such as this, where the measure being voted upon, will, if passed, eliminate the electorate's right to vote, there is no doubt that the ballot language must be clear in advising voters of the prospective elimination of so fundamental a right. Voters must know that an affirmative vote is a vote to surrender their right to vote in the future in the election of local judges that, for all but a few, constitute the only judicial officers they will ever encounter as jurors and as parties to litigation.

This proceeding is ***not*** about the wisdom of merit selection and retention of local circuit and county court judges versus election of those judges.[1] This proceeding is about presumptively correct legislation enacted this year to clarify for the voting public

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[1]Each of the Justices on this Court went through the judicial nominating process successfully — some on more than one occasion for service on one of Florida's district courts of appeal — and some may believe that the nominating process is the better of the two alternatives. However, as this Court has long held, the merits of ballot proposals lie beyond the judicial province. "[T]hose questions go to the wisdom of adopting the amendment and it is for the proponents and opponents to master the case for adopting or rejecting the amendment in the public forum." *Carroll v. Firestsone*, 497 So. 2d 1204, 1206 (Fla. 1986).

the difference between the current system and the proposed appointive system. It is crucial that the Court recognize, as it has in the past, its limited (but important) role of determining whether the action of the Florida Legislature in providing more detailed ballot language concerning the elimination of the fundamental right to vote is unconstitutional. That issue centers on whether the 2000 ballot language adopted by the Florida Legislature provides fair notice of the measure set for vote, i.e., whether local circuit and county court judges should be elected by a vote of the people or selected by the judicial nominating commission for appointment by the Governor.

FACTS

A. The Diaz Amici Curiae and their interest in this proceeding

This brief is filed on behalf of Victor Diaz, Gregory Samms, Hector Lombana, Valerie Evans, and Jefferson Knight, who the Court ruled could appear as amici curiae. The brief is also filed on behalf of the following Florida citizens who advised of their desire to serve as additional citizen representatives in this proceeding after the filing of the motion to intervene: Geraldine J. Meyer of Homosassa, Florida; Angelisse Athan of Clearwater, Florida; Alison L. Jobes of Orlando, Florida; Robert L. Hart of Middleburg, Florida; W. Bruce O'Donoghue of Winter Park, Florida; Michael Gonter of Kissimmee, Florida; Tina A. Stewart of Winter Springs, Florida; Jeanette L. Book of Orlando, Florida; Jim Book of Orlando, Florida; Teresa Johannessen of Winter

Park, Florida; Darrell Boyer of Orlando, Florida; James Boyer of Orlando, Florida; Gwynne Galloway of Orlando, Florida; and James K. Stewart of Orlando, Florida. We assume the Court would have allowed these individuals to appear as amici curiae had they been named in the Diaz motion to intervene; thus, the group is collectively referred to herein as the Diaz Amici Curiae.

The Diaz Amici Curiae are Florida citizens and registered voters in numerous counties who seek to insure that other voters be guaranteed their fundamental right to cast an informed ballot on November 7, 2000 in connection with the vote on the local option to select circuit and county court judges. The Diaz Amici Curiae believe that the 2000 ballot language adopted by the Florida Legislature provides fair notice of the measure being considered and, thus, that the petition for writ of mandamus should be denied.

B. The constitutional amendment requiring a vote and the statute implementing the ballot language

The Florida Constitution provides that "[a] vote to exercise a local option to select circuit court judges and county court judges by merit selection and retention rather than by election shall be held in each circuit and county at the general election in the year 2000." Fla. Const. Article V, Sec. 10(b)(3)(a). Florida voters approved this constitutional amendment in 1998. The language of the amendment quoted above,

including the phrase 'merit selection and retention', did not appear on the 1998 ballot.

A. 16. Instead, the ballot contained the following ballot title and summary:

REVISION 3

Article V, ss.10, 11(a)-(b), 12(a), (f), 14; Article XII, s. 22

LOCAL OPTION FOR SELECTION OF JUDGES
AND FUNDING OF STATE COURTS

> Provides for future local elections to decide whether to continue electing circuit and county judges or to adopt system of appointment of those judges by governor, with subsequent elections to retain or not retain those judges; provides election procedure for subsequent changes to selection of judges; increases county judges' terms from four to six years; corrects judicial qualifications commission term of office; allocates state courts system funding among state, counties, and users of courts.

A. 16.

The Constitutional Revision Commission voted not to include the phrase 'merit selection and retention' on the 1998 ballot because of its lack of clarity for the average voter, even though the phrase was used in the amendment itself. The Commission's discussion regarding the 1998 ballot language was as follows:

> CHAIRMAN DOUGLASS: No more amendments on the desk. All right. Now we're on the groupings of Revision 3 which is the grouping of Proposal No. 66 which is providing the local option merit selection and retention and the Article V funding provision which we spent a lot of time on which is No. 3155. Commissioner Lowndes is recognized.

COMMISSIONER LOWNDES: ***I have an amendment which I have prepared, but its not on the desk, to the ballot language because of some observations from some nonlegal people about its clarity.*** Can I offer that amendment?

CHAIRMAN DOUGLASS: You may. And it needs to be put on the table. We need a copy.

* * *

SECRETARY BLANTON: ***Commissioner Lowndes moved the following amendment to summary, on Page 1, Line 3, add after "selection," the words "selection, by appointment" and add after the word "retention by vote" to "retain or not."***

CHAIRMAN DOUGLASS: Now, Commissioner Lowndes to explain the amendment. ***This is for the ballot language, right?***

COMMISSIONER LOWNDES: ***As to ballot language.***

CHAIRMAN DOUGLASS: It's in one of these.

COMMISSIONER LOWNDES: Yes, sir. ***It was suggested to me by Mr. Morsani, Commissioner Morsani, this morning that the people that worked in his shop wouldn't know what we were talking about if we said merit selection and retention. And after he said that, it occurred to me that we really needed to be more clear what we're talking about. So this says, merit selection by appointment. And retention by a vote to retain or not. And then the average person could understand what they're voting for and that's the reason for the amendment.*** And I wanted to thank Commissioner Morsani for pointing that out.

CHAIRMAN DOUGLASS: Okay. ***So we have clarifying ballot language.*** Now, Commissioner Sundberg.

COMMISSIONER SUNDBERG: For a question, Commissioner Lowndes.

COMMISSIONER LOWNDES: Yes, sir.

COMMISSIONER SUNDBERG: Does this really clarify merit selection by appointment by whom under one process?

COMMISSIONER LOWNDES: ***Well, I think it clarifies to this extent, I think the average voter is going to be dealing with the proposition of whether I elect it or whether somebody appoints them. And I think it at least shows him that's the choice. I don't think he can figure out that's the choice if you simply say merit selection. It may be merit selection by the voter.***

* * *

CHAIRMAN DOUGLASS: ***As I understand it, it's offered by Commissioner Lowndes with the intent to clarify it for the average person.***

COMMISSIONER LOWNDES: The above average too because Commissioner Morsani brought it to your attention. Didn't mean to slight you, Commissioner Morsani.

All right. Is there any further discussion on the amendment to the ballot language that's been offered by amendment by Commissioner Lowndes? ***If not, all in favor of the amendment say aye. Opposed.***

(Verbal vote taken.)

CHAIRMAN DOUGLASS: ***It carries.***

A. 22-26. Thus, the ballot summary language for the 1998 election was amended to omit the phrase 'merit selection and retention', and the voters approved the constitutional amendment.

In implementing this constitutional directive, the 1999 Florida Legislature adopted appropriate ballot language. §101.161, Fla. Stat. (1999). The ballot language adopted in 1999 provided as follows:

> "Shall circuit court judges in the ... (number of the circuit) ... judicial circuit be selected through merit selection and retention?"
>
> * * *
>
> "Shall county court judges in ... (name of county) ... be selected through merit selection and retention?"

§ 101.161(c), (e), Fla. Stat. (1999). That language contained no disclosure that "merit selection and retention" entailed an elimination of the existing right to vote. Nor did the 1999 legislation explain that the Governor of Florida would be appointing all trial judges in the future, based on individuals selected by a nominating commission.

Following adoption of this ballot language, the Florida Legislature amended it to clarify for voters the measure upon which they would be casting their ballots. The House of Representatives Committee on Judiciary Analysis regarding bill number 1955 provided in pertinent part:

> "Rather than using the phrase 'merit selection,' the bill explains that voters can choose between directly electing

judges or allowing judges to be selected by the judicial nominating commission, appointment by the Governor, and retention by popular vote."

*   *   *

"While the statute uses the phrase 'merit selection,' it does not define it. This bill would change the ballot language as follows: Under this bill, the ballot language explains the merit selection and retention process rather than only using the phrase 'merit selection and retention'."

*   *   *

"The amendment eliminated the phrase 'merit selection' and rewrote the ballot question so that voters would choose between 'election by a vote of the people' and 'selection by the judicial nominating commission and appointment by the Governor with subsequent terms determined through a retention vote of the people'."

A. 1, 4, 6.

Thus, the amendment to the 1999 ballot language passed and the ballot language was revised to read as follows:

> Shall the method of selecting circuit court judges in the . . . (number of the circuit) . . . judicial circuit be changed from election by a vote of the people to selection by the judicial nominating commission and appointment by the Governor with subsequent terms determined by a retention vote of the people?

*   *   *

> Shall the method of selecting county court judges in the . . . (number of the circuit) . . . judicial circuit be changed from election by a vote of the people to selection by the judicial nominating commission and appointment by the Governor with subsequent terms determined by a retention vote of the people?

§ 101.161(c), (e), Fla. Stat. (2000).

RESPONSE TO ARGUMENT

A. The ballot language at issue is not defective

The Kainen Petitioners contend that this Court should exercise its discretionary mandamus jurisdiction to strike ballot language adopted by the Florida Legislature in connection with the local option to select circuit and county court judges by election or by merit selection and retention. The Kainen Petitioners argue that the ballot language must be stricken because it is ambiguous and misleading. As demonstrated below, however, the ballot language is not defective. To the contrary, the ballot language provides voters with clear and unambiguous notice of the issue such that each voter will be able to cast an intelligent and informed ballot.

The starting point for this analysis is the recognition that the legislation at issue must be sustained if under "any reasonable theory" it provides fair notice of the issue before the voters. *Smathers v. Smith*, 338 So. 2d 825, 827 (Fla. 1976). In *Smathers*, this Court acknowledged that: "[t]he legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that

we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done." *Id.* Thus, the constitutional sufficiency of the ballot language, if supported by any reasonable view, is *the* determinative issue in this proceeding. This Court's self-recognized "role in these matters is strictly limited to the legal issues presented" because the "responsibility to rule on the merits or the wisdom of the proposed initiative" is left to the people. *Advisory Opinion to the Attorney General Re Tax Limitation*, 644 So. 2d 486, 489 (Fla. 1994).[2] The Court has stated that its "duty is to uphold the proposal unless it can be shown to be 'clearly and conclusively defective'." *Advisory Opinion to the Attorney General Re Tax Limitation*, 673 So. 2d 864, 867 (Fla. 1996). The standard is high because, as this Court has held, "[i]nfringing on the people's right to vote on an amendment [or public measure as in this case] is a power this Court should use only where the record. . .establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment." *Id.*

The ballot questions — which the Kainen Petitioners allege are ambiguous and misleading — provide as follows:

> Shall the method of selecting circuit court judges in the . . . (number of the circuit) . . . judicial circuit be changed from election by a vote of the people to selection by the judicial

[2] *See also, e.g., Advisory Opinion to the Attorney General Re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 565 (Fla. 1998) (Court's inquiry is limited to two legal issues, one being whether ballot language is clear and unambiguous).

> nominating commission and appointment by the Governor with subsequent terms determined by a retention vote of the people?
>
> *   *   *
>
> Shall the method of selecting county court judges in the . . . (number of the circuit) . . . judicial circuit be changed from election by a vote of the people to selection by the judicial nominating commission and appointment by the Governor with subsequent terms determined by a retention vote of the people?

§ 101.161(c), (e), Fla. Stat. (2000).

The Kainen Petitioners have identified two alleged problems that purportedly render this ballot language unconstitutional. First, the Petitioners argue that the questions misrepresent the role of the judicial nominating commissions in the judicial selection process and, second, that the questions omit the term "merit selection and retention." As shown next, the ballot questions set out above give voters fair notice of the issue, thus enabling voters to cast an intelligent and informed ballot. *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954) ("Constitution requires that voter have notice of that which he must decide").

According to the Kainen Petitioners, the ballot questions must be stricken as constitutionally infirm because they misrepresent the role of the judicial nominating commissions by implying that the commissions "select" the judges rather than the Governor. The Kainen Petitioners argue that the judicial nominating commissions do not

"select" judges, but rather provide a list of nominees to the Governor from which the Governor "selects" the judge who will fill the vacancy. There simply is no ambiguity here, much less one that could mislead voters.

The phrase at issue — selection by the judicial nominating commission and appointment by the Governor — does accurately explain the role of the judicial nominating commissions in a very succinct fashion. As noted by the Kainen Petitioners, the judicial nominating commissions do indeed select at least three judicial candidates. Despite the desire to distance the judicial nominating commissions from the word "select", the nominating process is itself a process of 'selection.' In fact, the rules of procedure governing the judicial nominating commissions describe the commissions' responsibility to "select" nominees:

> Upon conclusion of all investigation reasonably conducted and obtained by the Commission and after the procedures set forth in Section IV have been completed, the Commission shall meet ***to select*** by majority vote qualified nominees from those persons having applied for such vacancy.

Fla.S.Ct.Jud.Nominating Comm.Rules, Sec. VI. A. 8.

* * *

> By majority vote, the commission shall ***select*** from the list of "most qualified" applicants who meet all legal requirements for the judicial office three (3) nominees for each vacancy in the judicial office.

Fla.Dist.A.Ct.Jud.Nominating Comm.Rules, Sec. VI. A. 10-11.

*   *   *

> By majority vote, the commission shall ***select*** no less than three nominees from the list of applicants who meet the requirement of the Florida Constitution and all other legal requirements for the judicial office.

Fla.Cir.Jud.Nominating Comm.Rules, Sec. VI. A. 13.

The Kainen Petitioners' objection to use of the word 'selection' in the ballot language is untenable given the word's use in the procedural rules governing the judicial nominating commissions. This objection also is contrary to the plain meaning of the term.[3] Clearly, the judicial nominating commissions "select" nominees and the Governor then appoints one of the nominees to fill the judicial position.[4] The ballot's use of the word "selection" in connection with the judicial nominating commissions is definitively accurate, just as the use of the word "appointment" by the Governor is accurate. *In re*

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[3]The argument that the word "select" connotes the choice of only one person by the judicial nominating commissions is contrary to the dictionary meaning of the term. Black's Law Dictionary defines "select" as "to take by preference from among others; to pick out; to ***cull***." Black's Law Dictionary Revised 4th Ed. (1968). The word "cull" in turn is defined as "to separate one ***or more things*** from others." The New Webster Encyclopedic Dictionary of The English Language (1980). The same dictionary defines the word "select" as "the act of selecting; a taking by preference from a number; a thing ***or things*** selected from others." The New Webster Encyclopedic Dictionary of The English Language (1980).

[4]Selection by the judicial nominating commission is obviously a critical process, specifying the few among a large pool of applicants who have the opportunity to become a judge.

Advisory Opinion to the Governor, 551 So. 2d 1205, 1209 (Fla. 1989) (Governor has duty of "appointment" pursuant to Article 5 § 11(b) of the Florida Constitution). In addition, the title "judicial nominating commissions" in the ballot language clearly indicates that the role of the commission is to 'nominate' judicial candidates, one of which the Governor will appoint. It cannot be said then that the phrase "selection by the judicial nominating commission and appointment by the Governor" is so ambiguous or misleading as to be struck down as unconstitutional. In effect, the Kainen Petitioners are inviting this Court to engage in a microscopic parsing of individual words and phrases contained within the overall ballot language written by the Legislature. The burden is on the Kainen Petitioners to demonstrate that the statutory language, ***taken as a whole***, fails to provide voters fair notice of the proposed abridgement of their fundamental right to vote.

The Kainen Petitioners also contend that the omission of the phrase "merit selection and retention" from the ballot questions render them ambiguous. This argument is also wrong. First, it should be noted that the constitutional provisions which delineate the appointment and retention process for Florida's appellate judiciary do not use the phrase "merit selection and retention." Fla. Const. Article V, § 11. In addition, the Florida Legislature amended the ballot questions specifically omitting the phrase "merit selection and retention" in favor of words that briefly explain the process, since "merit

selection and retention" is not generally understood by the public. The House of Representatives report on HB 1955 states that "[r]ather than using the phrase 'merit selection,' the bill *explains* that voters can choose between directly electing judges or allowing judges to be selected by the judicial nominating commission, appointment by the Governor and retention by popular vote." A. 1. The revised ballot language (i.e., the 2000 version) "explains the merit selection and retention process rather than only using the phrase 'merit selection and retention'." A. 4. Therefore, the current law represents a legislative finding that the phrase "merit selection and retention" is inadequate because it is not commonly understood, a finding that mirrors the conclusions of the Constitutional Revision Commission. The Kainen Petitioners have not demonstrated a basis to override that finding and, indeed, the conclusions of the Florida Legislature and the Commission are eminently sensible. *See Chiles v. Public Service Commission*, 573 So. 2d 829, 832 (Fla. 1991) (legislative findings of fact acknowledged and upheld by Court); *State v. Lanier*, 464 So. 2d 1192, 1193 (Fla. 1985) (Court will show legislative intent great deference, particularly where legislation is passed to clarify existing law); *Seagram-Distillers Corp. v. Ben Greene, Inc.*, 54 So. 2d 235, 236 (Fla. 1951) (legislative findings of fact are presumptively correct).

The fact that the phrase "merit selection and retention" was used in the Florida Constitution and in the 1999 version of the ballot questions does not render the

amended ballot questions automatically ambiguous simply because the phrase has been omitted. The Kainen Petitioners suggest that the phrase must be used in the ballot question since it appears in the Florida Constitution, but no such requirement exists. In fact, when the Article V revisions recommended by the Constitutional Revision Commission were put to the voters in 1998, the ballot title and summary did not include the phrase "merit selection and retention." The Commission specifically considered whether the phrase should be included in the ballot summary and rejected the phrase "merit selection and retention" on grounds that it would be unintelligible to the average voter. A. 22-26. Likewise, the legislative history of the 2000 ballot language shows that the phrase "merit selection and retention" was omitted for the same reason, i.e., to clarify the ballot questions. *See, e.g., Hawkins v. Ford Motor Company*, 748 So.2d 993 (Fla. 1999) (Court used legislative history to confirm clarity of statutory language).

The Kainen Petitioners also make a point that use of the word "merit" in the ballot questions is necessary because the nominees are selected based on their respective 'merit.' While there is no doubt that judicial nominating commissions believe 'merit' is the sole criteria for nominations, there is also no doubt that other factors are considered by the commissions as well such as general health, standing in the community, temperament, and diversity. Fla.Dist.A.Ct.Jud.Nominating Comm. Rules Sec. V. A. 13.

Thus, any discussion about a process of 'merit' selection is fraught with semantic difficulties.

Using the word 'merit' or the phrase 'merit selection and retention' in the ballot questions results in an ambiguity, particularly since the phrase can imply that the election process is not based on 'merit'. The word 'merit' is value-laden which sets up and reinforces the wholly improper assumption that voters do not seek to elect judges based on the candidates' 'merit'.[5] Given these inherent ambiguities, the Florida Legislature correctly decided to explain what is meant by "merit selection and retention" rather than using the largely academic and value-laden phrase itself.

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[5]Academic commentators have noted "...the lack of empirical evidence that 'merit' selection methods have removed 'politics' from judicial selection and thereby produced judges of demonstrably higher quality." Dubois, "*Accountability, Independence And The Selection of State Court Judges: The Role of Popular Judicial Elections*." 40 SW L.J. 31, 33 (1986). The use of the phrase "merit selection" to define an appointive versus elective system of judicial selection is inherently value laden. "[This definition] suggests that advocates of the competitive election process seek to select judges by some criteria other than merit. Taken to its logical conclusion, this definition could be extended to all democratic elections. Clearly all advocates believe that their respective selection method achieves the best balance of accountability and independence, and thus produces the most meritorious judiciary. [M]erit selection *per se* is hardly controversial. Everyone agrees that one should select judges based on merit. The controversy concerns which method produces the most qualified and responsible judiciary. Therefore, "since merit selection is the desired result, labeling a particular method 'merit selection' is misleading." McClellan, "*Merit Appointment v. Popular Election: A Reformer's Guide To Judicial Selection Methods In Florida*," 43 Fla. L. Rev. 529, 541 (1991).

The lack of widespread understanding amongst the general public of the phrase 'merits selection and retention' is further aggravated when this phrase is translated into Spanish in accordance with Florida law and the Voting Rights Act of 1965. § 42 U.S.C. §1973 (federal law requires bilingual ballots in the voters' primary language); 28 C.F.R. app. §55 (1998) (rules promulgated to implement the Voting Rights Act; Florida shall provide ballot language in Spanish as well as in English); §101.2515, Fla. Stat. (referencing to the requirement under the Voting Rights Act ballot language must be translated). As explained in the affidavit of Vincent De la Vega, there is no comparable academic or legal term in Spanish for the English language term "merit selection and retention" as refers to a method of judicial selection. A. 27-28. The words "merit selection and retention" when translated into Spanish lose any possible reference to a process of selecting judges. A. 27-28. The only meaning which remains after translation is the normative suggestion that judges should be picked and retained on the basis of their merit without any reference to who shall make this determination. A. 27-28. The 2000 ballot language avoids this translation problem by omitting the technical phrase "merit selection and retention" and instead explaining the proposed appointment process in terms that can be readily translated so that even voters who read the ballot language in Spanish will be able to cast an informed vote.

In short, the ballot questions are neither ambiguous nor misleading. As required, the ballot language gives voters fair notice that they are choosing between the right to elect local circuit and county court judges and giving up that right to judicial nominating commissions and the Governor. Accordingly, the Court should deny the petition for writ of mandamus filed by the Kainen Petitioners.

B. The Kainen Petitioners' proposed remedies must be rejected

If the Court were to conclude that the ballot language at issue is not sufficiently clear, the Kainen Petitioners have suggested two possible remedies. First, the Kainen Petitioners contend that the 1999 ballot language should be revived and the Secretary of State directed to use it on the November 2000 ballot. The other option is to use the language of the Florida Constitution itself. The problem is, however, that neither of these two options are viable in this case.

1. This case does not satisfy the test for statutory revival

Revival of the 1999 ballot language is not an option in this case. Once an amended statute has been held unconstitutional, the prior version of that statute may not be revived if it too is defective. *See, e.g., B.H. v. State*, 645 So. 2d 987, 995 (Fla. 1994)

(statutory revival does not apply if repealed predecessor is likewise unconstitutional).[6]

In such a case, there is nothing further a court can do:

> "This necessarily means that there cannot be a revival of any statute other than the immediate predecessor. ***If the immediate predecessor statute is defective, then no further revival is possible under any circumstances.***

Id. at 995, n. 5. Thus, before this Court could deem the 1999 ballot language revived, the Court would have to consider whether it is also unconstitutionally ambiguous.

Here, there is no question but that the 1999 ballot language is defective because it fails to advise voters that an affirmative vote would eliminate their right to elect local judges. The 1999 version of the ballot questions does not even mention the words 'elect' or 'election', much less inform voters that they would be extinguishing their right to vote:

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[6]Moreover, statutory revival is the exception, not rule. The rule "is ***only*** applicable where the loss of the invalid statutory language will result in a 'hiatus' in the law that would be intolerable to society." *B.H., supra*, 645 So. 2d at 995. No intolerable hiatus would occur here because the local option to select circuit and county court judges could be submitted to voters in a future election. The critically important part of the Florida Constitution is that the vote take place, not that it take place on November 7, 2000. *See Advisory Opinion to the Attorney General Re Florida Locally Approved Gaming*, 656 So. 2d 1259, 1263 (Fla. 1995) ("*The fact that the Legislature will not be able to exercise that authority by the specific date noted in the proposed amendment does not, in our view, void the amendment*" because the critically important aspect of the amendment, said the Court, was the requirement that the Florida Legislature implement certain procedures, not that it do so by a certain date).

> Shall the method of selecting circuit court judges in the . . . (number of the circuit) . . . judicial circuit be selected through merit selection and retention?
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> * * *
>
> Shall the method of selecting county court judges in the . . . (number of the circuit) . . . judicial circuit be selected through merit selection and retention?

§ 101.161(c), (e), Fla. Stat. (1999).

Even a cursory reading of the 1999 ballot language shows that it fails to communicate in any fashion whatsoever that by adopting the merit selection and retention system voters forgo their fundamental right to elect local judges. This omission becomes glaring when the 1999 ballot language is compared to the constitutional amendment; the 1999 ballot language dropped the phrase "rather than by election." In fact, the 1999 language does not indicate that any change will occur to the present system other than perhaps an emphasis on merit-based criteron. A voter could easily respond to the 1999 ballot question in the affirmative without realizing that it will result in the abolishment of his or her right to elect local judges in the future. Without advising voters of the ramifications of their vote, the 1999 ballot language is — unlike the 2000 version — misleading and, thus, constitutionally defective.

The right to vote is the most fundamental of all rights. It is the essence of a democratic society because "[o]ther rights, even the most basic, are illusory if the right

to vote is undermined." *Reynolds v. Sims,* 377 U.S. 533, 555-562 (1964), *quoting, Westberry v. Sanders*, 376 U.S. 1, 17 (1964). "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* If there ever was a case for clarity in ballot language it would certainly be present where the vote was one to surrender the right to vote. The 1999 ballot language in no way advises voters that an affirmative vote is one surrendering the right to vote and that fact conclusively establishes the unconstitutionality of the ballot language.

Revival of the 1999 ballot language is also prohibited in this case in light of the fact that the Florida Legislature specifically rejected the 1999 language by adopting the 2000 ballot language.[7] The Florida Legislature found the 1999 language defective — as its legislative history demonstrates — in that it failed to adequately advise voters of the measure being considered and used a phrase (merit selection and retention) which

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[7]The Kainen Petitioners cite *Smith v. Smathers*, 372 So.2d 427 (Fla. 1979) in support of their argument that the 1999 ballot language should be revived. However, in *Smith*, the prior version of the statute which was revived had already been held constitutional by this Court in *Pasco v. Heggen*, 314 So.2d 1 (Fla. 1975). Accordingly, *Smith* is easily distinguishable — here, the constitutionality of the 1999 ballot language has not been tested in any court in this State.

voters would not readily understand.[8] The Florida Legislature affirmatively rejected the 1999 ballot language and any revival of it by this Court would run afoul of the principles of separation of powers. Thus, to accept Petitioner's contention would require this Court to recreate language that has been legislatively repealed. This Court has recognized in similar circumstances that its role does not include rewriting legislation and has fastidiously guarded against taking such action when requested to do so. *See, e.g.,*

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[8]The Florida Legislature was correct in determining that the average voter would not understand the phrase 'merit selection and retention'. The phrase is not only uninformative to the man on the street, but also subject to different meanings in the legal academic community. Legal commentators have recognized that the catch-all phrase "merit selection and retention" does not describe a specific method of judicial selection, but rather encompasses instead "an almost endless combination of schemes used to select judges." Dubois, *Accountability, Independence and the Selection of State Judges: The Role of Popular Judicial Election,* 40 SW L.J. 31,40 (1986). Twenty four states use some sort of "merit selection and retention" plan involving gubernatorial appointment. However, in some of these states (California, Maine, New Hampshire and New Jersey) the governor appoints judges *without* using a nominating commission (subject to senatorial confirmation in Maine and New Jersey, and a five-member *elected* council in New Hampshire). In those states using some sort of non-partisan commission to aid in the selection of judges, there is a wide disparity in 1) the composition of the nominating commissions, 2) who appoints its members, and 3) their role in the selection process. Similarly, the timing and frequency of subsequent "retention" votes vary dramatically from state to state. L. Berkson, S. Beller & M. Grimaldi, *Judicial Selection In The United States: A Compendium of Provisions* (1980). Thus, far from presenting to the voters a specific or defined, proposed alternative method for selecting state trial court judges, the phrase "merit selection and retention" is an academic term of art used in the legal literature to describe an array of selection methods which vary from jurisdiction to jurisdiction. The phrase does not provide fair notice of anything to Florida voters.

Richardson v. Richardson, 2000 WL 1158317 (Fla. August 17, 2000) (separation of powers principles prohibit Court from rewriting legislation); *State v. Keaton*, 371 So. 2d 86, 89 (Fla. 1979) (this Court will not engage in rewriting terms of statute enacted by legislature; term 'or' would not be read as 'and'); *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978) (this Court has "been wary of transcending its constitutional authority by invading the province of the legislature; savings construction will not be read into statute because the Florida Constitution does not permit "legislation articulated by the judiciary").

Despite the Kainen Petitioners' contentions to the contrary, statutory revival of the 1999 ballot language is not proper in this case. No intolerable hiatus in the law will occur if this Court does not deem the 1999 ballot language revived and, even assuming the Court does not agree, revival is not an option where the predecessor ballot language is itself unconstitutional as in this case. The remedy of revival should therefore be rejected.

2. The constitutional amendment is not self-executing

The second remedy the Kainen Petitioners suggest is to use the language of the constitutional amendment itself as the ballot language for the November 7, 2000 election. According to the Kainen Petitioners, this Court can direct the Secretary of State to use that language on the ballot because the amendment is self-executing. The

amendment must, however, meet the test that determines whether a constitutional provision can be construed as self-executing and, as discussed next, it clearly does not.

In order for a provision of the Florida Constitution to be self-executing it must "lay[] 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." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960). The key factor in applying this test is determining whether the enactment of legislation is necessary (as opposed to supplemental) in order to carry out the purpose of the amendment. *Id.*

For example, in the *Gray* case, this Court found that the constitutional provision at issue was self-executing because it laid out a specific inflexible rule by which the number of local circuit court judges would be determined across the State. 125 So. 2d at 851. The constitutional provision — which upon its amendment changes the prior method by which the number of judges was determined — took away from the Florida Legislature any discretion in determining the number of such judges. *Id.* Accordingly, the constitutional worked autonomously, i.e., it did not require any additional legislation for it to be effective. *Id.*

An example of a constitutional provision which was not self-executing is found in *St. John Medical Plans, Inc. v. Gutman*, 721 So. 2d 717 (Fla. 1998). The constitutional provision being examined provided that public officers and employees who

breached the public trust for private gain and any person or entity inducing such breach were liable to the State for all financial obtained by their actions. *Id*. at 718. This Court found that the provision was not self-executing because it could not be implemented without legislative enactment. *Id.* at 719. Legislation was necessary to set out the manner of recovery, the extent of damages, the applicable definitions, and procedural guidelines. *Id.* Because the constitutional provision could not operate on it own, this Court determined it was not self-executing. *See also, e.g., Advisory Opinion to the Governor — 1996 Amendment 5 (Everglades)*, 706 So. 2d 278 (Fla. 1977) (constitutional provision not self-executing because legislation was necessary to carry out intent of provision).

The constitutional provision at issue here is no different than the one at issue in *St. John* because it too required legislative enactment to fulfill its purpose. The amendment merely provides that an election shall take place on the issue of the local option to select circuit court judges and county court judges by election or by merit selection and retention. The provision does not define essential terms such as "merit selection and retention," nor does it provide the actual ballot questions.

The point that Article V, Sec. 10(b)(3)(a) is not self-executing as ballot language is confirmed by the Constitution itself. When the intent is that a provision of the Constitution will be self-executing with respect to ballot language, the Constitution

sets out verbatim how the ballot shall read. Voters elect to retain Justices of this Court and district court of appeal judges pursuant to Article V, Sec. 10(a), and that constitutional provision details the applicable ballot language:

> Any justice or judge may qualify for retention by a vote of the electors in the general election next proceeding the expiration of the justice's or judge's term in the manner prescribed by law. . . . When a justice or judge so qualifies, the ballot shall read substantially as follows: "Shall Justice (or Judge) (name of justice or judge) of the (name of the court) be retained in office?"

In the constitutional provision at issue here, the ballot language was not identified. In effect, the Kainen Petitioners are asking this Court to write the ballot questions by lifting part of the constitutional provision and supplying the additional words that would be necessary to convert it into proper ballot questions. The Kainen Petitioners' unprecedented invitation for the Court to write the ballot language in this case is subtly suggested at page 14 of the petition where they suggest that "the constitutional provision . .. can be used ***to provide*** the ballot question." In fact, the Kainen Petitioners go as far as drafting the actual ballot questions for the Court on page 15 of their brief and cite to the constitutional amendment, improperly implying that the questions are set forth therein. Thus, both the case law on self-executing constitutional provisions and the Constitution itself demonstrate that Article V, Sec. 10(b)(3)(a) cannot be deemed self-executing.

The Diaz Amici Curiae do not believe that this Court need consider the remedies suggested by the Kainen Petitioners and discussed herein because the ballot language accurately and adequately informs voters of the measure being considered such that voters will be able to cast intelligent, informed ballots. However, should the Court disagree, revival of the 1999 ballot language is not an available remedy, particularly since it is itself unconstitutional. Likewise, the wording of the constitutional amendment may not be used as substitute ballot language because that provision is not self-executing. Neither the Kainen Petitioners, nor even this Court, can provide, revise or edit ballot language. *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 621-622 (Fla. 1992). Despite suggestions over the years from members of this Court that more flexible powers be legislatively authorized to the courts to correct or clarify ballot language, no such change has occurred. *Id.* Thus, the Court would be limited to either striking the 2000 ballot language, or denying the petition and allowing this issue to be submitted to the voters.[9] For the reasons set forth in this brief, the decision of the Florida Legislature to

[9]The Kainen Petitioners have asked this Court to issue a ruling before October 3, 2000 — the date the ballots for the November 2000 election are scheduled to be printed. As Justice Overton recognized in *Florida League of Cities v. Smith*, last minute challenges are problematic because such challenges could deny the electorate the opportunity to vote on a proposed measure if the Court finds the ballot language defective. 607 So.2d 397, 401 (Fla. 1992). Justice Overton noted that "there has to be a better way to address this type of issue at an earlier time." *Id.* Justice Overton's concern about last minute expedited review of ballot language is well taken, and better ways to address these type of challenges are available. *See, e.g., Evans v. Bell*, 651 So.2d

inform voters more fully concerning the important decision they are to make, a change that implicates the most fundamental rights in a democratic society. Thus, the Diaz Amici Curiae respectfully submit that the petition for writ of mandamus should be denied.

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162 (Fla. 1st DCA 1995) (results of election invalidated after vote based on ballot language defect). The issues involved in this proceeding should be developed in the trial court, and the Diaz Amici Curiae join in Respondent Harris' argument that the Court should not exercise its discretionary jurisdiction to entertain this 11th hour petition for writ of mandamus, particularly in this case where the ballot language clearly provides fair notice.

CONCLUSION

Based on the foregoing facts and authorities, the Diaz Amici Curiae respectfully submit that this petition for writ of mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Diaz Amici Curiae's Response in Opposition to Petition for Writ of Mandamus was mailed to: **Bruce Rogow, Esquire**, and **Beverly A. Pohl, Esquire**, at Bruce S. Rogrow, P.A., Counsel for Petitioners, Broward Financial Centre, 500 East Broward Boulevard, Suite 1930, Fort Lauderdale, Florida 33394 (and sent via facsimile on August __, 2000); **Robert Butterworth, Attorney General**, PL-01 The Capitol, Tallahassee, Florida 32399-1050; and **Katherine Harris, Secretary of State**, The Capitol, Tallahassee, Florida 32399-0250, this ___ day of October, 2000.

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