IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC00-1644

DENNIS G. KAINEN, et al.,
Petitioners

vs.

KATHERINE HARRIS, as
secretary of State of the State of Florida,
Respondent

BRIEF OF AMICUS CURIAE THE FLORIDA HOUSE OF REPRESENTATIVES

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the FLORIDA HOUSE OF REPRESENTATIVES, hereby adopts the Statement of the Case and Facts as included in the Response of Respondent, KATHERINE HARRIS, as Secretary of State of the State of Florida.

In addition, this Court, on August 28, 2000, granted the Motion of the Florida House of Representatives to appear as amicus curiae in support of the Respondent. In its Motion, the Florida House of Representatives stated that it was not seeking leave to file an additional brief, but would rely upon the brief filed by the Respondent. Counsel for the Florida House of Representatives, however, was informed that this Court granted the Motion contingent upon the Florida House of Representatives filing a brief with the Court by August 30, 2000. This brief is therefore filed in response to the Court's directive that the Florida House of Representatives further brief the Court in this matter.

INTRODUCTION AND SUMMARY

Amicus Curiae, the Florida House of Representatives fully adopts the arguments made on behalf of the Respondent, and will not repeat those arguments, herein. Rather, the Florida House of Representatives will seek to expand slightly upon the arguments of the Respondent.

Petitioners err in their assertion that the ballot language adopted by the Florida Legislature must comport with the requirements of Section 101.161(1),(2), Florida Statutes, that language be clear and unambiguous. The ballot language in question, which is specified in later subsections of Section 101.161, Florida Statutes, cannot be found to be subject to the general test for ballot language not specifically provided in that section. Rather, the test which should be applied is whether the language is fair and advises a voter suffciently to enable her or him to intelligently cast a ballot. The ballot language found in Section 101.161(3), Florida Statutes, clearly meets that test.

Mandamus is not proper in this case. Determining whether ballot language is sufficiently informative for the electorate is a factual matter which requires the development of a factual record. No emergency exists which justifies evading the scrutiny which a full hearing of the factual issues would provide.

The Court should not exercise the implicitly requested remedy of the Court to draft a ballot question for the 2000 election. Such action would violate the separation of powers doctrine embodied in Article II, Section 3 of the State Constitution.

ARGUMENT

A. THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY MANDAMUS JURISDICTION IN THIS CASE.

As ably argued by the Respondent in this case, Petitioners have failed to demonstrate that the functions of government will be adversely affected without an immediate determination of their alleged rights. Rather, should this Court grant the Petition and accept the invitation of the Petitioners to rush to judgment without the creation of an adequate factual record, the rights of millions of citizens in this state to intelligently determine the appropriate method of selecting trial court judges could be abridged.

As established in *Hill v. Millander*, 72 So.2d 796 (Fla. 1954), what is at issue in this matter is whether ballot language proposed by the Legislature fairly alerts the voters of this state as to the choice that is to be made between direct election of judges and selection, appointment, and retention of judges. Petitioners, in relying upon *Askew v. Firestone,* 421 So.2d 151 (Fla. 1982), as establishing a higher standard - that the language be clear and unambiguous - fail to comprehend that this higher standard arises from statute, not the Florida Constitution. Section 101.161(1),(2), Florida Statutes, which governs ballot language requires that the ballot title and summary "be printed in clear and unambiguous language..." Interestingly, it is the same Section 101.161, Florida Statutes, which also sets out the specific language to be used for the ballot in 2000 for the determination of whether a change in the method of selecting trial court judges should be adopted. It is the later adopted and more specific language of Section 101.161(3), Florida Statutes, which must govern this proceeding, not the general language. As stated by this Court:

> We begin our analysis of the issue by applying accepted rules of statutory construction to the statutes in question. First, a specific statute covering a

> particular subject area always controls over a statute covering the same and other subjects in more general terms. [citations omitted] The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. [citations omitted.] ...
>
> Further, when two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent...

McKendry v. State, 641 So.2d 45, 46 (Fla. 1994). Accordingly, the provisions of Section 101.161, Florida Statutes, relied upon by the court in *Askew, supra*, are not applicable in this case. There is no statutory requirement that the ballot language adopted by the Legislature in 2000 be clear and unambiguous. Rather, the less restrictive constitutional test enunciated in *Hill, supra*, and reaffirmed in *Askew*, must be applied. That test is simply "that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Askew, supra,* at 155, *citing Hill, supra*, at 798.

Through the adoption of a constitutional amendment in 1998, the people of this state have determined that they, and not the Legislature or the Court, should make the final determination as to the method of selection.[1] This case is therefore not about whether one favors election of judges or selection, appointment, and retention, it is about assuring that the voters are given a clear choice between the two alternatives. As demonstrated in the Response of the Secretary of State, the ballot language adopted by the Legislature in 2000 not only fairly advises the electorate

[1]We note that the ballot language presented to the people by the Constitutional Revision Commission also did not use the term "merit selection." If the Petitioners are correct in their assertion that those words must be used to present the voters a clear and unambiguous decision on whether to change the method of selecting trial court judges, clearly that term was also required for the proper passage of the constitutional amendment. If that is the case, this Court should declare the constitutional amendment which forms the basis for Petitioners' argument a nullity, and direct that it be stricken from the Constitution.

as to the choice to be made, but does so in an even-handed, neutral manner, and provides considerably more information to the voter than the alternative adopted in 1999.

The test as to whether the voter has been provided information sufficient for her or him to make an informed decision, is not, however, as the Petitioner would suggest in bringing this premature action, determined solely by the ballot language. In determining whether the voter is given fair notice, a court must also consider information disseminated to the public separate from the ballot statement.

> It is a matter of common knowledge that many weeks are consumed, in advance of elections, apprising the electorate of the issues to be determined and that in this day and age of radio, television, newspaper and the many other means of communicating and disseminating information, it is idle to argue that every proposition on a ballot must appear at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting. It is a matter of common knowledge that one does not wait until he enters the election booth to decide how he is going to cast his ballot.

Hill, supra, at 798. Of course, as this action is being brought as a mandamus action, prior to the election, the Respondent is prohibited from factually demonstrating that the information disseminated during the consideration by the Constitutional Revision Commission of the amendment permitting this election, and its subsequent adoption by the people, have already sufficiently informed the voters of the option before them. Neither may the Respondent demonstrate that this issue has been the subject of extensive public debate and comment in the public media, and is likely to receive even more public discussion as the election nears.

While the Florida House of Representatives is confident that the ballot language adopted in Chapter 2000-361, Laws of Florida, provides fair notice of the choice to be made by the electorate between the two alternative methods of judicial selection available for consideration by

the voters, should a Court determine otherwise, the need for an immediate determination is simply not necessary. It is within the power of the judicial branch to declare the 2000 election in any county or circuit invalid after the election has occurred, to direct the Legislature to adopt new ballot language consistent with the Court's ruling, and to require that the measure be reconsidered at the next ensuing general election. The Court would certainly not be setting new precedent to consider the invalidation of an election after it has been completed. It has done so previously and has pending before it such a challenge. *See, e.g., Hill, supra*; *Armstrong v. Harris,* No. 95,223 (argued September 2, 1999).

While Petitioners may assert that the after-the-fact remedy is insufficient in that they could suffer an injury by delaying the potential move to merit selection and retention by two years, this presumes first that the voters in their counties and circuits would reject the option of judicial appointment embodied in the ballot language, that they would prevail in an appropriate declaratory judgment action, and that those judges in the circuits or counties in which the five Petitioners reside, whose terms end in 2002 and who would seek merit retention, would not seek reelection or that the outcome would be different. This argument is at best speculative, and based on prior judicial election experience in this state, is more likely specious.

B. THE COURT HAS NO AUTHORITY TO DRAFT THE BALLOT QUESTION FOR ARTICLE V, SECTION 10(B)(3), FLORIDA CONSTITUTION.

While the Petitioners do not directly ask this Court to draft its own ballot statement, in requesting that the Court find to be self-executing a constitutional amendment which requires the presentation of a ballot question to the voters, but does not provide the question, clearly is asking the Court to do just that. This the Court may not do.

As provided in Article II, Section 3 of the State Constitution, "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless specifically provided herein." Where a provision of the state constitution requires further action for its provisions to take effect, it is clear that only the Legislature may take such action. *Lewis v. Florida State Board of Health*, 143 So.2d 867 (Fla. 1st DCA 1962), *cert. denied, Florida Board of Health v. Lewis*, 149 So.2d 41 (Fla. 1963).

This case does not present a situation in which the Legislature has refused to act. In fact, it is the assertion of the Petitioners that the Legislature has acted too frequently. With this assertion, the House of Representatives must unfortunately agree. Just as the Petitioners would have the judicial branch act too hastily, the Legislature in hastily adopting a ballot question in 1999 without the full reflection it would prefer[2], did not fully consider whether the question proposed was one which fairly apprised the electorate of the choice to be made. Should this Court determine that the 2000 ballot question, like the 1999 ballot question, does not sufficiently inform the voters to permit them to intelligently cast their votes, the Legislature is certainly prepared to further modify the question. This should be left to the Legislature, to do, however, and the Court should decline the invitation of the Petitioners that it enter the legislative sphere.

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[2]Unlike 1999 in which the House Bill which provided a ballot question was considered in only one committee and relatively late in session, the 2000 act, including the specific ballot question, was heard in the Florida House of Representatives at public meetings of both the Committee on Judiciary and the Committee on Ethics and Elections during the first month of session.

CONCLUSION

The Petitioners have failed to demonstrate that this case is one which the Court should exercise its discretionary and extraordinary mandamus jurisdiction. While the Florida House of Representatives believes that the arguments asserted by the Petitioner are totally without merit and that the matter should be dismissed with prejudice, the Court, should, at a minimum, dismiss the Petition and require the Petitioners to seek appropriate relief through a declaratory judgment action.

Respecfully submitted this 30th day of August, 2000.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by U.S. Mail this 30th day of August, 2,000, to:

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