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,

vs.

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

Respondent.

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned certifies that the type size and style used in this response is 12-point Courier New.

Pursuant to the Court's request, Respondent Katherine Harris, Secretary of State, and Attorney General Robert Butterworth, by and through the Solicitor General, hereby submit their response to the Petition for Writ of Mandamus filed in this case:

STATEMENT OF THE CASE AND FACTS

In 1998, the Constitution Revision Commission (CRC) proposed an amendment to the Florida Constitution to require elections in each county and circuit regarding the selection of trial court judges by merit selection and retention rather than by election.[1] This proposed amendment, referred to as Revision 7, was placed on the November 1998 General Election ballot with the following ballot title and summary:

> **BALLOT TITLE:** LOCAL OPTION FOR SELECTION OF JUDGES AND FUNDING OF STATE COURTS
>
> **BALLOT SUMMARY:** Provides for future local elections to decide whether to continue electing circuit and county judges or to adopt system of appointment of those judges

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[1] The pertinent portion of Revision 7 created Article V, section 10(b)(3)a., Florida Constitution, to read:

> 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.

Art V, § 10(b)(3)a., Fla. Const. (1999) [hereafter "section 10(b)(3)"]. <u>See</u> Appendix A at 2.

> 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.

Ballot Title and Ballot Summary for Revision 7 [Appendix A at 1]. Revision 7 was approved by the voters of Florida in the November 1998 General Election.

Revision 7 did not contain a provision setting forth the ballot question for the local option referendum. Consequently, in 1999 the Florida Legislature passed Ch. 99-355, § 10, Laws of Fla. (§ 101.161, Fla. Stat. (1999)), which expressly provided that the following local option question be placed on the ballot in each of the 67 counties and 20 circuits:

> "Shall circuit court judges in the <u>(number of the circuit)</u> judicial circuit be selected through merit selection and retention?"
>
> "Shall county court judges in the <u>(number of county)</u> be selected through merit selection and retention?"

§ 101.161(3)(c), (3)(e), Fla. Stat. (1999).

In response to concerns that the ballot questions adopted in 1999 were not understandable to the voters,[2] the Legislature

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[2] <u>See</u> Tape recording of Mar. 8, 2000, House Judiciary Committee meeting on PCB JUD 00-07 which became CS/HB 1955 (comments of Rep. Brummer explaining the amendments to sections 101.161(3)(c) and (3)(e)) (available from committee).

revised the ballot questions in the 2000 session to "explain[] the merit selection and retention process rather than only using the phrase 'merit selection and retention'." See Staff Analysis of CS/HB 1955, Comm. on Election Reform, at 3, 5, 6 (Mar. 29, 2000)[Appendix B].

The purpose of the change was to inform voters of their choice between election of trial judges by a vote of the people or selection through the merit selection and retention process. Id. This revision to the ballot question was made by the House Judiciary Committee, id. at 6, and was later added to the Senate companion bill, SB 2104, which was enacted as Chapter 2000-361, Laws of Florida. Chapter 2000-361 was signed by the Governor on June 23, 2000, and became effective on July 1, 2000.

As a result of the 2000 amendments to sections 101.161(3)(c) and (3)(e), the ballot questions that will be presented to the voters read:

> "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 . . . (name of the county) 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(3)(c), (3)(e), Fla. Stat. Ann. (West 2000).

On August 14, 2000, Petitioners filed this original mandamus action seeking, in essence, a declaration that the 2000 amendments to sections 101.161(3)(c) and (3)(e) are unconstitutional and asking the Court to either reinstate the 1999 version of the ballot questions or draft alternative ballot questions. The petition set forth only two grounds for the requested relief: (1) the ballot questions are "false" because they use the word "selection" rather than the word "nominate" to describe the role of the judicial nominating commission in the merit selection process; and (2) the ballot questions do not provide fair notice to the voters because they do not include the words "merit selection and retention." Respondent's position as set forth hereafter, is that the use of the word "selection" is appropriate and does not render the ballot questions false, and the description of the merit selection and retention process fairly informs the voters.

INTRODUCTION AND SUMMARY

The petition presents two questions. First, whether an original proceeding in mandamus is proper in this case. Second, whether sections 101.161(3)(c) and (3)(e), Florida Statutes, as amended in 2000, are unconstitutional. The statutory provisions being challenged implement article V, section 10(b)(3), Florida Constitution, and provide the ballot question for each of the 67 county and 20 circuit local option elections regarding merit selection and retention of trial judges.

As to the first question, this Court should not use mandamus to declare a statute unconstitutional and should not encourage expansion of the Court's original mandamus jurisdiction beyond the narrow class of cases in which the Court has historically exercised that jurisdiction.

As to the second question, Petitioners' constitutional challenge is based on two points. First, that the use of the word "selection" rather than "nominate" in describing the Judicial Nominating Commission (JNC) process renders the ballot question "false." Second, that using a description of the JNC process and reference to the Governor's appointment power instead of the phrase "merit selection and retention" does not fairly inform the voters. This Response will clearly show that use of the word "selection" is

appropriate, consistent with the uniform rules for the JNC's, and supported by the common definition and meaning of the word. Further, this Response will clearly show that the local option ballot questions fairly inform the voters, and that both the CRC and the Legislature were concerned that the phrase "merit selection and retention" did not adequately inform voters of their choice between electing trial judges and having those judges appointed by the Governor and subject to a retention vote.

Finally, neither "remedy" proposed by Petitioners is appropriate or available. Striking the current ballot questions would result in either a reversion to the less informative 1999 version of the ballot questions or no ballot questions at all. Moreover, there is no authority for Petitioners' suggestion that this Court undertake the legislative function of drafting the ballot questions. The petition should be denied or dismissed with prejudice.

STANDARD OF REVIEW

This action challenges the constitutionality of a state statute. It is a "judicial obligation" to sustain an act of the legislature if possible to do so. Armstrong v. City of Edgewater, 157 So. 2d 422, 425 (Fla. 1963). An act of the legislature "will not be declared unconstitutional unless it is determined to be unconstitutional beyond a reasonable doubt." Todd v. State, 643 So. 2d 625, 627 (Fla. 1st DCA 1994), rev. denied 651 So. 2d 1197 (Fla. 1995). A statute is presumed constitutional and all reasonable doubts as to its validity are resolved in favor of constitutionality. In re Estate of Caldwell, 247 So. 2d 1, 3 (Fla. 1971).

ARGUMENT

CHAPTER 2000-361, LAWS OF FLORIDA, AMENDING SECTION 101.161, FLORIDA STATUTES, IS NOT UNCONSTITUTIONAL AND THE BALLOT QUESTIONS FOR THE LOCAL OPTION ELECTIONS ON THE MERIT SELECTION AND RETENTION OF TRIAL COURT JUDGES SHOULD NOT BE STRICKEN FROM THE BALLOT.

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

The Court should not issue a writ of mandamus in this case because Petitioners have failed to show a clear legal right to the performance of a duty by a public officer. Furthermore, Petitioners have failed to show the functions of government will be adversely affected without an immediate determination. In essence, Petitioners are improperly seeking a Declaratory Judgment from the Court that the statute is unconstitutional on the basis of this substantial issue of fact: that the ballot questions will somehow mislead voters.

Petitioners seek to invoke the original discretionary jurisdiction of this Court under article V, section 3(b)(8), Florida Constitution, to issue writs of mandamus to state officers. Historically, "[t]his Court is always chary of assuming original jurisdiction in cases of mandamus." State ex rel. Ayers v. Gray, 69 So. 2d 187, 191 (Fla. 1953) (emphasis supplied). Moreover, mandamus should not be used to establish a legal right but "... to

enforce a right which has already been clearly established." State ex rel. Glynn v. McNayr, 133 So. 2d 312, 316 (Fla. 1961). For a writ of mandamus to issue, a petitioner "...must show that he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him." Hatten v. State, 561 So. 2d 562, 563 (Fla. 1991). In their attempt to avoid meeting these fundamental requirements for issuance of a writ of mandamus Petitioners allege: (1) that this Court routinely reviews proposed constitutional amendments by original mandamus; and (2) that the functions of government will be adversely affected absent an immediate determination of their case by this Court. Petitioners offer no legal or factual support for either point.

First, this petition challenges a state statute, not a proposed constitutional amendment. Accordingly, Petitioners' reliance on Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992) to support the exercise of this Court's original mandamus jurisdiction is misplaced.

Second, Petitioners have failed to identify any "clearly established legal right" or "clear legal right to the performance of a clear legal duty by a public officer." Indeed, to the contrary, Respondent has a clear legal duty to perform her

statutory duties under the elections laws and place the 2000 version of the ballot questions on the ballot. See § 15.13, Fla. Stat.; see also Peacock v. Roberts, 195 So. 914 (Fla. 1940). This petition is simply an attempt to bypass Chapter 86, Florida Statutes, and the established ordinary procedures of the courts, to invoke the original discretionary mandamus jurisdiction of this Court for the purpose of challenging the constitutionality of a state statute. The Court should not condone this process.

Initial challenges to the constitutionality of a state statute should not ordinarily be raised in an original mandamus petition but should be made before a trial court. Moreau v. Lewis, 648 So. 2d 124, 126 (Fla. 1995) (citing House of Representatives v. Martinez, 555 So. 2d 839, 848 (Fla. 1990)). Only under a very narrow set of circumstances will this Court consider exercising its discretionary mandamus jurisdiction to resolve constitutional questions, and Petitioners carry the burden of proving that "...the functions of government will be adversely affected without an immediate determination." Division of Bond Finance v. Smathers, 337 So. 2d 805, 807 (Fla. 1976) (citing Dickinson v. Stone, 251 So. 2d 268 (Fla. 1971)). See also Moreau, supra. Under the circumstances of this case, the Court should not expand the class of cases in which it has exercised its original mandamus jurisdiction, and the

Court should not invite the filing of original constitutional challenges under the guise of petitions for mandamus. Such expedited constitutional challenges detract from the orderly and careful review the courts should give to a presumptively valid statute, and preclude the opportunity for fair development of a record upon which such important determinations should be made.

In each of the above-cited instances in which this Court has exercised its original mandamus jurisdiction to resolve constitutional challenges, Smathers, Dickinson and Moreau, the constitutional challenges were made to provisions of the General Appropriations Act. The Court's seminal decision in Dickinson expunged parts of the 1971 General Appropriations Act which purported to transfer data center operations from the Office of the Comptroller to the then Department of General Services. The Court only exercised its discretionary original mandamus jurisdiction "...because of the emergency situation caused by the inclusion of improper provisions in the General Appropriations Act." Dickinson, 251 So. 2d at 273 (emphasis supplied).

In Smathers the Court exercised original jurisdiction to expunge portions of the General Appropriations Act which "jeopardized" the Environmentally Endangered Lands Bond Program, and in Moreau, the Court expunged provisions of the General

Appropriations Act which negatively impacted the availability of prescription medications for Medicaid recipients. In each of these cases the Court clearly determined that circumstances of an emergency nature existed which presented an immediate jeopardy to an important governmental function. No comparable circumstances are presented in the case at hand. (This Court most recently allowed original mandamus review in Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000); however, the Court once again referenced that this is extraordinary review only allowed because the statute "drastically changes" postconviction death penalty proceedings.) Id. at 755.

Petitioners here seek to invalidate sections 101.161(3)(c) and (3)(e) and have this Court rewrite the statute in a manner which Petitioners hope will influence the vote of the electorate. Petitioners allege that these circumstances require immediate resolution because the ballots will be printed following the October 3, 2000 primary election. The immediacy of Petitioners' circumstances is largely of their own making.

The challenged legislation, Senate Bill 2104 codified as Chapter 2000-361, Laws of Florida, passed the Legislature on May 3, 2000, was approved by the Governor on June 23, 2000, and went into effect on July 1, 2000. The Petition for Writ of Mandamus was not served on Respondent until August 14, 2000. By delaying this

challenge, the Petitioners now argue that this Court should depart from the ordinary rule of law for bringing constitutional challenges in the circuit court and instead utilize its discretionary original mandamus jurisdiction because time is of the essence. Petitioners have by their own inaction exacerbated their alleged need to expedite this matter and invoke the original jurisdiction of this Court. Bringing these important constitutional challenges under an expedited time frame is a rush to judgment, and prevents Respondent from having a full opportunity to present the issues, prepare a complete record and have a careful, orderly judicial review. Clearly, this Court has refrained from exercising original jurisdiction in constitutional challenges except in the most exigent circumstances which are not presented in this case.

Finally, this Court has "...consistently ruled that it will not entertain a Petition for Writ of Mandamus which raises substantial issues of fact..." State ex rel. International Ass'n of Firefighters, Local 2019 v. Board of Commissioners, Broward County, 254 So. 2d 195, 196 (Fla. 1971); State ex rel. Collins v. Brooker, 46 So. 2d 600 (Fla. 1950). The lynchpin of Petitioners' allegations is that the statute presents misleading questions to the voters. This is a substantial issue of fact. While a court may

determine whether the questions are accurate or informative, the effect of the questions on the voters cannot be presumed without record evidence. Under these circumstances, the Court should not entertain the Petition for Mandamus.

B. THE BALLOT QUESTIONS SET FORTH IN SECTIONS 101.161(3)(c) AND (3)(e) ARE NOT FALSE AND PROVIDE THE VOTERS FAIR NOTICE OF THE CHOICE THEY ARE BEING ASKED TO MAKE.

Petitioners assert that "the ballot language in the 2000 amendments to § 101.161 misleads the voters in several significant ways." Pet. at 8. In fact, the petition raises only two points: (1) using the word "selection" rather than "nominate" to describe the JNC's role in the merit selection process renders the ballot question "false," and (2) replacing the phrase "merit selection and retention" with a description of the JNC process which results in the gubenatorial appointment of judges does not fairly inform the voters. Pet. at 8-11. These claims are unpersuasive and apparently rest on the premise that the voters should be given less information rather than more.

Petitioners' first claim takes issue with the Legislature's use of the word "selection" to describe the role of the JNC. Petitioners contend that the Legislature's use of this word "misrepresents the role of the JNC" because the JNC nominates rather than selects candidates. Pet. at 8-9. This linguistic

claim is without merit.

The Respondent recognizes that in the context of the review of a ballot summary for a proposed constitutional amendment, the Court has scrutinized the wording of the summary. See Advisory Opinion re: Amendment to Bar Government from Treating People Differently, 25 Fla. L. Weekly S546, S549-50 (Fla. July 13, 2000) (discussing cases). Such a linguistic exercise is inappropriate, however, because this case does not involve a challenge to a ballot summary for a constitutional amendment, but involves a challenge to the validity of a statute. In any event, the wording of the ballot question in sections 101.161(3)(c) and (3)(e) would withstand review against the cases cited in Treating People Differently which all involved ambiguous words which confused the scope of the proposed amendment. Any ambiguity in the use of the word "selection" to describe the function of the JNC is immediately clarified in the ballot question by informing the voters that the Governor will appoint the judge.

The Uniform Rules of Procedure for Circuit Judicial Nominating Commissions use the word "select" rather than "nominate." In fact, the wording of sections 101.161(3)(c) and (3)(e), as amended, is virtually identical to section VI of the Uniform Rules entitled "Final Selection of Nominees", to wit: "[T]he commission shall

select no less than three nominees . . . . The names of such nominees selected by the commission shall be certified to the governor . . . ." (emphasis supplied) [Appendix C at 9]. The use of the word "selection" in connection with the JNC's role does not "minimize the role of the Governor" (Pet. at 8) because the ballot question goes on to state that judges will be "appoint[ed] by the Governor." Thus, the ballot question makes clear that the Governor, not the JNC, will ultimately appoint the judge. Accordingly, the language contained in the revised ballot question is an accurate and fair description of the merit selection process.

Furthermore, Petitioners cannot demonstrate that the word "nominate" is more clear than the word "selection." To the contrary, Respondent submits that the word "selection" more accurately describes the role of the JNC in the merit selection process. "Select" is defined to mean "to pick from among several" or "chosen from a number or group by fitness or preference" while "nominate" is defined to mean "to propose as a candidate, as for election."[3] Because Petitioners cannot demonstrate that their

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[3] Webster's II New Riverside University Dictionary, at 778, 1057 (1994); Webster's New Collegiate Dictionary, at 1039 (1979). The Court has previously relied upon dictionary definitions when construing terms presented to the voters. See Advisory Opinion to the Governor - 1996 Amendment 5 (Everglades), 706 So. 2d 278, 282 (Fla. 1997).

preferred word (nominate) is more clear than the word used by the Legislature (selection) and because the language used by the Legislature is consistent with the language used in the uniform rules for the JNC's, the Court should reject Petitioners' linguistic claim.

Petitioners' second claim rests on the proposition that the phrase "merit selection and retention" is uniformly understood by the voters and is critical to the implementation of the local option vote required by section 10(b)(3). The first component of that claim – whether the voters understand the concept of "merit selection and retention" such that the ballot question would be misleading if that phrase was omitted – is an issue of fact which Petitioners should be required to prove. The second component of the claim – whether the ballot question is inaccurate because it omits the phrase "merit selection and retention" – is belied by reference to the ballot summary for Revision 7 and the ballot summary for the 1976 constitutional amendment which established merit selection and retention for appellate judges and justices.

The ballot summary for Revision 7 did not use the phrase "merit selection" in describing the purpose of section 10(b)(3). Instead, it stated:

> 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; . . . .

See Ballot Summary for Revision 7 [Appendix A at 1]. The ballot summary, like sections 101.161(3)(c) and (3)(e), as amended, more accurately and fully describes the choice available to the voter; i.e., continue to elect trial judges or allow the Governor to appoint those judges. Use of the phrase "merit selection and retention" does not inform the voters that the Governor is involved in the process at all. Moreover, the wording of the ballot summary for Revision 7 undermines Petitioners' unsupported assertion that "the word 'merit' [was] the touchstone of the constitutional amendment and the most important aspect of the local option mandated by the Constitution." Pet. at 10. If the word "merit" was so important, surely the CRC would have included it in the ballot summary for Revision 7. Its omission from the ballot summary suggests that the actual "touchstone" of section 10(b)(3) is the choice between election or appointment of trial judges. Sections 101.161(3)(c) and (3)(e), as amended, clearly frame that choice for the voter.

The Respondent's interpretation is consistent with debate on Revision 7 by the CRC. The initial version of the ballot summary for Revision 7 included the phrase "merit selection and

retention."[4] Immediately prior to the adoption of Revision 7, the CRC amended the ballot summary to replace that phrase with a short explanation of the merit selection and retention process.[5] In explaining the purpose of the amendment, its sponsor stated:

> It was suggested to me by . . . 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.

See Transcript of CRC Proceedings, March 23, 1998, at 86-87 [Appendix E]. And, in response to a question on the amendment, the sponsor stated:

> Well, I think it clarifies [the ballot summary's reference to "merit selection and retention"] 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.[sic] And I think it at least shows him that's the choice. I don't think he can figure

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[4] See CRC Journal at 227 (Mar. 23, 1998) [Appendix D].

[5] The amendment was proposed by Commissioner Lowndes and is reprinted in the CRC Journal at page 227 (Mar. 23, 1998) [Appendix D]. The Style and Drafting Committee further refined the ballot summary, but retained the spirit of the Lowndes' amendment by explaining the merit selection and retention process rather than simply using the phrase "merit selection and retention." Compare CRC Journal at 235 (Mar. 23, 1998) (ballot summary for Revision 7 with Lowndes' amendment) with id. at 251 (May 5, 1998) (final version of ballot summary for Revision 7) [Appendix D].

> out that's the choice if you simply say merit selection. It may be merit selection by the voter.

_Id._ at 88-89. The 2000 amendments to the ballot question framed in sections 101.161(3)(c) and (3)(e) had the same purpose as the amendment to the ballot summary for Revision 7, that is to explain to the voters that their choice is "whether I elect [judges] or somebody appoints them."

Similarly, the ballot summary for the 1976 constitutional amendment which changed the method of selecting appellate judges and justices did not use the words "merit selection." The summary stated:

> Proposing an amendment to the State Constitution to provide that . . . justices of the supreme court and judges of district courts of appeal submit themselves for retention or rejection by the electors in a general election every six years . . . ; and to provide that the governor fill vacancies on the supreme court or on a district court of appeal by appointing a person nominated by the appropriate judicial nominating commission . . ..

CS/SJRs 49 & 81 (reprinted in 1976 Laws of Fla. at 932-33). The summary for the 1976 amendment, like the ballot questions framed by sections 101.161(3)(c) and (3)(e), as amended, provided a short explanation of the merit selection and retention process and inform the voter that the Governor and the JNC would have a role in the process.

In sum, to the extent that Petitioners' challenge is limited

to the accuracy and informative nature of the ballot questions, that challenge must fail. However, because the petition uses the words "inaccurate", "uninformative", and "misleading" interchangeably, it is difficult to determine whether Petitioners contend that these are three independent grounds for invalidating the ballot question, e.g., Pet. at 5, or whether they contend that the ballot question is per se misleading if it is either inaccurate or uninformative.[6] E.g., Pet. at 8. To the extent that Petitioners challenge that the ballot questions are "misleading" on some other basis, Respondent submits that such bases are not set forth in the petition.

Furthermore, an independent claim that the ballot questions are "misleading" would be fact-based and would require proof through polling or other means which would indicate how the revised ballot questions are understood by a sample of voters. Absent such evidence, Petitioners cannot demonstrate that the ballot question "misleads the voters." This Court should not relieve Petitioners of their burden by entertaining this declaratory judgment action as a petition for mandamus.

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[6] Of course, all of these claims simply obscure the fact that Petitioners are actually seeking a declaratory judgment that sections 101.161(3)(c) and (3)(e), as amended by Chapter 2000-361, Laws of Florida, are unconstitutional.

C. NEITHER REMEDY PROPOSED BY PETITIONERS IS APPROPRIATE.

Neither "remedy" proposed by Petitioners is appropriate. With respect to the proposed "automatic revival of the 1999 statutory ballot language" (Pet. at 11-13), Respondent submits that revival is not appropriate in this case. Further, the ballot question contained in the 1999 statutes is less informative to the voters than the 2000 version as to the choice that they are being asked to make. With respect to the "alternative remedy" (Pet. 14-16), Respondent submits that there is no basis in law for the Court to undertake the legislative function of drafting a ballot question for section 10(b)(3).

1. <u>The 1999 version of the ballot question is less informative than the version provided in chapter 2000-361, Laws of Florida.</u>

By amending sections 101.161(3)(c) and (3)(e) through Chapter 2000-361, the Legislature effectively determined that the ballot question in the 1999 statutes did not fully inform voters of the choice they are being asked to make under section 10(b)(3). The amendments were considered and adopted in the House Judiciary Committee. The legislative staff analysis of CS/HB 1955[7] sets

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[7] CS/HB 1955 is the companion bill to SB 2104 which became Chapter 2000-361, Laws of Florida. The amendments to sections 101.161(3)(c) and (3)(e) at issue in this proceeding were added to CS/HB 1955 in the House Judiciary Committee on March 8, 2000, through an amendment offered by Representative Brummer. The same

forth the underlying legislative intent:

> The [current] statute does not define what is meant by "merit selection and retention."
>
> * * * *
>
> 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."

Staff Analysis of CS/HB 1955, Comm. on Election Reform, at 3, 5, 6 (Mar. 29, 2000) [Appendix B]. This intent is confirmed by the comments of Representative Brummer in explaining the amendments to sections 101.161(3)(c) and (3)(e) to the House Judiciary Committee: "The current language, I think, is confusing and this amendment will make the ballot more understandable to the voters."[8]

The 2000 amendments to sections 101.161(3)(c) and (3)(e) not only seek to explain the process of "merit selection and retention"

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language was added to SB 2104 early in the last week of Session when the Senate conformed SB 2104 to CS/HB 1955.

[8] Tape recording of March 8, 2000, House Judiciary Committee meeting on PCB JUD 00-07 which became CS/HB 1955 (available from committee).

but correct a glaring omission in the 1999 ballot summary, namely the failure to mention that the current process for selecting trial judges is election. Petitioners make much ado over the omission of the word "merit" in the 2000 version of the ballot question (Pet. at 9-10), but conveniently ignore the omission of the word "election" in the 1999 version. If, as Petitioners argue, the omission of the word "merit" renders the 2000 version of the ballot summary "inaccurate and uninformative, preventing voters from casting intelligent and informed ballots" (Pet. at 10), the 1999 version of the ballot summary would even be more flawed. Thus, it would be inappropriate to reinstate the 1999 version of the ballot question. Cf. State ex rel. Glynn v. McNayr, 133 So. 2d 312, 317 (Fla. 1961) (refusing to issue writ of mandamus to local tax assessor to use "reassessment" of tax rolls in lieu of original assessment where "reassessment" also violated the applicable constitutional requirements). Even the case cited by Petitioners recognizes this limitation. See B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994) (" . . . the judicial act of striking the new statutory language automatically revives the predecessor unless it, too would be unconstitutional.") (emphasis supplied).

A comparison of the 2000 version of the ballot question to the 1999 version supports the legislative analysis and shows that the 2000 version provides a much more accurate and informative summary

of the choice that the voters are being asked to make. For example, the 2000 version of the ballot question informs the voters that the method for selecting judges is currently election; the 1999 version does not mention election. The 2000 version asks whether the voters are in favor of changing that method to something else; the 1999 version does not mention a change in method. The 2000 version informs the voters that the alternative to election is appointment by the Governor; the 1999 version does not indicate the Governor's involvement. The 2000 version informs the voters that the JNC will be involved in the selection of judges; the 1999 version does not indicate the JNC's involvement.

If the 1999 version of the ballot questions were a ballot summary for a proposed constitutional amendment, it might be stricken from the ballot for failure to mention "election" as the current method for selecting trial judges. This Court has consistently struck ballot summaries which failed to inform the voters of significant changes in the functions of government.[9]

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[9] See, e.g., Advisory Opinion re: Fish and Wildlife Conservation Comm'n, 705 So. 2d 1351, 1355 (Fla. 1998) (ballot summary failed to inform the voter that Legislature would be stripped of certain powers); Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982) (ballot summary tracked the language of the proposed amendment but failed to inform voter that it created an exception to the Sunshine Law and therefore was stricken "not for what [it] says, but, rather, with what it does not say"). And see Treating People Differently, 25 Fla. L. Weekly at S552, S553 (Shaw,

Given the fundamental nature of the right to vote in our system of government, the failure to inform the voters that they would lose the right to elect trial judges might constitute a fatal flaw in the 1999 version of the ballot question.

In light of the concerns regarding the 1999 version of the ballot question, it was appropriate for the Legislature to redraft the language as it did in Chapter 2000-361, Laws of Florida. If the Court strikes the 2000 version of the ballot question and "reinstates" the 1999 version, that language would be subject to challenge as well. For this reason alone, the Court should deny the petition. See Glynn, supra; B.H.,supra.

1. The Court has no authority to draft the ballot question for article V, section 10(b)(3), Florida Constitution.

Petitioners have not cited and Respondent is unaware of any basis in law for the Court to undertake the legislative function of drafting the ballot question for section 10(b)(3). Petitioners gloss over this point by claiming that section 10(b)(3) is self-executing; however, Petitioners' own argument undermines this claim. By asking the Court to prepare alternative language for the

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J., concurring) (concluding that the ballot summaries "fly under false colors" and "hide the ball" because they describe the proposed amendments in a manner that gives voters an illusory and incomplete impression of their purpose).

ballot questions or by urging the 1999 version of the ballot questions, Petitioners implicitly acknowledge that the purpose of section 10(b)(3) cannot be accomplished "without the aid of legislative enactment." See Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960). Thus, section 10(b)(3) is not self-executing. Id.

Had the framers of section 10(b)(3) intended for that provision to be self-executing, the ballot questions could have been provided in the constitution, as was done in article V, section 10(a), Fla. Const. Section 10(a) sets forth the specific ballot questions to be presented on the retention vote for justices of this Court and judges of the district courts.[10] No legislative enactment is necessary to implement section 10(a). By contrast, because the constitution did not provide a ballot question for section 10(b)(3), it was necessary for the Legislature to frame the questions to be presented to the voters. The Legislature, not the Court, is the appropriate entity to provide the ballot questions and, the Legislature having done so, the Court should defer to the ballot questions enacted by the Legislature.

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[10] The ballot question set forth in Article V, § 10(a), Florida Constitution, is: "Shall Justice (or Judge) ___(name of justice or judge)___ of the ___(name of court)___ be retained in office?"

CONCLUSION

For the foregoing reasons of law and policy, this Court should not exercise its discretionary mandamus jurisdiction to entertain Petitioners' declaratory judgment action against Chapter 2000-361, Laws of Florida. The Petition for Writ of Mandamus should be denied or dismissed with prejudice.

Respectfully submitted this ____ day of August, 2000.

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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 BRUCE ROGOW, BEVERLY A. POHL, BRUCE S. ROGOW, P.A., Broward Financial Centre, 500 East Broward Blvd., Ste. 1930, Fort Lauderdale, Florida 33394, this ____ day of August, 2000.

____

TOM WARNER
Solicitor General

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,

vs.

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

Respondent.

APPENDIX TO THE RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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