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

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RESPONSE TO PETITION FOR WRIT OF MANDAMUS BY AMICI CURIAE THE CUBAN AMERICAN BAR ASSOCIATION, THE HISPANIC NATIONAL BAR ASSOCIATION, THE BLACK LAWYERS ASSOCIATION, INC., AND THE FLORIDA ASSOCIATION FOR WOMEN LAWYERS – MIAMI-DADE COUNTY CHAPTER

John K. Shubin, Esq.
Florida Bar No. 771899
Shubin & Bass, P.A.
46 S.W. 1st Street
Third Floor
Miami, Florida 33130
Tel.(305) 381-6060
Fax.(305) 381-9457

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CERTIFICATION OF TYPE SIZE AND STYLE

I hereby certify that the typeface used in this brief is no smaller than 12 point nonproportionately spaced Courier New.

INTRODUCTION

The underlying petition in this matter implicates certain fundamental civil rights, including the right to vote, which are cherished dearly by the Cuban American Bar Association, the Hispanic National Bar Association, the Black Lawyers Association, Inc., and the Florida Association for Women Lawyers – Miami-Dade County Chapter. Accordingly, the amici sought leave of this Court to file a consolidated brief supporting the Legislature's clear and unambiguous attempt to inform voters that certain proposed judicial reforms would, in part, eliminate their right to elect circuit and county court judges. In furtherance of protecting these fundamental rights, and pursuant to this Court's Order dated August 25, 2000, the amici respectfully submit this brief in support of the legal propriety of the legislation amending Section 101.161, Florida Statutes, which created the November 7, 2000, ballot language on the general election issue of a local option for the selection and retention of circuit and county judges. The amicus organizations maintain that the petition for writ of mandamus should be denied.

STATEMENT OF THE CASE AND FACTS

Other than certain editorial characterizations regarding the relative merits of one amendment over another, which should be disregarded by this Court, the amicus groups do not object to the petitioners' presentation of the underlying facts.

SUMMARY OF ARGUMENT

Because the sole standard for evaluating the merits of this petition involves the application of a very simple test – whether the proposed ballot language as written by the Legislature provides fair notice to the average voter – this Court must deny the petition forthwith. Quite simply, the petition must be denied because the resolution of this matter neither requires nor compels that this Court address either the merits of the competing visions held by segments of the public regarding the judicial selection process or whether suitable alternatives to the proposed language could have been drafted by the Legislature had it so chosen. Most importantly, the petition must be denied because the statutory language upon which the proposed ballot question is based complies with all of the requisite legal requirements requiring a fair explanation of the effect of the proposed amendment.

The weakness of the petitioners' position is best evidenced by their reliance on the argument that the employment of the term "select" in the statute somehow renders it a legal nullity. The petitioners maintain that it is misleading to represent that judges, under the proposed system, would be "selected" by a judicial nominating committee. In making this argument, they would like this Court to ignore the plain meaning of the term "select" and the language of the Uniform Rules of Procedure for Circuit Judicial Nominating Commissions, which presently refers to the

commissions' obligation to "select" nominees.

This Court is not required to address the deficiencies contained in the original statutory language, which is presented by the petitioners as the preferred remedy upon the granting of their petition, if this Court concludes, as it must, that the current language provides fair notice. As noted, it is not this Court's task to weigh the competing amendments and choose its favorite. This Court's sole obligation is to recognize that the existing language provides Florida voters with fair notice of the proposed changes and, accordingly, deny the petition.

ARGUMENT

I. The Appropriate Standards of Review

A. The Standard of Review For The Issuance of a Petition For Writ of Mandamus

The amicus groups acknowledge that Article V, Section 3(b)(8) of the Florida Constitution authorizes this Court to issue writs of mandamus to "state officers and state agencies". Notwithstanding this constitutional authority to issue such writs, this Court has held that a writ of mandamus should only be issued "where the functions of government will be adversely affected without an immediate determination." *Allen v. Butterworth*, 756 So. 2d 52, 54 (Fla. 2000), citing *Division of Bond Finance v. Smathers*, 337 So. 2d 805, 807 (Fla. 1976). Because the petitioners have failed to either allege or establish why an "immediate determination" is

necessary, this Court need not exercise their discretionary jurisdiction in this action. Furthermore, mandamus may only be used to enforce "clear" and "certain" legal rights, which is a hurdle that the petitioners also fail to clear. *See generally, Florida League of Cities v. Smith*, 607 So. 2d 397, 400-401 (Fla. 1992).

B. The Standard of Review For Ballot Language

This Court has made it clear that it is mindful of its limited role in reviewing constitutional proposals which have been adopted by the Legislature for direct submission to the people:

> Another thing we should keep in mind is that we dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are constraining. They have a right to change, abrogate, or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution. The 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. This is the first rule we are required to observe when considering acts of the legislature and it is even more compelling when considering a proposed constitutional amendment which goes to the people for their approval and disapproval.

Smothers v. Smith, 338 So. 2d 825, 826-827 (Fla. 1976)(*citing Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). Moreover, if "there is doubt as to whether the Legislature has violated what appear to be strictures of their amendatory powers", then this Court is compelled to sustain the legislative action. *Smothers,* 338 So. 2d at 827.

Therefore, the standard established by this Court for determining whether ballot language should be stricken is extremely narrow. To prevail, the petitioners must establish that the proposed language "would clearly mislead [the] public concerning material elements of the proposed amendment and its effect on the present Constitution." *Advisory Opinion to the Attorney General re Tax Limitation*, 644 So. 2d 486, 489, (Fla. 1994) (Emphasis supplied). Moreover, this Court is limited to the legal issues presented by the petition and can not "rule on the merits or the wisdom of the proposed...amendments..." *Id.* In light of this standard, this Court must deny the petition and allow the public to address the merits of the underlying public issues presented by the amendment in a manner which is conducive to a responsible debate on these issues.

The deference given to the Legislature to "modify" the ballot language is especially important when considering that what is at issue is the people's right to vote. As stated by the United States Supreme Court, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Moreover,

> The right to vote freely for the candidate of one's

> choice is the essence of a democratic society, and any restrictions on that right strikes at the heart of representative government...
>
> ...Undoubtedly, the right of suffrage is fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and impartial manner is preservative of other civil rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 555-562 (1964), *quoting Wesberry v. Sanders.*

For this reason, the Legislature decided to propose ballot language informing Florida voters that the proposed constitutional amendment changing the selection process for circuit and county court judges involved a fundamental change in their constitutionally protected voting rights.

II. The Proposed Ballot Language Is Clear and Unambiguous

> 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.....
>
> (Article V, Section 10,(b)(3)(a), Florida Constitution)
>
> ***
>
> Shall [circuit/county] judges in the ... (number of the circuit)...be selected through merit selection and retention?
>
> (Fla.Stat.§101.161 (3)(c)(e)(1999))
>
> ***
>
> Shall the method of selecting [circuit/county] judges in the ...(name/number of the county/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?
>
> (Fla.Stat.§101.161 (3)(c)(e)(2000)

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Although it should be patently obvious to this Court that the language which is the subject of this original action commendably and accurately informs Florida voters of the true import of the proposed constitutional amendment, thus requiring the dismissal of the petition, the amicus organizations will directly address the two central issues presented by the petitioners. These hyper-technical arguments, related to the employment of the term "select" and the omission of the term "merit" from the present amendment, completely miss the mark where this Court's sole task is to evaluate whether the entire provision, not the use of an individual term, is misleading.[1]

What is also fatal to the petition, however, is the satisfactory explanation of how anyone other than a few members of the Florida Bar could ever comprehend the meaning of the term "merit selection and retention." Most non-lawyers would undoubtedly have no idea what this term of art actually means, and even those few insiders familiar with the term would struggle with identifying the specifics of its planned implementation under the amendment. Properly recognizing that the average voter could not possibly understand the meaning of such a technical term of art, and further recognizing that the public was not being informed that their existing right to select judges was being substantially diluted, the Legislature undertook the salutary task of righting a mistake.[2] This Court

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[1] Because the petition frames the issues for this Court's review, the petitioners can only rely on these two arguments and should not be allowed to interject new arguments as part of a reply.

[2] The legislative history of the most recent amendment makes it clear that the Legislature intended to replace the term "merit

must honor their commendable action.

A. The Employment of the Term "Select" Is Not Misleading

The first element of the petitioners' challenge hinges upon the argument that the present amendment is misleading because it describes the proposed alternative to the election of judges as involving "selection by the judicial nominating commission and appointment by the Governor..." The corollary to this argument – the amendment "...omits the critical fact that merit is the standard that will govern appointments." *Petition*, at pp. 8-9. When viewed together, the essence of their argument is that, under the proposed system, a merit-based system will "govern judicial appointment".

Engaging in an exercise comparable to counting angels on the head of a pin, the petitioners splice the amendment beyond recognition and protest that judicial nominating commissions do not "select" judges but instead "investigate" and "nominate" them for the Governor's consideration. This argument is easily dispatched by reference to both the dictionary definition of the word "select"[3] and Section VI of the Uniform Rules of Procedure For Circuit Judicial Nomination Commissions, admirably cited by the petitioners, which states that the role of the nominating commission is to "select no less than three nominees..."[4] The employment of the term "select" is thus a far cry from

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selection and retention" with language which was more descriptive of the proposed system and which would advise voters that they were giving up, in part, their right to elect judges. *See* "Summary" portion of Staff Analysis of CS/HB 1955 (2000).

[3] Webster's Third International New Dictionary defines the verb "select" as follows: "to choose from a number or group [usually] by fitness, excellence, or other distinguishing feature." Ironically, this definition connotes the use of merit in the process of culling from a number or group, a definition which the petitioners ignore.

[4] As if there was any question that the use of the term "select" was deliberate, it is also utilized in the Uniform Rules For Nominating Commissions for the Supreme Court and District Courts of Appeal.

being misleading!

The petitioners also seemingly overlook the fact that the direct reference in the proposed amendment to the "judicial nominating commission" would have made it redundant and confusing to use the term "nominate" instead of "select". It should be obvious to the average voter that the role of the judicial nominating commission is to "nominate" judges after a selection process, with the ultimate appointment being decided by the Governor. However, the petitioners carry the impossible burden of demonstrating to this Court that the use of the word "select", when viewed in the context of the entire ballot language, renders the amendment deficient. When evaluated in light of the bedrock principle of statutory construction that requires harmonization of all of the words employed in a statute[5], the language at issue is more than legally sufficient and must be presented to the voters.

B. The Omission of the Term "Merit" Does Not Invalidate the Proposed Ballot Language

With respect to the petitioners' objection that the word "merit" is improperly omitted from the proposed amendment, the amicus groups maintain that the Legislature's obvious interest in employing less value-laden language in explaining the effect of the proposed amendment goes to the essence of this Court' proclamations regarding ballot language – "that the voter should not be misled and that he have the opportunity to know and be on notice as to the proposition on which he is to cast his vote." *Hill v. Milander*, 72 So. 2d 796, 798 (Fla. 1954); accord, *Askew v. Firestone*, 421 So.

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[5] *See generally, St. Mary's Hospital, Inc. v. Phillips*, 2000 WL 854258 (Fla. June 29, 2000) ("It is a cardinal rule of statutory construction that a statute must be construed in its entirety and as a whole"); *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977) (finding that the entire statute must be considered and effect must be given to every part of the provision under construction).

2d 151, 154 (Fla. 1982) While debates over the meaning of "merit" are appropriate for academics, the voting public should be spared from a blatant attempt to manipulate them into believing that the system endorsed by the proposed amendment possesses some sort of superior status over the existing system.[6]

Presently, Section V of the Uniform Rules of Procedure for Circuit Judicial Nominating Commission identifies twenty-one (21) separate criteria which should be employed in the evaluation of potential applicants by the judicial nominating commission. The petitioners instead maintain that the use of the term "merit", which is not even mentioned in Section V, is indispensable to a voter's appreciation of the substance of the proposed amendment. This argument, rather than being persuasive, merely exposes the disingenuous qualities of the petitioner's position – they reject value-neutral and descriptive terms as being misleading and promote value-laden terms in their place. The screening process which this Court must employ can not coexist with the manipulative use of

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[6] In fact, 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 agree 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 bases 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)

language espoused by the petitioners.

III. The Remedies Sought By The Petitioners Are Inherently Unconstitutional

Without acknowledging in any respect the propriety of the petitioners' central arguments regarding the proposed amendment, the amicus groups will address, in an abundance of caution, the remedies sought by the petitioners. Because the 1999 amendment suffers from extreme errors of omission, making it legally defective, it can not be employed as ballot language under any circumstances. Because the exact language of the constitutional amendment is a hollow substitute for the Legislature's clear and unambiguous amendment, and because it still utilizes the term "merit selection and retention", the petition must be summarily dismissed.

The most glaring deficiency in the ballot language of the original 1999 statute, which should immediately eliminate it from consideration, is that it omitted any reference to the fact that the public's sacred "right to vote" would be affected by the passage of the amendment, excising, as if it were without consequence, the words "rather than by election.". This is an omission of tremendous significance to the amicus organizations, all of whom have worked tirelessly to empower and expand, rather than contract, the public's right to vote. More importantly, this Court has repeatedly recognized that ballot titles and summaries that do not identify certain constitutional and statutory provisions that they will affect are legally defective. *Advisory Opinion to the Attorney General re Stop Early Release of Prisoners*, 642 So. 2d 724, 726 (Fla. 1994). The mere suggestion by the petitioners that this defective amendment should be resurrected speaks volumes regarding the petitioners' commitment to a thoughtful evaluation of this issue by the voters.

Moreover, this Court has also held repeatedly that reference to "legal phrases" and terms of art, similar to the term "merit selection and retention", are legally problematic and inadequate. *Advisory Opinion to the Attorney General re Amendment to Bar Government From Treating*

People Differently, 2000 WL 963904, 963912. Like the invalidation of the terms "common law nuisance" or "bona fide qualification based on sex", the use of the term "merit selection and retention" is vague and ambiguous, and thus violative of Fla. Stat. §101.161, in that it forces voters to "undoubtedly rely on their own conceptions of what constitutes [merit selection and retention]." *Treating People Differently*, 2000 WL at 963912.

Adding to this ambiguity is the fact that the catch all phrase "merit selection and retention" does not describe a specific method of judicial selection but instead encompasses "an almost endless combination of schemes used to select judges." Dubois, supra 40 SW L. J. at 40. 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 Main 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 commission; 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.[7]

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[7] Most of these alternatives have been considered by the Florida Bar and the various commissions and groups including the Constitution Revision Commission, which have addressed these issues. *See generally*, Martha W. Barnett, "The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection," 52

Finally, and of particular concern to the amicus groups, there is no legal or technical term or phrase in the Spanish language which is comparable to the term "merit selection and retention." As set forth in the attached affidavit of Vincente de la Vega, the phrase, when it is translated literally, "connotes only that judges should be picked and retained and on the basis of their merit" – not any particular process for judicial selection. *Affidavit*, at App. 2. Because a translated version of the statute will inevitably be relied upon by a significant segment of Florida's population, the term can not be employed.

The petition should be denied, however, not because of the legal deficiencies inherent in the proposed alternatives, but because the proposed amendments provide fair notice to the public of the proposed amendment and its consequences. They adequately apprise the voter of the consequences of their vote and avoid legal jargon that is value laden, prejudicial, and confusing.

CONCLUSION

For the reasons set forth herein, the Court should deny the petition for writ of mandamus.

Fla.L.Rev. 411, 419-20 (April 2000) (describing recent history); see also Peter D. Webster, "Selection And Retention Of Judges: Is There One 'Best' Method?," 23 Fla. St. U.L. Rev. 1, 31-32 (Summer 1995)(("It is difficult to generalize regarding the validity of the claims made by proponents and opponents of a 'merit' system because of the number of variation in the plans..."). (Emphasis supplied); Barnett, *supra,* at 421-424 (describing recent history of judicial selection efforts in Florida).

Respectfully submitted,

Shubin & Bass, P.A.
46 S.W. lst Street
Third Floor
Miami, Florida 33l30
(305) 381-6060

By:_____
John K. Shubin, Esq.
Fla. Bar No. 771899

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via Facsimile Transmission on this 28th day of August, 2000 to: Bruce S. Rogow, Esq., Broward Financial Center, 500 E. Broward Blvd., Ste. 1930, Ft. Lauderdale, Fl 33394; Deborah K. Kearney, Esq., Florida Dep't of State, The Capital, 301 N. Monroe St, #PL-02, Tallahassee, FL 32301-7621; Robert Butterworth, Esq., Attorney General, #PL-01, The Capital, Tallahassee, FL 32399-1050; A..J. Barranco, Jr., Esq. & Kimberly L. Boldt, Esq., 150 West Flagler Street, Museum Tower, Ste 1400, Miami, FL 33130; and Joseph W. Little, Esq., 3731 N.W. 13th Place, Gainesville, FL 32605.

_____
Attorney