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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

A Petition for Writ of Mandamus
Directed to a State Officer,
Invoking the Court's Original Jurisdiction

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This Reply is typed using a Times New Roman 14-point font.

ARGUMENT

MANDAMUS SHOULD ISSUE TO STRIKE INVALID STATUTORY BALLOT LANGUAGE FROM THE NOVEMBER 7, 2000 GENERAL ELECTION BALLOT, WHICH *MUST* PROVIDE FLORIDA VOTERS WITH A "A LOCAL OPTION TO SELECT CIRCUIT COURT JUDGES AND COUNTY COURT JUDGES BY MERIT SELECTION AND RETENTION RATHER THAN BY ELECTION" (ART. V, § 10(b)(3)a., FLA. CONST.)

Neither Respondent's brief nor the briefs of any of the Respondent's *amici* can overcome the fact that the challenged ballot language does not present the voters with the choice to exercise the precise local option mandated by Article V, § 10(b)(3)a. of the Florida Constitution ("a local option to select circuit court judges and county court judges by merit selection and retention rather than by election. . . ."). The flaw in the ballot language set forth in § 101.161(3)(c) and (e), Fla. Stat., as amended, 2000 Fla. Sess. Law Serv., Ch. 00-361, § 1 (S.B. 2104) (West) (see Petition Appendix, pp. 6-7), is so patent, that the only real question is the mechanism for placing the right question on the ballot.[1]

The simple premise of this case is that the Florida Constitution is the supreme law

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[1] The Respondent's *amici*'s responses reveal their apparent preference for election of circuit court and county court judges. Petitioners and their *amici*, past presidents of The Florida Bar, support a system of merit selection. However, this is not the forum to debate the merit of "merit selection and retention." Whether or not the concept or the term has benefits or flaws, the term "merit selection and retention" appears in the Florida Constitution (Art. V, § 10(b)(3)a.), a provision enacted by voters who were presumably informed about its meaning.

of the State, and that state statutes cannot conflict with the Constitution. If statutory ballot language is inconsistent with the Constitution, and inaccurate to boot, this Court has the power to, and should, direct the Secretary of State to strike that invalid ballot language and to replace it with ballot language that is faithful to the Constitution. Art. V, § 3(b)(8), Fla. Const. This case demands that remedy.

This Reply responds to the opponents' various arguments.

A. MANDAMUS IS APPROPRIATE

The State argues that this Court should not exercise its discretion to review the challenged statute *via* a petition for writ of mandamus (Harris Response, pp. 8-13), but stops short of saying that the Court has no jurisdiction. If anything, Respondent's argument and the cited cases confirm that if "circumstances of an emergency nature exis[t] which present[] an immediate jeopardy to an important governmental function" (id. at 11), mandamus has historically been used to save that governmental function.

Conducting a constitutionally sound general election, and deciding how to select members of the judiciary around the state, are important governmental functions, no less important than appropriating state funds, which was the focus of the cases cited by Respondent, all of which resulted in the requested judicial relief. Harris Response, pp. 10-11 (citing Smathers, Dickinson, and Moreau). Other controversies, in addition to

appropriations cases, have also prompted this Court to act in an original mandamus proceeding, including cases in which the integrity of the ballot process was at stake, as here. See generally, State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561 (Fla. 1980) (finding administrative rule regulating the time for submitting signatures for constitutional initiative petitions to be unconstitutional, in an original proceeding in mandamus); Allen v. Butterworth, 756 So. 2d 52, 54 (Fla. 2000) ("This Court has previously addressed the constitutionality of legislative acts through its mandamus authority. Accordingly, we treat all of the petitions filed here [challenging Death Penalty Reform Act] as petitions for writs of mandamus").

The precise contours of this case -- presenting for the first time how to properly effectuate an express constitutional command for a local option to change the law in a certain general election -- are admittedly unprecedented. But the importance and urgency of the purely legal issue makes this proceeding proper.[2]

Since the ballot language challenged in this case jeopardizes the fulfillment of a

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[2] Respondent contends that whether the statute is misleading presents a "substantial issue of fact" needing factual development such as "polling" the voters. Harris Response, pp. 7, 8, 13, 16, 20. No authority is cited for the unusual position that this Court needs to rely upon a poll in order to determine whether a statute violates the Constitution. This Court has long held that the constitutionality of a statute presents a question of law, not fact. See Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d at 562 (calling the issue of "the legal validity of [a] statute and rule . . . [a] constitutional question which requires no evidentiary findings or hearing"). Thus, no additional "record" is required.

constitutional mandate to present "a local option to select circuit court judges and county court judges by merit selection and retention rather than by election" to all Florida voters "at the general election in the year 2000," the immediate need for non-misleading, constitutional ballot language on this issue in the November 7, 2000 general election is a circumstance of an emergency nature, warranting the exercise of this Court's discretion to grant appropriate relief.[3]

B. RESPONDENT'S JUSTIFICATIONS CANNOT CURE THE STATUTORY DEFECTS

Respondent has offered a discussion of the Constitutional Revision Commission history of the notion of a local option for merit selection and retention of trial court judges, and the ballot summary for Revision 7. Response, pp. 17-18. That history is irrelevant, because the Constitution has been amended, and its provisions are the law that governs this case. The mandate of the Constitution is clear:

> A vote to exercise a local option to select circuit

[3] Respondent's *amicus*, The Florida House of Representatives, suggests that, in lieu of the immediate relief requested by the Petitioners, it would be preferable to conduct a state-wide election, despite a pending substantial challenge to the validity of the ballot language, then to invalidate the entire election, so that the Legislature could then "adopt new ballot language consistent with the Court's ruling." House *Amicus* Brief, p. 6. That approach is an affront to the voters of this State, who adopted the 1998 amendments to Article V, § 10, Florida Constitution, and who deserve a properly conducted election in 2000, consistent with those provisions.

> 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. (emphasis supplied).[4] Another provision, referring to "approv[al]" of the local option (Art. V, § 10(b)(1)), makes it clear that an affirmative vote must be for "a local option to select circuit judges by merit selection and retention rather than by election," and not for some distortion or permutation of that directive (such as placing the phrase "election by a vote of the people" first, and omitting the term "merit selection and retention" altogether), however well-intended.

Rather than follow the simple directive of section 10(b)(3)a., the Legislature, responding to "concerns that the ballot questions adopted in 1999 were not understandable to the voters" (State Response, p. 2), enacted ballot language that causes "concerns" of another type.

Again, the challenged language in § 101.161, as amended, is this:

> (c) [t]he ballot shall state: "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

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[4] The term "general election" is defined in section 97.021(11), Fla. Stat., as "an election held on the first Tuesday after the first Monday in November in the even-numbered years . . . ."

> subsequent terms determined by a retention vote of the people? . . . .
>
> * * *
>
> (e) [t]he ballot shall state: "Shall the method of selecting county court judges in . . . (name of 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? . . . .

(emphasis supplied).

The Petitioners contend that "selection by the judicial nominating commission" is factually inaccurate, and therefore misleading. The Respondent and her *amici* contend that "selection" does not necessarily mean selection of the individual judge to be seated, but that the very name "judicial nominating commission" fairly informs the voters that the JNC's role is merely to nominate, not to conclusively "select" the judges.[5] The Diaz

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[5] The House of Representatives' *amicus* brief makes the argument – without the citation of any authority – that legislatively enacted ballot language is not required to be clear and unambiguous, because § 101.161(1), (2), Fla. Stat., is inapplicable in this context. The statute states:

> (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot . . . .

(emphasis supplied). We can discern no reason why the ballot language for the local

amici (p. 14) go so far as to say that "[t]he ballot's use of the word "selection" in connection with the judicial nominating commissions is definitively accurate. . . ." (emphasis supplied). In order to accept that strained argument, this Court would have to take the unusual step of interpreting "selection" two different ways within the same statute. The requirement that a word used twice in the same statute should be given the same meaning in both usages is an established principle. See Rollins v. Pizzarelli, 761 So. 2d 294, 298 (Fla. 2000) ("the same meaning should be given to the same term within subsections of the same statute"); accord State v. Warren, 755 So. 2d 145, 146 (Fla. 1st DCA 2000); Schorb v. Schorb, 547 So. 2d 985, 987 (Fla. 2d DCA 1989).

The statute first asks whether "the method of selecting" judges should "be changed from election by a vote of the people. . . ." In that context, selection means a judgeship. Once a candidate is selected by election, he or she is a judge. The alternative posed in the statute is "selection by the judicial nominating commission and appointment by the Governor. . . ." But there can be no dispute that "selection" by the judicial nominating commission does not make one a judge. The judicial nominating commission narrows the field and selects nominees, but it does not "select" judges. Thus, by making "selection by the judicial nominating commission" the alternative to selection *via*

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option for merit retention and selection of judges should not be subject to the "clear and unambiguous" standard; and we maintain that "selection by the judicial nominating commission" is both unclear and ambiguous.

"election by a vote of the people," the statute misleads the voters, by positing two arbiters of "selection": electors or the judicial nominating commission. The Governor's "appointment" is, under the statutory language, ministerial. [6]

C. FIXING THE BALLOT BY APPLYING THE SELF-EXECUTING LANGUAGE OF THE CONSTITUTION

The opponents of the Petition argue that the 1999 statutory ballot language is an unacceptable substitute for the 2000 ballot language because it fails to inform voters that merit selection and retention would replace an existing right to elect circuit court and county court judges. We see the logic of that argument. Therefore, the alternative remedy proposed in the Petition – that Article V, § 10(b)(3)a. is self-executing and provides usable ballot language – provides the fairest solution.

The State claims that the Court cannot "draft" ballot language, without running afoul of the separation of powers that the state Constitution requires. See Art. II, § 3, Fla.

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[6] The State's Response, in its zeal to point out that the Uniform Rules of Procedure for Circuit Judicial Nominating Commissions use the word "select," fails to appreciate that the Rules consistently refer to the "selection of nominees." See State's Response, pp. 14-15 ("`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. . . .'") (emphasis added by the State). In any event, it is unpersuasive for the State to suggest that a misstatement on the ballot can be clarified or cured by the existence of the Uniform Rules of Procedure for Circuit Judicial Nominating Commissions. It is fair to say that most voters would be unaware of those Rules.

Const. However, merely utilizing a self-executing provision of the Constitution as the ballot language – where the Constitution expressly requires an election on a specific issue – is not "drafting," and thus is within the Court's power to order.

In Florida Department of Education v. Glasser, 622 So. 2d 944 (Fla. 1993), in the context of examining Article VII, section 9 of the Florida Constitution, this Court gave several examples of self-executing constitutional language:

> Had the framers of the 1968 Florida Constitution intended a self-executing grant of power, they could have chosen self-executing language. Our present constitution contains numerous examples of such phrases: "The seat of government shall be the City of Tallahassee, in Leon County. . . ." Art. II, § 2, Fla. Const. "The supreme executive power shall be vested in a governor." Art. IV, § 1(a), Fla. Const. "The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." Art. V, § 1, Fla. Const.

622 So. 2d at 947 (emphasis supplied). The constitutional provision that is the foundation of the November 7, 2000 general election question is another example of a self-executing provision. The Article V, § 10(b)(3)a. language ("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") contains the mandatory "shall," and does not expressly state

that the Legislature is required to draft separate ballot language. It "lays 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). That is the test for self-executing provisions. Article V, § 10(b)(3)a. meets that standard. Thus, as we said in the Petition, the ballot question should be that which Article V, § 10(b)(3)a. mandates:

> Shall circuit court judges in the [number of circuit] judicial circuit be selected by merit selection and retention rather than by election?
>
> and
>
> Shall county court judges in [name of county] be selected by merit selection and retention rather than by election?

CONCLUSION

For the foregoing reasons, and those advanced in the Petition for Writ of Mandamus, this Court should exercise its jurisdiction and grant the writ and the relief requested in the Petition.

Respectfully submitted,

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Appendix 1