IN THE SUPREME COURT OF FLORIDA

Dennis G. Kainen, Gerald F. Richman, John L. (Jim) Hampton, Don L. Horn, Rebekah J. Poston, and Norman Davis,

Petitioners,

CASE NO. SC 00-1644

vs.

Katherine Harris, as Secretary of State of Florida,

Respondent.

RESPONSE OF AMICI CURIAE HARVEY M. ALPER, JOSEPH W. LITTLE AND HENRY P. TRAWICK TO PETITION FOR WRIT OF MANDAMUS

Amici Curiae Alper, Little and Trawick (hereinafter referred to as "Amici") respectfully submit that this court should exercise its discretion to deny the petition on the ground that Petitioners have not made and cannot make a sufficient showing that the ballot title they attack is "clearly and conclusively" deceptive or misleading.

Memorandum of Law

Amici cannot gainsay that this Court possesses the obligation to protect Florida citizens and voters against attempts to induce them to amend the Florida Constitution

unwittingly by the practice of presenting proposals to them under deceptive and misleading ballot titles and summaries. Amici also concede that, despite the great deference this Court must give to actions of the Legislature, this protective obligation extends even to amendments proposed by joint resolution. Askew v. Firestone, 421 So.2d 151 (Fla. 1982). Nevertheless, this Court has acknowledged that it possesses no power to rewrite or alter a ballot title or summary, but is possessed solely with the remedy of excluding proposals flying under false or misleading colors from the ballot. Smith v. American Airlines, Inc., 606 So.2d 618, 621 (Fla. 1992). In any case, Petitioners bear the burden of showing the ballot title to be "clearly and conclusively defective." Askew, 421 So.2d at 155.

Amici believe this action to be novel in that the proposed amendment (not the ballot title) was placed upon the ballot, not by initiative, not by a revision commission and not by the Legislature, but by the Constitution (i.e., the people) itself. Hence, this Court cannot stop the vote, or even delay it, without overtly departing from the explicit mandate of the Constitution that the people vote on the measure in the 2000 general election. Article V § 10(b) Florida Constitution. Hence, the ordinary remedy of removing the measure from the ballot for future

reinstatement by the Legislature, if desired by it, is not available.

Under these novel circumstances this Court must afford the greatest possible deference to the ballot title proposed by the Legislature and may not disturb its work in the absence of the plainest possible showing that the proposed ballot title is "clearly and conclusively" deceptive and misleading. If the ballot title adequately reveals the true substance of the issue the people must decide, as Amici submit that it does, then the petition must be rejected. If, on the other hand, this Court determines the ballot title to be "clearly and conclusively" deceptive and misleading, then this Court must fashion a remedy that both permits the 2000 election to take place and trenches as little as possible upon the choice made by the Legislature. Under the particular circumstances of this case such a remedy should include permitting the Legislature itself cure the defect.

A. THE SUBSTANCE OF THE MEASURE.

The essence of the measure to be voted upon is this: Do the people wish to supplant the current plan for electing trial judges in the ordinary election process? Or, do the people wish to supplant elections with a plan whereby all trial judges are appointed by the governor from slates

proposed by judicial nominating commissions and are thereafter retained in office or rejected in uncontested retention elections? That is the substance of the measure.

Petitioners' entire case is wrapped up in the erroneous proposition that the adjective "merit" is some how substantive in this context. Indeed, the word "merit" does not appear in the constitution in regard to retention elections of justices and judges of the district courts. Article V § 10(a) Florida Constitution. Although the phrase "merit selection and retention rather than election" does appear in Article V § 10(b) Florida Constitution, as amended in 1998, the word "merit" is not defined in the Constitution, in the statutes, or in the common law. Nor does it have an accepted meaning in the practice of selecting judges in Florida or anywhere else that would permit any credible basis to assure the voters that a more or less "meritorious" system of justice is more likely to result from one method of selection of judges rather than the other. The people who have attempted to make empirical assessments of this question (i.e., which is "better," election or "merit selection"?) have simply failed to find a distinction between the merits of the two systems. See Little, "No! It's the Voters Right to Elect," The Florida

Bar News, Jan. 15, 1990.[1] In short, the work “merit’ in this context is a political term, not a substantive term. Not only is it not a source of deception to exclude the term from the ballot title, but it would also be a source of deception to include it.

In this regard, Petitioners need to be reminded of the ballot title and summary that were printed on the ballots presented by the Constitution Revision Commission and approved by the voters in the 1998 general election. They were:

> **BALLOT TITLE:** LOCAL OPTION FOR SELECTION OF JUDGES AND FUNDING OF STATE COURTS

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[1] That article concludes:

> ALTHOUGH much scholarly effort has been expended in assessing the merits of methods of selecting judges, the nature of the evaluative task is so complex and the measuring tools so inexact that the studies do not conclusively prove that judges selected by one method perform better than judges selected by another method. Nor do they prove that one plan seats lawyers with better credentials that the other does. A typical summary of these studies concluded, "Most of the evidence about Missouri Plan recruitment of state judges leads to the conclusion that selection systems themselves have little impact in guaranteeing that selection procedures will be free from partisan or interest group politics, or that decidedly superior judges will be selected for office. In short, "The findings show that the Missouri Plan does not distinguish itself by producing clearly superior judges." Nor does the Missouri Plan seat judges with qualitative superior educational and experiential backgrounds. After reviewing all the data, one scholar concluded: "[T]he Missouri Plan does not consistently produce obviously superior judges in terms of quality education, cosmopolitan backgrounds, previous judicial experience or nonpartisan careers. Indeed, not only are the judges not decidedly superior in this regard, but they often appear indistinguishable from the others."

> **BALLOT** SUMMARY: PROVIDES FOR FUTURE ELECTIONS TO DECIDE WHETHER TO CONTINUE ELECTING CIRCUIT AND COUNTY JUDGES OR TO ADOPT SYSTEM OF APPOINTMENT OF THESE JUDGES BY THE GOVERNOR, WITH SUBSEQUENT ELECTIONS TO RETAIN OR NOT RETAIN THOSE JUDGES...

Proposed Constitutional Amendments and Revisions to be Voted on November 3, 1998, Sandra B. Mortham, Secretary of State, printed June 23, 1998, p. 14.

What appears above is what the voters saw on the 1998 ballot, and what they saw did not include the word “merit.” Instead, it went to the substantive heart of the matter: Do you want to elect judges? Or, do you want the governor to appoint them, followed by elections to retain or not retain? This is exactly the substantive core of the ballot title the Legislature has placed upon the 2000 general election ballot. That title states:

> SHALL THE METHOD OF SELECTING CIRCUIT [COUNTY] COURT JUDGES..... BE CHANGED FROM ELECTION BY 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?

The substance is there: elimination of elections in favor of appointment by the governor. Is the typical voter, who is assumed to have made some effort to become acquainted with the ballot measures to be voted upon, likely to be deceived as to the substance of the measure? More

specifically, is the average voter likely to believe that the governor's role is purely ceremonial and ministerial; that is, that the governor's role is merely to "annoint" judges that others have selected? (In fact, of course, the nominating commissions will have selected the slate of three nominees from which the governor must make the appointments.) Amici submit that this language will not deceive anyone as to the process by which nominees are selected and will not deceive anyone as to the role the governor plays in the final selection and appointment. Most assuredly, this ballot title would not deceive a voter who prefers elections to vote for appointments. Nor would it deceive a voter who prefers appointments to vote for elections. It is certainly not a case in which the voter must vote "no" to mean "yes." Instead, the ballot title in question gives the voter the "fair notice of the decision he must make" as required by law. Askew, 421 So.2d at 155. In short, the ballot title is not deceptive and misleading and certainly is not "clearly and conclusively" so.

More important than the views of Petitioners or of these Amici is that of the Legislature. Petitioners cannot properly ask this Court to question the motives of the Legislature, and certainly cannot ascribe a motive to deceive. Plainly the Legislature did not believe its chosen

ballot title was deceptive, and its choice must be accepted absent the most compelling showing that the ballot title is "clearly and conclusively"deceitful and defective, which Petitioners have not made.

Accordingly, this Court has no occasion to consider what remedy would be appropriate if the ballot title were defective, and Amici respectfully submit the Court should deny the petition.

B. PETITIONERS' PREFERRED REMEDY IS NOT AVAILABLE TO THIS COURT.

Even if it be assumed *arguendo* that the ballot title is "clearly and conclusively" deceptive and misleading, which Amici deny, then the first remedy sought by Petitioners, i.e., to "revive" a statute the Legislature repealed, is not constitutionally permissible. No matter the gravity of the burden upon this Court to impose the Constitution against over-reaching acts of the Legislature, that burden does not include clothing this Court with any of the legislative power of the state. As this Court know, the legislative power is vested solely in the Legislature absent explicit delegations elsewhere in the constitution. Accordingly, this Court may not supplant the Legislature's choice of a title with others that seem more pleasing or appropriate to Petitioners or even to the Court. Instead, if remedy is

called for, this Court must alter the latest expression of the Legislature in the least degree required to conform to constitutional principles.

Despite Petitioners' assertion, Chapter 00-361 laws of Florida is not unconstitutional. Petitioners have shown no defect in the enacting process that would render the law a nullity or void. Even Petitioners have not challenged the legal validity of section 2 and most of section 1. Nor have Petitioners identified an article or section of the constitution that positively limits the power of the Legislature to choose the ballot title it has chosen or that disempowers it to enact the law. Instead, Petitioners seek to invoke the powers of this Court to safeguard the integrity of public elections. Fortunately, the Legislature itself has provided the vehicle for doing this by enacting § 101.161 Fla. Stat. That provision requires ballot titles to be "clear and unambiguous." This Court has enforced the legislative mandate by applying § 101.161 Fla. Stat. to remove "clearly and conclusively" misleading measures from the ballot. Askew.

The consequence of this is not that this Court possesses no power to withhold the placement of a deceptive and misleading ballot title before the voters. It certainly does pursuant to § 101.161. Instead, the consequence is that the remedy sought by Petitioners, i.e., revival of the

repealed ballot language, is not available. If a remedy is required, this Court must seek a permissible alternative.

Revival of the repealed language would also be impermissible on the ground that in enacting Chap. 00-361 the Legislature overtly reconsidered that repealed language and deliberately rejected it. This legislative history is outlined in Petitioners' petition. For this Court to make an assumption that the Legislature would intend to resurrect language that it had deliberately rejected would constitute a most grievous judicial invasion upon the legislative prerogatives of the Legislature in violation of Article II § 3 and Article III § 1 Florida Constitution and the Republican Form of Government clause of the United States Constitution.

Finally, revival of the repealed language would itself plainly create a deceptive and misleading ballot title. That repealed language is: "Shall circuit [county] court judges... be selected through merit retention and selection?" That statement utterly fails to notify the voter that the choice is being made between *elections* and *appointments*. In the absence of that information, a voter might be deceived to believe that the choice is between having judges selected on a "merit" basis as opposed to a basis that is lacking in "merit." And, without that

information, a voter might be deceived to vote "yes," when a "no" would be forthcoming if the abolition of elections had been revealed. Plainly, such a statement would be deceptive and misleading. Indeed, this Court has flatly held that "it is clearly misleading to reveal only one half of a constitutional 'trade off.'" Evans v. Firestone, 457 So.2d 1351, 1357 (Fla. 1984). Not to tell voters that they are voting to give up the right to choose judges by election grievously fails that test. For this reason alone, the repealed language cannot be "revived." Furthermore, failure to inform the voter of the "chief purpose" of the measure, which is to supplant elections with appointments and retention elections, would be fatally defective in itself. Askew and Wadhams v. Board of County Commissioners, 567 So.2d 414, 416 (Fla. 1990).

C. A REMEDY, IF A REMEDY MUST BE HAD.

If it be assumed *arguendo* that the ballot title is "clearly and conclusively" deceptive and misleading, which Amici deny, then the remedy must satisfy these constraints:

1. It must permit the vote to be taken in the 2000 general election.

2. It must not itself be deceptive and misleading, which would be the consequence of not dealing with the substance; i.e. the choice between elections and appointments by the governor followed by elections to retain or not retain.

3. It must depart from the Legislature's choice the least degree necessary to conform to constitutional principles.

4. It must not usurp legislative powers in contravention of the Florida or the United States Constitution.

(1) Ample Time Remains for the Legislature to "Fix" Any Defect.

As noted above, the facts herein are novel to the jurisprudence of this Court. Moreover, the constitutional principles at stake are of the highest order. The selection of a ballot title is a legislative prerogative. Hence, if the title must be fixed, this Court should afford the Legislature full opportunity to fix it. Time aplenty remains for the Legislature to be convened into special session to fix the title. In these circumstances, in which the constitution requires a vote in November 2000, the Legislature must be permitted to perform its function. Hence, if a remedy is required, this Court should announce that requirement without delay so that the Legislature may do its work.

(2) The "Drop Dead" Alternative.

Should, contrary to Amici's submission, this Court determine that the ballot title must be revised, this Court may announce a "drop dead" ballot alternative to be placed on the ballot if and only if the Legislature is unable to provide a timely revision. Such an alternative must conform

to the requirements stated above. Amici respectfully submit that the 1998 ballot summary provides language that best conforms to and harmonizes all these principles. It may be stated as a ballot title as follows:

> **BALLOT TITLE:** TO DECIDE WHETHER TO CONTINUE ELECTING CIRCUIT [COUNTY] JUDGES IN (CIRCUIT OR COUNTY TO BE ADDED), OR TO ADOPT A SYSTEM OF APPOINTMENT OF THOSE JUDGES BY THE GOVERNOR, WITH SUBSEQUENT ELECTIONS TO RETAIN OR NOT RETAIN THEM.

This language satisfies all the criteria stated above. Amici respectfully submit that this should be the Court's "drop dead" alternative to be placed on the ballot if and only if this Court should decide a remedy is required and the Legislature does not supply a revised title in time for printing the 2000 ballots.

If the Court thought it were restrained to the 15 word limitation, the foregoing could be reduced to:

> **BALLOT TITLE:** SHALL CIRCUIT [COUNTY] JUDGES CONTINUE TO BE ELECTED LOCALLY, OR SHALL THE GOVERNOR APPOINT THEM

CONCLUSION

Amici respectfully submit that Petitioners have not made a sufficient showing that the ballot language is "clearly and conclusively" deceptive and misleading. Accordingly, this Court has no authority or discretion to disturb the ballot language selected by the Legislature and should deny the petition. If and only if this Court disagrees on that

point, the Court possesses the authority to fashion a remedy that satisfies these criteria:

1. It must permit the vote to be taken in the 2000 general election.

2. It must not itself be deceptive and misleading by not dealing with the substance; i.e. the choice between elections and appointments by the governor followed by elections to retain or not retain.

3. It must depart from the Legislature's choice the least degree necessary to conform to constitutional principles.

4. It must not usurp legislative powers in contravention of the Florida or the United States Constitution.

Furthermore, under the novel circumstances of this case, this Court must also give the Legislature ample opportunity to fulfil its legislative responsibility to provide a proper ballot title. To assure that a valid ballot title will be available, this Court may adopt a "drop dead" alternative, consistent with the foregoing criteria, to be employed if and only if the Legislature is unable to perform its function. This language from the 1998 ballot summary satisfies these criteria.

> **BALLOT TITLE:** TO DECIDE WHETHER TO CONTINUE ELECTING CIRCUIT [COUNTY] JUDGES IN <u>(CIRCUIT OR COUNTY TO BE ADDED)</u>, OR TO ADOPT A SYSTEM OF APPOINTMENT OF THOSE JUDGES BY THE GOVERNOR, WITH SUBSEQUENT ELECTIONS TO RETAIN OR NOT RETAIN THOSE JUDGES.

Respectively submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this petition was mailed to Bruce Rogow, Esq., attorney for petitioners, Broward Financial Centre, 500 Financial Blvd., Suite 1930, Fort Lauderdale, Fl. 33394, Debra Harris, Esq., General Counsel for Katherine Harris, Secretary of State of Florida, The Capitol, Tallahassee, Fl. 32399, Kimberly L. Boldt, Esq., Attorney for Amici, 150 W. Flagler Street, Museum Tower, Suite 1400, Miami, Fl. 33130, John Shubin, Esq., attorney for Amici, 46 S.W. 1st Street, 3rd Floor, Miami, Fl. 33130, and Robert A. Butterworth, Attorney General of Florida, The Capitol, Tallahassee, Fl. 32399, on this 25 of August 2000.

Joseph W. Little

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