IN THE SUPREME COURT OF FLORIDA

Case No. SC05–1754

IN RE: ADVISORY OPINION TO THE ATTORNEY GENERAL RE INDEPENDENT NONPARTISAN COMMISSION TO APPORTION LEGISLATIVE AND CONGRESSIONAL DISTRICTS WHICH REPLACES APPORTIONMENT BY LEGISLATURE

ANSWER BRIEF OF THE HONORABLE ALLAN G. BENSE, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES

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PRELIMINARY STATEMENT AND NOTICE OF ADOPTION

The proponent of the proposed initiative, the Committee for Fair Elections, will be referred to as "the sponsor."

The Honorable Allan G. Bense, Speaker of the Florida House of Representatives, adopts the initial briefs of (i) Hons. Mario Diaz-Balart, Lincoln Diaz-Balart, and Ileana Ros-Lehtinen, Members of the United States House of Representatives, and (ii) Hons. Charlie Clary, Alfred Lawson Jr., and Jim Sebesta, Members of the Florida Senate, to the extent applicable. Both briefs were filed on October 20, 2005.

SUMMARY OF ARGUMENT

The summary of the proposed amendment misleads when it should inform, and it hides the ball when it should illuminate. Its characterization of a "nonpartisan method of appointment" is wrong as a matter of fact and law. Its failure to apprise of central elements of the proposal deprives voters of fair notice.

The proposal also violates the stringent single-subject requirements of Article XI, section 3, of the Florida Constitution. It improperly conjoins multiple, discrete changes into a single proposal, forcing voters to make an all or nothing choice. It also substantially affects all three branches of government.

Because the proposal violates Article XI, section 3, Florida Constitution and Section 101.161, Florida Statutes, it must not be permitted on the ballot.

ARGUMENT

I. THE AMENDMENT TITLE AND SUMMARY ARE MISLEADING.

The sponsor concedes that the title and summary must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to the Att'y Gen. re Fee on the Everglades Sugar Production*, 681 So. 2d 1124, 1127 (Fla. 1996). But it neglects to explain how giving partisan legislators the power to appoint partisans to 80% of the commission constitutes a "nonpartisan method of appointment."

This title and summary do not provide fair notice. They mislead the voter and subvert the electoral process.

A. The Misuse of the Word "Nonpartisan" is Inaccurate and Misleading.

The sponsor contends that the summary "plainly discloses that the amendment would create a commission that replaces the Florida Legislature to apportion legislative and congressional districts." Sponsor's Brief at 12. Note that even the sponsor cannot bring itself to describe the commission as "nonpartisan." The summary is defective because it announces a "non-partisan method" of appointment which, in truth, is intrinsically partisan.

Florida law draws a clear distinction between the words partisan and nonpartisan. For example, a "nonpartisan office," such as a judicial office, is "an office for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation." § 97.021(2), Fla. Stat. (2005); *see also* § 105.011(2), Fla. Stat. (2005) ("A judicial office is a nonpartisan office, and a candidate for election or retention thereto is prohibited from campaigning or qualifying for such an office based on party affiliation."). The term "nonpartisan," therefore, means without regard to political party. *See also* Merriam-Webster Online Dictionary, available at www.m-w.com (defining "nonpartisan" as "free from party affiliation, bias, or designation").

The proposed amendment, to the contrary, selects the commission members with *express* regard for party affiliation. Three commissioners are selected by the President of the Senate and three by the Speaker of the House of Representatives, *see* Proposed Amendment at § 16(a)(1)—legislative officers who, in practice, are uniformly selected based on party affiliation.[1] Members of "*minority parties* in the senate" and of "*minority parties* in the house of representatives" appoint an

[1] There is no requirement that the Speaker of the House of Representatives or the President of the Senate belong to the majority party in their respective body. The political reality, however, is that majority members of the legislative bodies elect one of their own to preside. Presumably, this reality contributed to the provision that empowers minority parties, as a counterpoise, to appoint an equal number of commissioners.

additional six commissioners. *Id.* (emphasis added).[2] Indeed, the majority of individuals who select commissioners are undoubted partisans whose authority to nominate derives from their party affiliation.[3]

The sponsor cannot escape the partisan nature of the Commission by suggesting that the requirement of a supermajority vote (thus requiring crossover voting for commission action), or an equal balancing of opposing partisans, transforms the commission into something else. The Florida Legislature is frequently required by the State Constitution to act by a two-thirds supermajority. *See, e.g.*, Art. I, § 24(c), Fla. Const. (exemption of records from public records law); Art. III, § 4(d) (overriding gubernatorial veto); Art. III, § 8(c) (expulsion of members of either chamber); Art. III, § 17 (impeachment and conviction of public officers); Art. V, § 2(a) (repeal of rules of judicial administration). But that hardly makes the Legislature a nonpartisan body. The most that can be said is that a partisan body can act in a bipartisan fashion. Thus, even if the proposed

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[2] The Chief Justice of this Court nominates the three remaining members, none of whom may be registered with the "two largest parties in the senate and the house of representatives." Proposed Amendment at § 16(a)(1). But even the Chief Justice is free to choose partisans of minor parties.

[3] Common Cause of Georgia notes that among the disadvantages of a redistricting commission is the "partisan bias of politically-appointed commission members." Common Cause, Independent Redistricting, available at http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=998747 (last visited November 8, 2005). Undeniably, 80% of this commission is politically appointed.

commission adopts redistricting plans on a bipartisan basis, the body itself—and certainly the "method of appointment"—is not nonpartisan.

Similarly, the proposed commission is not a nonpartisan body merely because the partisans on either side are equal in number. Again, a legislature equally divided between Republicans and Democrats is in no sense nonpartisan. The body is "equally divided" precisely because its membership is based on party affiliation. And for the same reason, this proposed commission is manifestly partisan, since 80% of its membership is based on party affiliation.

Notably, the proposed redistricting commission fails the test of nonpartisanship advanced by Common Cause, the self-professed leader of the sponsor, the Committee for Fair Elections, *see* http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=192839 ("Common Cause Florida is leading a new coalition, The Committee for Fair Elections, to stop unfair redistricting . . . .") (last visited November 9, 2005). According to Common Cause, a nonpartisan commission must be structured "so that the two major political parties cannot collude [join forces] to create a plan without support from other members not affiliated with either major political party." Common Cause, Redistricting Guidelines, available at http://www.commoncause.org (last visited November 9, 2005). Contrary to that standard, this proposed commission would permit

Florida's two major parties to join forces and obtain the necessary supermajority vote without support from the three other commission members.[4]

On election day the voter will not have the proposed amendment text in the voting booth. *Armstrong v. Harris*, 773 So. 2d 7, 12-13 (Fla. 2000). Accordingly, the summary must faithfully summarize the amendment language. But if this proposed amendment were to reach the ballot, a voter would be asked to vote for a "nonpartisan" commission that could include among its members pollsters, campaign managers, fund raisers, or political consultants. The term nonpartisan has no place in this summary, and voters should not be tricked into believing otherwise.

B. The Summary Omits Critical Information.

The sponsor's brief contends that the summary includes "all details reasonably necessary to assist the voter in making an informed decision." Sponsor's Brief at 12. That is not the case. For example, the proposed amendment changes the standards and requirements for new districts by requiring all single-member districts. Currently, the Florida constitution also allows for multi-member districts. Art. III, § 16, Fla. Const. The proposed amendment also adds an

[4] Common Cause also notes that any independent redistricting commission should "reflect the geographic, racial, ethnic, gender, and age diversity of the state." Common Cause, Redistricting Guidelines, available at http://www.commoncause.org (last visited November 9, 2005). This proposal makes no such provision.

undefined requirement that all districts be "convenient." Next, the proposed amendment grants new and extraordinary powers to the Florida Supreme Court, discussed more fully below, which are omitted entirely from the summary. Each of these changes is vital to a voter's informed decision.

Floridians are entitled to a summary providing the "full truth" of a proposed amendment. *Armstrong*, 773 So. 2d at 21. When they are told that they are to vote on creation of a nonpartisan commission, but *not* told the commission will be selected by partisans, they are denied the whole truth. When they are told the proposal creates a commission to apportion districts, but *not* told that it also changes the standards for drawing districts, they are misled. When they are told nothing of the grant of new powers to the judiciary, they are deprived of fair notice or the right to cast an informed vote.

II. THE AMENDMENT ENCOMPASSES MORE THAN ONE SUBJECT.

A. Because the Proposed Amendment Encompasses More than One Subject, it Violates the Single-Subject Requirement.

Article XI, section 3 of the Florida Constitution demands that an initiative petition "embrace but one subject and matter *directly connected therewith*"—a requirement decidedly more stringent than the single subject test for legislation. Art. XIII, § 16, Fla. Const. (emphasis added); *see also Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984). This Court requires "strict compliance" with the standard. *Ray v. Mortham*, 742 So. 2d 1276, 1279 (Fla. 1999).

While the sponsor's brief argues that the amendment's "single subject is to create a fifteen–member independent commission to replace the legislature to apportion legislative and congressional districts," it neglects to inform that the proposal also changes the standards for drawing new districts (single-member and convenient). This comprises two discrete subjects, about which voters could reasonably differ. Viewed another way, if this proposal was severed, there would remain "two complete, workable proposals"; (1) creation of a commission, and (2) a change in the standards for drawing districts. *See Ray v. Mortham*, 742 So. 2d at 1288 (Lewis, J., concurring in result). This proposed initiative fails the stringent test of Article XI, section 3, Florida Constitution.

Next, as explained more thoroughly in the Speaker's Initial Brief, the proposed amendment violates the single-subject requirement because it changes the manner in which legislative *and* congressional districts are created. Under current law, the process for apportioning state legislative districts is different than the process for apportioning congressional districts. Thus, the proposed amendment would substantially impact two entirely different processes. Furthermore, by requiring commissioners to forego running for office after serving on the commission, the proposed amendment establishes a new qualification for legislators. Reasonable voters might differ on these discrete issues, but because they are conjoined, voters face an "all or nothing" choice. *See Ray v. Mortham*,

742 So. 2d at 1288 (Lewis, J., concurring). That violates Article XI, section 3 of the Florida Constitution.

B. Because the Proposed Amendment Substantially Modifies Multiple Branches of Government, It Violates the Single-Subject Requirement.

The single-subject requirement serves to "prevent a constitutional amendment from substantially altering or performing the functions of multiple aspects of government." *Advisory Op. to the Att'y Gen. re Voluntary Univ. Pre-Kindergarten Ed.*, 824 So. 2d 161, 165 (Fla. 2002). The proposed amendment unquestionably affects the legislative branch, as the sponsor concedes. Sponsor's Brief at 9. The sponsor also admits that the proposed amendment will affect other branches, but it incorrectly contends that the effect would be insubstantial.

1. *The proposed amendment substantially affects the Judicial Branch.*

As discussed in the Speaker's Initial Brief, the proposed amendment introduces a new and substantial role for the judiciary in the redistricting process. Yet, the sponsor contends that the proposed amendment:

> *continues to allow for*: judicial apportionment (by the Florida Supreme Court) in the event the commission does not complete its reapportionment plan; judicial review of apportionment by the Florida Supreme Court; … and judicial apportionment (by the Supreme Court) in the event an amended plan is not filed or the amended plan is not valid.

Id. (emphasis added). Although the Court already possesses these powers with respect to state legislative districting, *it has no similar role in the separate process by which congressional districts are currently drawn*. With respect to congressional districting, the proposed amendment does not, as the sponsor asserts, *continue to allow for* the exercise of these powers by the Court; instead, it would *create* them.

Under current law, congressional districting and state legislative districting are accomplished by separate and distinct processes. Unlike state legislative districting, this Court is under no constitutional duty either to review congressional districting plans before they take effect or to frame congressional districting plans if the Legislature fails to adopt a valid plan. Congressional districting plans become law upon enactment, without any automatic judicial review. *See* § 8.0002, Fla. Stat. (2005) (delineating congressional districts).

In contrast, current law subjects state legislative district plans to judicial review before they can take effect. Art. III, § 16(c), Fla. Const. If the Court invalidates the plan, the Florida Constitution requires the Governor to call an extraordinary apportionment session, and the Court must review any plan produced at this special session. Art. III, § 16(d-e), Fla. Const. If the new plan is invalid, or if the Legislature does not submit a plan, the Court must itself draw state legislative districts. Art. III, § 16(f), Fla. Const. No similar procedure for judicial

review and judicial apportionment by the Florida Supreme Court now exists with respect to congressional districts.

The proposed amendment, therefore, would confer on the Judiciary new powers to review congressional districting plans and draw congressional districts if the commission fails to file a districting plan or files an invalid one.

2. *The proposed amendment substantially affects the Executive Branch.*

The proposed amendment also substantially affects the Executive Branch, but that branch is not even mentioned in the sponsor's brief. Under current law, the Governor plays an important role in the creation of congressional districts—his veto power enables him to enjoy meaningful participation in the congressional districting process. *Cf.* § 8.0002, Fla. Stat. The proposed amendment, by placing congressional redistricting in the hands of the commission and this Court, wipes out the Governor's veto power.

CONCLUSION

The ballot title and summary do not fairly and unambiguously disclose the chief purpose of the proposed amendment. Instead, they mislead voters, omit critical information about the proposed amendment, and do not provide fair notice to voters. In addition, the proposed amendment encompasses more than one subject and substantially affects multiple branches of government.

The people of Florida have every right to amend their constitution. But no amendment may be adopted if it violates the Florida Constitution and governing statutes. This proposal is defective and must not be permitted on the ballot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Florida Rules of Appellate Procedure.

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