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 MARIO DIAZ-BALART, LINCOLN DIAZ-BALART, and ILEANA ROS-LEHTINEN MEMBERS, UNITED STATES HOUSE OF REPRESENTATIVES IN OPPOSITION TO THE INITIATIVE

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Certification of Type Face and Type Size

Mario Diaz-Balart, Lincoln Diaz-Balart, and Ileana Ros-Lehtinen, by and through their undersigned counsel, hereby certifies that they have utilized the Times New Roman type face at a size of 14 points throughout this Answer Brief.

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SUMMARY OF ARGUMENT

The initial brief filed by Committee for Fair Elections, the Sponsor of the proposed amendment recites a number of the general principles which this Court applies in reviewing initiative petitions for compliance with single subject and ballot summary requirements, and concludes by offering the Sponsor's opinion that the proposed amendment meets these requirements. The brief's generalized treatment of the proposed amendment does not address the scope of its proposal. In failing to do so, the Sponsor confirms the contention of Congresspersons Mario Diaz-Balart, Lincoln Diaz-Balart, and Ileana Ros-Lehtinen that the proposal is clearly defective as to both single subject and ballot summary requirements.

The proposed amendment violates the single subject requirement of the Constitution by combining multiple subjects, Congressional and legislative redistricting and reapportionment, into one "all or nothing" proposal, as a prohibited form of logrolling. It conceals significant collateral effects which would result if the proposal is adopted, altering multiple functions of this Court, the Legislature, and the office of the Governor.

The ballot summary misleads voters by failing to inform them of the full range of matters. It implies that Congressional reapportionment can be conducted by a governmental body which is not the Legislature, in contravention of the United States Constitution and federal statutes. The summary's use of the phrase

"non-partisan" when 80 percent of the members of he proposed Commission are appointed by partisans, is affirmatively misleading. The ballot summary states that Commission members will be limited from seeking office, but the proposed amendment text does not contain such a broad prohibition on candidacy. Moreover, the ballot summary does not disclose that the Florida Constitution may not add additional qualifications for candidates for Congress. The Governor plays an important role in the drafting of Congressional districts, but the ballot language fails to disclose the removal of the Governor from the process. Finally, the ballot language implies that, as the result of the amendment, this Court will have a role in redistricting, ignoring the fact that this Court presently has a major role in the redistricting of the Legislature.

ARGUMENT

I.

THE PROPOSED AMENDMENT VIOLATES THE SINGLE SUBJECT REQUIREMENT OF THE FLORIDA CONSTITUTION

A. THE PROPOSED AMENDMENT "LOGROLLS" SEPARATE AND DISTINCT ISSUES INTO A SINGLE INTO A SINGLE INITIATIVE PROPOSAL

In their initial brief, Congresspersons Mario Diaz-Balart, Lincoln Diaz-Balart, and Ileana Ros-Lehtinen identified two distinct violations of the single subject requirement of the Florida Constitution: logrolling and the alteration of multiple functions of state government. The generalized treatment given these two issues in the Sponsor's initial brief is telling. In a single paragraph, the Sponsor baldly asserts that the proposed amendment "does not engage in logrolling". Initial Brief of the Sponsor Committee at 8. The Sponsor focuses on the creation of a single commission to create Congressional and Legislative reapportionment plans as proof that the proposed amendment deals with a "single subject." That approach is too simplistic.

The focus is not on whether the amendment would create a single commission to redistrict the Legislature and reapportion the State's Congressional delegation, but whether the amendment attempts to intertwine unrelated

governmental actions, forcing voters to accept one popular provision in order to adopt a second, perhaps unpopular, proposal. *See In re Advisory Opinion to the Attorney General — Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994); *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998). Although the Legislature is presently responsible for drawing both the Legislative and Congressional plans, the source of those duties is unrelated.

Article III, section 16 of the Florida Constitution imposes duties upon the Legislature and this Court with regard to the creation of a legislative plan after the decennial census, but is silent as Congressional redistricting. Likewise, Article I, section 4 of the United States Constitution imposes an obligation on the legislatures of the several states to prescribe the "times, places and manner of holding elections" for Representatives. The United States Constitution does not speak directly to the requirement that the States redistrict their legislatures at all.

The mandate to redistrict Congressional and state legislative seats springs from different Constitutions. The provisions governing the redistricting process for each body also flow from different and distinct federal constitutional provisions, which create different standards. With regard to Congressional districts, the Supreme Court has set the strictest standard for achieving equality of population. The Court stated in *Westberry v. Sanders,* 376 U.S. 1 (1964) that "the

command of Article I, Section 2 of the U.S. Constitution, that the Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one mans vote in a congressional election is to be worth as much as another's." *Id*. at 7-8.

In contrast, the state is obligated to redistrict its legislature based on a judicially recognized principle of "one-person, one-vote". *Baker v. Carr*, 369 U.S. 186 (1962); *See also Reynolds v. Sims*, 377 U.S. 533 (1964). In *Reynolds*, the United States Supreme Court held that the Fourteenth Amendment required that seats in state legislatures be reapportioned on a population basis. In its now famous words, the Supreme Court concluded that:

> [T]he basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies … The Equal Protection Clause demands no less than *substantially equal* state legislative representation for all citizens, of all places as well as of all races. We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.

377 U.S. at 567-68 (emphasis added)(footnotes omitted).

Baker and *Reynolds* embody a reaction against the practice in several states of maintaining districts for state legislative offices that used criteria, such as county

boundaries, without due regard to population figures. The Court in *Reynolds* specifically stated that:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.

377 U.S. at 562.

Congressional districts within a state must be as nearly equal in population as practicable. However, the Supreme Court has validated wider population discrepancies among State legislative plans. In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Supreme Court held that New Jersey's congressional redistricting plan violated Article I, section 2, even with an overall deviation between the largest and smallest congressional districts of .6984 percent (3,674 people). The plaintiffs carried their burden to prove that the State did not undertake a good-faith effort to reduce as much as practical the deviation amongst districts, and the State failed to

prove that the differences were justifiable. As a rule of thumb, most every expert agrees that the "safe harbor" in terms of the overall deviation in a congressional district plan is substantially less than one percent and often approaches zero.

With regard to state legislative districts, the Supreme Courts has permitted a greater overall deviation amongst districts. In *Reynolds*, the Court observed all that is necessary when drafting state legislative districts is achieving "substantial equality of population among the various districts."[1] In *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) the court specifically stated that "Our decisions have established, as a general matter that an apportionment plan with a maximum population deviation under 10 percent falls within this category of minor deviations."[2]

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[1] The phrase "substantial equality of population" has come to generally mean that a legislative plan will not be held to violate the Equal Protection Clause if the difference between the smallest and largest district is less than ten percent.

[2] In two cases, *Mahan v. Howell*, 410 U.S. 315 (1973) and *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Supreme Court *upheld* state legislative redistricting plans with a deviation between the smallest and largest districts *of more than ten percent*. In *Mahan,* the Supreme Court upheld Virginia's state legislative redistricting plan that had a deviation between the smallest and largest districts of sixteen percent amongst districts to the Virginia House of Delegates. The Supreme Court determined that the General Assembly's desire to preserve political subdivision boundaries, justified the deviation amongst the districts. In *Voinovich,* the Supreme Court reversed a decision of the lower court holding Ohio's legislative plan to be unconstitutional because the overall deviation for the Ohio House of Representatives was 13.81 percent and the overall deviation of the Ohio Senate plan was 10.54 percent. The Court determined that the preservation of the boundaries of political subdivisions was a "rational state policy" that in this case justified an overall deviation in excess of ten percent. Whether examining

Not withstanding the foregoing analysis, the proposed amendment treats the federal and state obligation to redistrict alike. Also, the initiative petition before the Court requires voters who may feel more strongly about state redistricting or Congressional reapportionment to cast an all or nothing vote on the initiative, without a way to separate to these two distinct concepts.

B. THE PROPOSED AMENDMENT ALTERS SEPARATE FUNCTIONS OF MULTIPLE BRANCHES OF GOVERNMENT

The Sponsor acknowledges that a proposed initiatory amendment may not alter or perform the functions of multiple forms of government. Initial Brief of the Sponsor Committee at 8. The Sponsor admits that the amendment "alters the functions of the Florida Legislature by removing its powers to reapportion legislative and congressional districts." *Id*. at 8-9. The Sponsor then broadly proclaims that "[a]s the Independent Commission Initiative only substantially alters one branch of government, it cannot substantially alter *multiple* branches of government." *Id*. at 9 (emphasis in original). Again, the Sponsor takes an approach that is too simplistic.

The proposal alters the role of the Legislature in ways that it fails to articulate or recognize. The Legislature is removed from the primary decision-

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deviations for Congressional or state plans the courts will give some deference to the legislative body in applying rational or sound public policy objectives that may lead to deviations within the parameters already set by existing precedents

making body on reapportionment and redistricting. Four of its members, the Speaker of the House and President of the Senate, and an elected minority member from each chamber, will now have a duty which is tangential to the task of drawing districts: the appointment of 12 of the 15 members of the Commission. One hundred fifty six members of the Legislature, as a part of the collective and collegial branch of government, will be removed from reapportionment and redistricting entirely, while two minority members of these two chambers will be given constitutional status.

Although the Sponsor acknowledges the present role of this Court in legislative redistricting, it does not disclose that this Court does not have a present role in the drafting of Congressional districts. That power to review and approve the Congressional plan is also a substantial alteration of this branch of government. Moreover, the Sponsor does not admit that the new duties imposed upon the Chief Justice of this Court and the Chief Judges of the District Courts to nominate and appoint Commission members are a substantial alteration of those offices.

The Sponsor also ignores the fact that the proposal will strip the Governor's power to approve or veto the Congressional plan. Such a change removes from his office a significant function and "substantially affect[s] more than one function of government and multiple provisions of the Constitution." *Advisory Opinion To The Attorney General Re Requirement For Adequate Public Education Funding*, 703

So. 2d 446, 449 (Fla. 1997).

This Court has recognized that when a proposal substantially alters or performs the functions of multiple branches, it violates the single-subject test. *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission*, 705 So. 2d 1351, 1354 (Fla. 1998). As discussed *supra*, the proposed amendment significantly alters the powers of the executive, legislative, and judicial branches of Florida government. Although the text of the proposed amendment only notes that it will alter Article III, section 16 of the Florida Constitution, it will impact, and by implication modify, Article III, sections 2, 6, 7, and 8, and Article V, sections 2(b) and 2(c).

II.

THE PROPOSED BALLOT SUMMARY IS CLEARLY DEFECTIVE

The arguments advanced by the Sponsor in support of the ballot summary that it drafted are as myopic as the case it attempted to make for compliance with the single subject requirement. The Sponsor applauds itself for staying under the number of words permitted in the ballot title and summary. Initial Brief of the Sponsor Committee at 12. However, the Sponsor erroneously claims that "the summary accurately tracks the text of the amendment itself, *including all details reasonably necessary* to assist the voter in making an informed decision." *Id.* (Emphasis supplied.)

A less hurried examination of the proposed ballot language shows that it fails to meet the test of section 101.161, Florida Statutes, to advise the electorate of the true meaning and ramifications of an amendment. *See Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). Here, the ballot title and summary are not accurate and informative and fail to give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots. *See Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 468 (Fla. 1995).

The ballot summary fails to warn voters that the State does not have the authority under the Article I, section 4 of the U.S. Constitution to delegate the power to draft Congressional districts.

The Sponsor failed in its initial brief to address each part of the ballot title and summary to persuade this Court that neither were misleading. Again, the Sponsor's cursory review of its own proposal only serves to highlight its misleading nature.

The Sponsor fails to justify its use of the word "non-partisan" in the title and ballot summary. As previously discussed, the Commission, as envisioned by the amendment, is not "non-partisan". Twelve of the 15 members will be chosen by partisans and the three members chosen by the Chief Justice can be partisans, so long as they are not members of the two major parties. Clearly, this initiative

petition flies under false colors. *In re Advisory Opinion to the Attorney General - Save Our Everglades, supra* at 1341.

The Sponsor also failed to address how the amendment will limit Commission members "from seeking office for four years after service on the Commission." On its face, the amendment does not limit members from seeking any office. Rather, it makes the taking of an oath notto seek election for office for a period of four years a condition of appointment. However, neither the ballot summary nor the amendment itself details what the consequences of violating that oath might be or how it would be enforced. The Sponsor also failed to address the issue of whether the amendment, if approved by the voters, could constitutionally restrict Commission members from being candidates for the Congress. The Qualifications Clause states that a U.S. Representative must be at least 25 years of age, a citizen of the United States for seven years, and an inhabitant of the state from which he is elected. Article I, section 2, clause 2, U.S. Const. The United States Supreme Court has clearly held that the States may not impose any additional qualifications upon candidates for Congress. *U.S. Term Limits v. Thorton*, 514 U.S. 779 (1995). The Sponsor failed to address the fact that the ballot summary would not alert the voters to the fact that imposing a qualification on Congressional candidates cannot be enforced under the United States Constitution.

The Sponsor also failed to address the fact that the ballot summary does not inform voters that the Governor will be stripped of his role in the Congressional reapportionment process.

Finally, the Sponsor did not discuss the fact that the ballot summary, by stating that the amendment would require "Florida Supreme Court to apportion districts if commission fails to file a valid plan", implies that this Court does not have a present role in redistricting. Under the present language of Article III, section 16, this Court is an integral participant in the redistricting of the Florida House and Senate. However, the Sponsor failed to justify the inclusion of this portion of the ballot language where a potential voter might be persuaded to vote for the amendment on the belief that that it would include the Court in the redistricting process for the first time.

CONCLUSION

The Sponsor had an opportunity to fully explain how the proposed amendment met the requirements of the Florida Constitution and section 101.161. It failed to do so. Instead, it glossed over the faults and defects of the amendment. After due review, this Court should reject the proposed amendment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was mailed to the Honorable Jeb Bush, Governor, PL-05 The Capitol, 400 South Monroe Street, Tallahassee, FL 32399-0001, the Honorable Charlie Crist, Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050, the Honorable Glenda Hood, Secretary of State, R. A. Gray Building, 500 S. Bronough Tallahassee, FL 32399-0250, the Honorable Tom Lee, President, Florida Senate, Suite 409 The Capitol**,** 404 South Monroe Street, Tallahassee, FL 32399-1100; Geroge M. Meros, Jr., Gray Robinson, 301 S. Bronough Street, Suite 600, Tallahassee, 32301 for the Honorable Allan G. Bense, Speaker, Florida House of Representatives; Mark Herron Esq., Committee for Fair Elections, 215 South Monroe St., Suite 701, Tallahassee, FL 32302; Dawn K. Roberts, Esq., Director, Florida Division of Elections, R. A. Gray Building, 500 S. Bronough Tallahassee, FL 32399-0250 and Barry Richard, Esq., Greenberg Traurig, P.A., 101 Esast College Avenue, Tallahassee, FL 32301 this 3rd day of November, 2005.