IN THE SUPREME COURT
STATE 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

INITIAL BRIEF OF CHARLIE CLARY, ALFRED LAWSON JR. AND JIM SEBESTA

Filed in Opposition to Initiative Petition 05-14

ORIGINAL PROCEEDING

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STATEMENT OF THE INTERESTS OF THE PARTIES

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STATEMENT OF THE CASE

Committee for Fair Elections, a political action committee, sponsored a petition drive to amend the Florida Constitution by initiative pursuant to Article XI, Section 3 of the Constitution. The ballot title and summary for the proposed amendment under review were as follows:

Title

> INDEPENDENT NONPARTISAN COMMISSION TO APPORTION LEGISLATIVE AND CONGRESSIONAL DISTRICTS WHICH REPLACES APPORTIONMENT BY LEGISLATURE

Summary

> Creates fifteen member commission replacing legislature to apportion single-member legislative and congressional districts in the year following each decennial census. Establishes nonpartisan method of appointment to commission. Disqualifies certain persons for membership to avoid partiality. Limits commission members from seeking office under plan for four years after service on commission. Requires ten votes for commission action. Requires Florida Supreme Court to apportion districts if commission fails to file a valid plan.

Full Text

Delete current Article III, Section 16, and insert the following:

Section 16. Apportionment and Districting Commission. --.

(a) APPORTIONMENT AND DISTRICTING COMMISSION. In the year following each decennial census or when required by the United States or by court order, a commission shall divide the state into not less than 30 or more than 40 consecutively numbered single-member senatorial districts of convenient contiguous territory, not less than 80 or more than 120 consecutively numbered single-member representative districts of convenient contiguous territory as provided by this constitution or by general law and shall divide the state to create as many congressional districts as there are representatives in congress apportioned to this state. Districts shall be established in accordance with the constitution of this state and of the United States and shall be as nearly equal in population as practicable.

(1) On or before June 1 in the year following each decennial census, or within 15 days after legislative apportionment or congressional districting is required by law or by court order, 15 commissioners shall be certified by the respective appointing authorities to the custodian of records. The president of the senate and the speaker of the house of representatives each shall select and certify three commissioners. Members of minority parties in the senate shall elect one from their number who shall select and certify three commissioners. Members of the minority parties in the house of representatives shall elect one from their number who shall select and certify three commissioners. On or before June 1 of the same year, the chief justice of the supreme court shall select three commission members, each of whom shall be a registered voter who for the previous two years was not registered as an elector of either of the two largest political parties in the senate and the house of representatives. The chief justice shall select commissioners from recommendations made by the chief judge of each district

court of appeal. Each chief judge shall recommend three individuals who otherwise meet the requirements of this section and who reside in that district. From the individuals recommended by chief judges of the district courts of appeal, the chief justice shall select and certify three commissioners. No two commissioners selected by the chief justice shall reside in the same appellate district.

(2) a. No commissioner shall have served during the four years prior to his or her certification as an elected state official, member of congress, party officer or employee, paid registered lobbyist, legislative or congressional employee, and no commissioner shall be a relative, as defined by law, or an employee of any of the above.

b. As a condition of appointment, each commissioner shall take an oath affirming that the commissioner will not receive compensation as a paid registered lobbyist, or seek elected office in any legislative or congressional district for a period of four years after concluding service as a commissioner.

(3) The commission shall elect one of its members to serve as chair and shall establish its own rules and procedures. All commission actions shall require 10 affirmative votes. Meetings and records of the commission shall be open to the public and public notice of all meetings shall be given.

(4) Within 180 days after the commission is certified to the custodian of records, the commission shall file with the custodian of records its final report, including all required plans.

(5) After the supreme court determines that the required plans are valid, the commission shall be dissolved.

(b) FAILURE OF COMMISSION TO APPORTION; JUDICIAL APPORTIONMENT. If the commission does not timely file its final report including all required plans with the custodian or records, the commission shall be dissolved, and the attorney general shall, within five days, petition the supreme

> court of the state to make such apportionment. No later than the sixtieth day after the filing of such petition, the supreme court shall file with the custodian of records an order making such apportionment.
>
> (c) JUDICIAL REVIEW OF APPORTIONMENT. Within 15 days after the final report of the commission is filed with the custodian of records, the attorney general shall petition the supreme court to review and determine the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within 30 days from filing the petition, shall enter its judgment.
>
> (d) EFFECT OF JUDGMENT IN APPORTIONMENT. A judgment of the supreme court determining the apportionment to be valid or ordering judicial apportionment shall be binding upon all citizens of the state. Should the supreme court determine that the apportionment made by the commission is invalid, the commission, within 20 days after the ruling, shall adopt and file with the custodian of records an amended plan that conforms to the judgment of the supreme court. Within five days after the filing of an amended plan, the attorney general shall petition the supreme court of the state to determine the validity of the amended plan or if the commission has failed to file an amended plan, report that fact to the court.
>
> (e) JUDICIAL APPORTIONMENT. Should the commission fail to file an amended plan or should the supreme court determine the amended plan is invalid, the commission shall be dissolved, and the supreme court shall, not later than 60 days after receiving the petition of the attorney general, file with the custodian of records an order making such apportionment."

The above amendment was one of three sponsored by Committee for Fair Elections. The other two petitions proposed amendments that would create standards for apportionment and establish a schedule for implementation of the

other two. The three petitions were circulated in a format whereby all three were bound together on the top or side and layered so that only the title and summary of the proposed amendment creating standards was visible to the voter without lifting pages. Only the signature lines of the remaining two petitions were visible.

The sponsor used a number of different formats for the petition. One format contained a directive at the top binding on the front page that directed voters to "SIGN ALL THREE PETITIONS". Another format said nothing at the top.[1] None of the formats gave any indication on the front page that there were three separate proposed amendments bound in the package or that a voter signing any of the visible signature lines other than the top one was signing for a different proposed amendment than the one showing on the top page. The summary on the top page was for a different amendment than the one currently under review and gave no indication of the contents of the current amendment.

The Secretary of State initially approved all three petitions. However, the petition proposing standards (the one on top of the bundled petitions) was later disapproved because the ballot summary contained more than 75 words, and that

[1] Copies of the differently formatted petitions are included in the Appendix to this brief. [App. 1, 2]

petition is not before the court. The third petition, which establishes a schedule for implementation of the other two, is before the Court in case number 05-1755.[2]

On September 29, 2005, the Florida Attorney General requested the Court's advisory opinion on whether the commission and scheduling amendments comply with the single subject requirement of Article XI, section 3 of the Florida Constitution, and meet the ballot title and summary requirements of section 101.161, Florida Statutes.

[2] The opponents herein do not challenge the scheduling amendment, but it is dependent upon passage of the commission amendment that is challenged and should be removed from the ballot if the commission amendment is removed.

INTRODUCTION

The ballot summary of a proposed constitutional amendment must state in clear and unambiguous language the chief purpose of the amendment and must be accurate and informative. *Treating People Differently*, 778 So. 2d 888 (Fla. 2000). The summary currently under review fails to meet these criteria both as to how it would appear on the ballot and as to how it appeared on petitions at the time signatures were gathered.

There is a significant divergence in language between the ballot summary of the amendment under review and the actual text of the amendment. As result, the summary would be materially misleading to voters as they cast their ballots. The summary was also materially misleading as it was presented to voters on petitions for signatures to place the measure on the ballot. The summary that appeared on the first page of the bundled petitions made no reference to the current amendment, and nothing on the first page alerted voters to the fact that the bundle contained three separate amendments and that one of the visible signature lines was for the current amendment.

SUMMARY OF ARGUMENT

There are two material discrepancies between the language of the ballot summary and the text of the proposed amendment, a defect that this Court has held to be fatal on more than one occasion.

The ballot summary tells voters that the proposed amendment would create a commission to redraw legislative and congressional territorial boundaries and that the selection of commission members will by a "nonpartisan method." In actuality, the proposed amendment provides for 80% of the commission members to be selected by a method that is, by design, patently partisan.

The ballot summary also states that commission members are limited from seeking office in the commission-apportioned territories for a period of four years after serving on the commission. No such limitation exists in the proposed amendment. The amendment simply requires commission members to *take an oath* not to seek such office for four years. Nothing in the amendment or elsewhere in the Florida Constitution makes such an oath enforceable. Moreover, the United States Constitution precludes such a limitation on congressional candidates, whom the ballot summary purports to include.

As presented to voters on petitions, the summary was fatally defective in yet another respect. The petition to place the current amendment on the ballot was one of three that were bound together. Signature lines for all three petitions were visible without turning pages, but only one ballot summary was so visible. The summary shown on the top page was for a different amendment than the one currently under review and contained no reference to the provisions of the current amendment. No indication was given on the top page that there were petitions for two other

amendments appended or that signing on any but the top signature line would be an endorsement of one of the other two petitions. Thus, the ballot summary shown on the top page of the bound petitions was misleading as to the amendment here reviewed.

ARGUMENT

I
THE DESCRIPTION IN THE BALLOT SUMMARY OF THE METHOD OF SELECTING COMMISSION MEMBERS AS "NONPARTISAN" IS MATERIALLY MISLEADING

This Court has recognized that a divergence in language between the ballot summary and the text of the proposed amendment, including the misuse of a single critical word, will render a proposed amendment invalid if it could mislead voters or create an ambiguity that forces voters to speculate as to the meaning and effect of the proposal. *Smith v. American Airlines, Inc.*, 606 So. 2d 618 (Fla. 1192) (incorrect use of "ad valorem" in summary); *Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563 (Fla. 1998) (incorrect use of "citizen" in summary). The summary in the case at bar suffers from the same type of defect addressed in the cited cases.

The ballot summary states that the proposed amendment: "Establishes *non-partisan method* of appointment to commission." (emphasis added) The statement is material to a voter's decision. It might well be a decisive influence either way on whether a voter casts a ballot for or against the amendment. It is also inaccurate.

Florida Statutes define the term "nonpartisan" with respect to the method of selecting office holders:

> "Nonpartisan office" means an office for which a candidate is prohibited from campaigning or qualifying for election or retention in office based on party affiliation.

§97.021, Fla. Stat. (2005). The term appears in at least 18 additional sections, always with the same meaning - political parties and party affiliation play no part in the selection process.[3] That meaning is consistent with common usage of the term nonpartisan. Thus, a voter reading the ballot summary statement that the proposed amendment, "Establishes non-partisan method of appointment to commission," would reasonably conclude that the amendment is designed to eliminate party affiliation from the process for selecting commission members. Nothing would be farther from the truth.

The proposed amendment provides for the *party leaders* of each legislative chamber to select 3 commission members and a representative of the *minority parties* in each chamber to select 3 members. Thus, the method of selecting 12 out of the 15 commission members is strictly partisan. Only the selection of 3 of the commission members can fairly be described as nonpartisan. They are selected by the Chief Justice of the Supreme Court from a pool nominated by the chief judges

[3] §§ 101.2512, 101.5606, 105.011, 163.3247, 189.4051, 190.006, 216.235, 350.031, 350.05, 430.05, 582.18, 98.255, 1001.361, 105.031, 191.005, 388.101, 105.041, 189.405, Fla. Stat. (2005).

of the District Courts of Appeal. It is difficult to understand how the sponsors of the amendment could devise a method whereby 80% of the commission members are selected through a partisan process and only 20% through a nonpartisan process and then describe the entire process as a "nonpartisan method" of selecting members. Whatever may have been the reasoning of the sponsors, the resulting ballot summary is materially misleading.

II
THE STATEMENT IN THE BALLOT SUMMARY THAT THE PROPOSED AMENDMENT LIMITS COMMISSION MEMBERS FROM SEEKING OFFICE UNDER THE PLAN FOR FOUR YEARS AFTER SERVICE IS MATERIALLY MISLEADING

The ballot summary states that the proposed amendment, "Limits commission members from seeking office under plan for four years after service on commission." Again, the summary is entirely inaccurate.

There is no such limitation in the proposed amendment. The only provision dealing with a commissioner seeking office after service states:

> As a condition of appointment, each commissioner shall *take an oath* affirming that the commissioner will not receive compensation as a paid registered lobbyist, or seek elected office in any legislative or congressional district for a period of four years after concluding service as a commissioner.

(emphasis added) Commissioners are not limited from seeking office by the amendment. They are merely required to take an oath not to seek such office. Nothing in the provision itself or elsewhere in the Florida Constitution makes the oath enforceable. Whether such an oath would ever be held to be enforceable is purely speculative. Moreover, no such limitation can be placed upon commission members who wish to seek election to congressional office despite the fact that the summary includes such candidates in the purported limitation. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (states cannot add qualifications for

congressional offices); *Cook v. Gralike*, 531 U.S. 510 (2001) (invalidating state constitutional provision requiring congressional candidates, among other things, to support term limits and requiring ballot to indicate when candidate failed to sign pledge of such support).[4]

The statement that commissioners are limited from seeking office cannot be dismissed as an insignificant detail. The statement is likely to influence the decision of many voters, some of whom would not vote for a commission whose members could immediately seek office in a district he or she was instrumental in creating. Other voters might not vote for an amendment that would so limit commission members.

[4] It is likely that the provision for an oath rather than a real limitation resulted from recognition by the sponsors of this restriction. However, that does not excuse their failure to accurately describe the provision in the ballot summary.

III

THE PETITIONS AS CIRCULATED CONTAINED A BALLOT TITLE AND SUMMARY THAT WAS MISLEADING AS TO THE CURRENT AMENDMENT

As presented to voters for signature, the petition containing the current amendment was bundled together with two other amendment petitions. [App. 1-2] The three petitions were bound at the top or side and layered so that only the title and summary of one of the proposed amendments was visible to the voter without lifting pages, but all three signature lines were immediately visible. The title and summary visible on the top page state:

> Title
>
> ADDITIONAL STANDARDS TO BE FOLLOWED IN APPORTIONING LEGISLATIVE AND CONGRESSIONAL DISTRICTS
>
> Summary
>
> Establishes additional standards for legislative and congressional districts beyond those currently set forth in the state constitution. Requires that districts be compact and, where practicable, utilize existing political and geographical boundaries; that districts, where practicable, preserve communities of interest; that districts not be drawn to favor an incumbent, political party or other person; that competitive districts should be favored and that districts not consider the residence of any individual, except to comply with the constitution or laws of the United States.

The above-quoted title and summary were for a proposed amendment initially approved by the Secretary of State, but subsequently disapproved because the

summary contained more than 75 words in violation of Section 101.161, Florida Statutes.

The bundled petition forms did not inform voters that separate petitions for three different amendments were included. Some formats contained, at the top of the first page, the directive to "SIGN ALL THREE PETITIONS." [*See*, *e.g.*, App. 2][5] Others contained no directive. [*See*, *e.g.*, App. 1]

Without an clear indication that the bundle contained three petitions *for three separate amendments*, the directive to "SIGN ALL THREE PETITIONS", could easily lead a voter to assume that he or she is simply signing three copies of the same petition for administrative use. Even if a voter realized that there were three separate provisions, he or she might reasonably conclude from the directive that all three petitions must be signed in order for any to be effective. On the petitions containing no directive, a voter could reasonably be misled into signing any one of the signature lines, thinking the signature was solely for the amendment referenced in the summary shown on the top page.

[5] The opponents herein believe that the use of the petition forms included in the appendix to this brief is undisputed. The forms are in the administrative record of the offices of the Division of Elections and Supervisors, which constitutes the record on review. If the Court deems it necessary, the opponents herein move to supplement the record with copies of each petition format included in the appendix.

In *Fee on Everglades Sugar Production,* 681 So. 2d 1124 (Fla. 1996), the Court upheld three proposed amendments that were also circulated in bundled petitions. The distinction between the *Everglades* petitions and those under review illustrates the deceptive nature of the current ballot summary. The Court noted that the *Everglades* petitions contained the following statement at the top of the first page: "THREE PETITIONS. READ EACH CAREFULLY. SIGN AND DATE ANY OR ALL." *Everglades*, 681 So. 2d at 1131.[6] The voters in *Everglades* were alerted in all-caps type at the top of the first page that the bundle contained three petitions that were not the same, and that a voter could sign any or all of them. In contrast, the petitions here either contained nothing to alert the voter that the signature lines were for separate petitions involving different amendments, or contained language that compounded the problem because it could reasonably have led voters to believe that three signatures were necessary in order to validate the only amendment that was summarized on the first page.

It is insufficient for the sponsor to argue that the petition gatherers can be presumed to have informed voters that they were signing petitions for three separate amendments or that voters have an obligation to make reasonable inquiry. This

[6] In *Everglades*, the opponents did not challenge the petitions as being misleading as a result of the combined presentation; they argued that the petitions violated the single-subject requirement and that the individual summaries were misleading.

Court has recognized the necessity for the ballot summary itself to fairly and accurately inform the voters of the contents of the amendment:

> We also agree with appellant that voters are generally required to do their homework and educate themselves about the details of a proposal and about the pros and cons of adopting the proposal. However, the availability of public information about a proposed amendment cannot be a substitute for an accurate and informative ballot summary. As this Court stated in *Askew*, "the burden of informing the public should not fall only on the press and opponents of the measure – the ballot title and summary must do this."

Smith v. American Airlines, Inc., 606 So. 2d at 621. In *Smith*, the Supreme Court rejected the notion that it is sufficient for the voter to be informed of the nature of a proposed amendment from public information sources. There is even more reason to reject any suggestion that the voter can be informed by petition gatherers. At least in the case of public media sources, the availability of the information can be corroborated. Any assumption that petition gatherers have fully informed voters would be beyond reasonable corroboration and would require a leap of faith that would invite fraud.

The use of multiple, bound petitions to gather signatures, unless tightly circumscribed and carefully scrutinized by this Court, is an invitation to fraud.

CONCLUSION

For the foregoing reasons, the opponents herein respectfully urge the Court to order removal of Amendment # 95-14 from the ballot.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this initial brief was sent by Hand-delivery/U.S. Mail on October 20, 2005 to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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