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

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

J. Dudley Goodlette
Florida Bar No. 156018
Goodlette, Coleman & Johnson, P.A.
Northern Trust Bank Building
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103
Telephone (239) 435-3535
Facsimile (239) 435-1218

George N. Meros, Jr.
Florida Bar No. 263321
Allen C. Winsor
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311

Attorneys for The Honorable Allan G. Bense, Speaker of the Florida House of Representatives

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF CASE

Pursuant to Article XI, section 3 of the Florida Constitution, the Committee for Fair Elections, a political committee registered with the Division of Elections, has proposed an initiative amendment to the Florida Constitution entitled "Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature."

On September 29, 2005, the Attorney General petitioned this Court, pursuant to Article IV, section 10 of the Florida Constitution and section 16.061, Florida Statutes, for an advisory opinion regarding the validity of the initiative petition. On September 30, 2005, this Court entered an order inviting all interested parties to file briefs.

THE PROPOSED AMENDMENT

Ballot Title:

Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature

Ballot Summary:

Creates fifteen member commission replacing legislature to apportion single-member legislative and congressional districts in the year following each decennial census. Establishes non-partisan 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 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 members of the commission , 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 of 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.”

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

This is not a turf battle between the three branches of government. The power to amend the constitution by initiative petition is a fundamental right reserved to the people. Art. XI, § 3, Fla. Const.; *State of Fla. ex rel. Citizens Proposition for Tax Relief v. Firestone*, 386 So. 2d 561, 566 (Fla. 1980). The Speaker of the Florida House of Representatives would fully respect any legally proposed and adopted constitutional initiative.

At the same time, the people of Florida have an equally fundamental right to an initiative process that does not permit logrolling or the inclusion of multiple subjects in a single proposal. The people are also entitled to a ballot that does not confuse, mislead, or convey half-truths. *See In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653-54 (Fla. 2004). And the Florida House of Representatives has the unquestioned "duty and obligation to ensure ballot integrity and a valid election process." *Citizens Proposition for Tax Relief*, 386 So. 2d at 566-67.

The Honorable Allan G. Bense, in his official capacity as the Speaker of the Florida House of Representatives, files this brief in opposition to the proposed amendment because it violates the single-subject rule and includes an inaccurate and misleading summary in violation of state law.

SUMMARY OF ARGUMENT

The proposed amendment includes a summary that is incomplete, inaccurate, and misleading. The summary misleads voters as to the purpose and effect of the proposed amendment and ignores critical components of it. By hiding the ball as to the true purpose of the proposal, the summary would prevent voters from making informed decisions.

The proposed amendment also violates the single-subject rule. It encompasses more than one subject by providing for multiple discrete changes to the constitution. Furthermore, the proposed amendment would substantially affect more than one branch of government. It must be excluded from the ballot.

ARGUMENT

In reviewing proposed amendments, this Court is limited to two legal issues: (1) whether the proposed amendment's title and summary are "printed in clear and unambiguous language" as required by Section 101.161(1), Florida Statutes, and (2) whether the proposed amendment satisfies the single-subject requirements of Article XI, section 3 of the Florida Constitution. *Advisory Op. to the Att'y Gen. re Fla. Locally Approved Gaming*, 656 So. 2d 1259, 1262 (Fla. 1995). This review is not of the merits or wisdom of the proposed change. *Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 489 (Fla. 1994). The proposed

amendment in this case fails both legal tests, and it must not be permitted on the ballot.

I. THE AMENDMENT TITLE AND SUMMARY ARE MISLEADING AND FLY UNDER FALSE COLORS.

The title and summary of the proposed amendment will mislead voters as to the proposal's true substance and effect. A ballot title and summary must "state in clear and unambiguous language the chief purpose of the measure." *Askew v. Firestone*, 421 So. 2d 151, 154-55 (Fla. 1982). They 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). As this Court recently stated:

> The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based *only* on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.

In re Advisory Opinion to the Att'y Gen. re Additional Homestead Tax Exemption, 880 So. 2d 646, 653-54 (Fla. 2004) (citation omitted).

"[T]he gist of the constitutional accuracy requirement is simple: A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000). This Court has interpreted this requirement to encompass several specific factors: (1) the title and summary must be accurate; (2) they must not include unnecessary editorializing; (3) they must not omit facts necessary to prevent an inaccurate negative implication; and (4) they must describe any constitutional provisions that the amendment will modify.

This proposed amendment fails each of these tests.

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

The proposed amendment includes a title and summary that are inaccurate and affirmatively misleading. To be permitted on a ballot, a proposed amendment's title and summary must be accurate and informative. *Advisory Op. to the Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998).

The title of the proposal states that the commission will be "nonpartisan," and the summary states that the proposal establishes a "non-partisan method of appointment." As a matter of fact and plain common sense, these statements are false. The method of appointment is intrinsically partisan, which will in turn produce a partisan commission.

The proposed amendment would create a new fifteen-member commission to assume the legislative role of redistricting. The commission would comprise three members appointed by the Speaker of the House, three appointed by the President of the Senate, three appointed by members of the minority parties in the Senate, and three appointed by members of the minority parties in the House. The remaining three commissioners would be selected by the Chief Justice of this Court from among individuals recommended by the chief judges of the district courts of appeal. The three commissioners selected by the Chief Justice must not have been registered electors for either of the two major political parties. Importantly, there is no such restriction relating to the other twelve commissioners.

The commission, then, would comprise twelve political appointees among its fifteen members. The proposed amendment includes some limitations on who can serve—it prohibits commissioners who have recently served as elected officials, party officers or employees, or paid lobbyists—but it does nothing to ensure the members are not partisan advocates. To the contrary, it *guarantees* that the majority of commissioners indeed will be partisan advocates by placing four fifths of the appointment authority in the hands of partisan leadership.

Given this appointment scheme, it is not surprising that the text of the proposed amendment does not include the word "nonpartisan." To be sure, there is no appropriate place for that word in the text. Nevertheless, the title of the

amendment uses the word "nonpartisan" to describe the commission.[1] Even worse, the summary says that the amendment establishes a "non-partisan method of appointment to [the] commission." Merriam-Webster's dictionary defines "partisan" as of or pertaining to "a firm adherent to a party, faction, cause, or person." It would be fanciful to suggest that the partisans responsible for selecting the commissioners would choose persons holding views directly contrary to their own beliefs.[2] In fact, if the amendment drafters believed this to be the case, there would have been no need to divide the selection responsibilities between the majority and minority political parties. Their decision to distribute the appointment power among different partisans demonstrates their anticipation of a partisan appointment process and partisan appointees.

The use of the word "nonpartisan" in the title and summary will affirmatively mislead voters. This is particularly true here, where one of the presumed purposes of the amendment is to reduce the partisanship associated with

---

[1] The amendment's proponents will undoubtedly argue that the commission itself, as a body, is nonpartisan, but that is hardly the case. A body made up of partisans—even competing partisans—cannot be considered nonpartisan simply because the body does not have its own official allegiance. If that were the case, then legislative bodies such as the United States Congress likewise would be labeled "nonpartisan." Common sense suggests otherwise.

[2] The drafters could have limited the commission to appointees who had registered as voters "NPA" (no party affiliation) for at least the past five years. Instead, they gave the appointment duties to majority *and* minority parties, guaranteeing a partisan method of appointment.

redistricting. Voters who favor the elimination of politicians from the redistricting process will support the petition based on their false impression that the amendment would eliminate partisanship in redistricting. The amendment itself, which would not appear with the title and summary on the ballot, does not create a nonpartisan commission, does not establish a nonpartisan method of appointment, and does not even use the word "nonpartisan."[3] The use of this affirmatively misleading language violates Section 101.161(1) and precludes the proposed amendment from appearing on a ballot.

B. The Amendment Summary Includes Improper Editorializing.

In addition to being factually misleading, the representations that the commission is nonpartisan and that its members will be impartial and selected in a nonpartisan manner amount to improper editorial comment. "[T]he ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment and no more. The political motivation behind a given change must be propounded outside the voting booth." *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984); *accord In re*

---

[3] Related to the "nonpartisan" misrepresentation is the summary's contention that the amendment "[d]isqualifies certain persons for membership to avoid partiality." Again, the word "partiality" or "partial" does not appear in the amendment's text, and it is substantially unfair to suggest that the commission members—partisan political appointees—will be anything but partial.

Advisory Op. to the Attorney Gen—Save Our Everglades, 636 So. 2d 1336, 1342 (Fla. 1994) ("[T]he summary more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment.").

Here, the use of "nonpartisan" in the title was unnecessary, subjective evaluation. The title reads "Independent Nonpartisan Commission to Apportion . . . ." Omitting the unnecessary first two words would have eliminated the title's editorializing and would have resulted in a more accurate title. The title then would have read much like the beginning of the summary, which starts: "Creates fifteen member commission replacing legislature to apportion. . . ." Instead, the drafters chose to include improper editorial comment. The editorial comment and use of the words "independent" and "nonpartisan" will appeal to voters' notions of fairness and evenhandedness. But it will do so only by misleading voters about the true effect of the amendment. *Cf. Additional Homestead Tax Exemption*, 880 So. 2d at 653 ("The use of the phrase 'provides property tax relief' clearly constitutes political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment."). Because the summary includes improper editorial comment, it must not be permitted on the ballot.

C. The Amendment Summary Omits Critical Information.

Important aspects of the proposed amendment are entirely ignored in the summary. In this respect, the issue is not with what the summary says, "but, rather, with what it does not say." *Advisory Op. to the Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 804 (Fla. 1998). The summary does not need to explain every minute detail of a proposed amendment. *Advisory Op. to the Att'y Gen. re Prohibiting Pub. Funding of Political Candidates' Campaigns*, 693 So. 2d 972, 975 (Fla. 1997). But it cannot omit critical components or effects of an amendment. "The purpose of the statute is to 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." *Term Limits Pledge*, 718 So. 2d at 803 (marks omitted); *accord Advisory Op. to the Att'y Gen. re Amendment To Bar Government From Treating People Differently Based On Race In Public Education*, 778 So. 2d 888, 906 (Fla. 2000) (Shaw, J., concurring in result) ("The sponsors of an amendment must place all the cards on the table, face up, prior to the election. Each voter is entitled to cast a ballot based on the *full* truth."). The summary in this case omits several different critical facts, each of which is necessary to allow a voter to cast a ballot based on the full truth.

1. The amendment summary fails to disclose that the amendment alters the standards and requirements for new districts.

The proposed amendment does more than change *who* creates the districts; it changes *how* they are created. The amendment text states that the commission shall divide the state into "*single-member* senatorial [and representative] districts of convenient contiguous territory" (emphasis added). The constitution currently allows, on the other hand, for single or multi-member districts. Art. III, § 16(a), Fla. Const. Thus, the proposed amendment makes a fundamental change in the constitutional standards for drawing districts—without any notice to the voter.

A voter reading only the title and summary of the proposed amendment would have no indication that the amendment's text adds a new requirement that all districts be contiguous. The summary makes no reference to this change. The summary does include a reference to single-member districts, but it makes no attempt to explain that the single-member requirement would be a new one. The summary says: "Creates fifteen member commission replacing legislature to apportion single-member legislative and congressional districts. . . ." That sentence tells voters that the commission will replace the legislature *to apportion single-member districts*, and it clearly implies that the Legislature's apportionment currently is limited to single-member districts. In fact, the Legislature faces no such limit under the Florida Constitution. Although there are currently no multi-member districts, the Legislature has created them in the past. *In re Apportionment*

Law Senate Joint Resolution No. 1305, 1972 Regular Session, 263 So. 2d 797 (Fla. 1972). And the Florida Constitution permits the Legislature to create them in the future. Art. III, § 16(a), Fla. Const.; *see also* §§ 8.0111, 8.0112, Fla. Stat. (addressing noncontiguous territory). The proposed amendment will eliminate the constitution's current allowance for non-contiguous or multi-member districts, and the summary must provide that important information to voters. This summary both hides the ball and affirmatively misleads the voters on the effect of the amendment.

2. The amendment summary fails to disclose the unprecedented change in the separation of powers created by the grant of a legislative power to the judiciary.

Article V, section 1 of the Constitution states that the "judicial power shall be vested in a supreme court . . . ." The proposed amendment, in contrast, grants a core legislative role to the Supreme Court, acting through its Chief Justice, in appointing twenty percent of the districting commission. Remarkably, the summary does not even mention this fundamental change to Florida's organic law. This omission is fatal.

By itself, the Chief Justice's sharing with partisans the duty to appoint a powerful legislative commission is a critical component of the amendment that voters have a right to understand. But the overall scheme of this amendment makes the judiciary's role in selecting commissioners even more significant. First,

under the proposed amendment, this Court would have review authority over any plan submitted by the commission. Therefore, the Chief Justice would select commissioners and then participate in the judicial review of the plan created by his or her appointees. Second, this Court would have the entire responsibility of redistricting if the commission failed to submit a plan. Because any commission action requires a two-thirds vote, and because two opposing political parties will each select half of the remaining commissioners, the failure of the Chief Justice's appointees to break a likely deadlock would result in this Court's having complete apportionment responsibility.

These unusual facts certainly make the new judicial role an important issue for voters to consider. But many voters will not be able to consider this issue because it is not explained—or even mentioned—in the amendment summary.

In *Term Limits Pledge,* the proposed amendment would have granted the Secretary of State new constitutional duties. 718 So. 2d at 803. The summary in that case at least disclosed *some* change to the Secretary of State's constitutional duties. The summary included a sentence that read: "Affects powers of Secretary of State under Article IV." *Id.* at 800. This Court concluded that this disclosure was insufficient. The proposed amendment would have "substantially impact[ed] article IV of the Florida Constitution regarding the Secretary of State's powers and duties. However, in this regard, the ballot summary simply states that the proposed

amendment *affects* the powers of the Secretary of State." *Id.* at 803. That critical omission in the summary invalidated the proposed amendment:

> The ballot summary fails to inform the public that the Secretary of State would be granted discretionary constitutional powers concerning elections that the Secretary of State presently does not possess. Because the ballot summary is silent as to the constitutional ramifications on, and the discretionary authority vested in, the Secretary of State under the proposed amendment, the ballot summary must fail.

Id. at 804.

This case is no different. The ballot summary fails to inform voters that the Chief Justice will be granted new constitutional powers that she does not now possess.

3. The amendment summary fails to disclose the method of commissioner selection and the likelihood that the selection method will lead to gridlock.

The proposed amendment will include six commissioners appointed by legislative majority leaders, six appointed by legislative minority parties, and three appointed by the Chief Justice. Twelve of the fifteen commissioners are selected by legislators, yet the ballot title and summary suggest that the new commission will *replace* apportionment by the Legislature. A more accurate summary would have informed voters that apportionment by the Legislature will be replaced by a commission *comprised of members selected by the Legislature*. This critical fact

would undoubtedly affect voters who believe that the Legislature should be replaced by another body for the conduct of apportionment.

Furthermore, while the summary tells voters that action by the commission requires ten votes, it does not tell them that the composition of the commission is designed virtually to ensure commission gridlock. The result of the commission's failure to adopt a valid plan is that this Court would step in to handle apportionment.

With majority and minority parties selecting six commissioners each, and with the Chief Justice selecting three, commission members selected by each party would have to agree on a plan. Ten votes are required for commission action, so all six partisans on one side plus all three judicial appointees would be insufficient to adopt a plan without the cooperation of at least one of the other partisans. This recipe for deadlock is not explained to voters. And its effect is even more momentous—a tectonic shift in the Separation of Powers through a transfer of a core legislative duty to the Florida Supreme Court. The deadlock will mean that most of the time, the Judiciary will have the absolute power of redistricting. Florida voters have the right to understand that fundamental change before they vote.

4. The amendment summary creates a negative implication that this Court does not already have a role in redistricting.

Separate and apart from the primary legislative role the Court would be forced to assume by virtue of the inevitable gridlock in the commission, the summary ignores the important fact that this Court presently has a contingent role in apportioning districts. The last sentence of the amendment summary says: "Requires Florida Supreme Court to apportion districts if commission fails to file a valid plan." This Court, then, would have a backup role and would act if the commission failed to do so.

The amendment summary includes no mention, though, of the Court's current backup role in redistricting, in which the Court acts if the Legislature fails to. Art. III, § 16(b), Fla. Const. By omitting any reference to this Court's current and important role in redistricting, the summary creates the inaccurate negative implication that the Court has no current role. The summary suggests that this Court's backup redistricting role would change under the proposed amendment. But in fact it will be quite the same. This Court—with or without the adoption of the proposed amendment—will have responsibility to apportion districts if the task is not done by the body (either the legislature or the commission) otherwise having apportionment responsibility.

A proposed amendment's summary or title can be misleading if it leads to an incorrect negative implication. In *Race in Public Education*, for example, the

ballot title stated: "Amendment to bar Government from Treating People Differently Based on Race…." 778 So. 2d at 898. This Court concluded that the amendment title falsely implied that there was no current provision addressing differential treatment for racial classification. *Id.* Similarly, in *Advisory Opinion to the Attorney General re Tax Limitation,* the proposed amendment sought to limit taxes. This Court held that the title and summary were misleading because they implied that the constitution did not already have a cap or limitation on taxes, when it in fact it had several. 644 So. 2d 486, 494 (Fla. 1994). Likewise, in *Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, this Court determined that the summary included a false implication that casinos were already allowed in the state, which they were not. 656 So. 2d 466, 469 (Fla. 1995).

By not mentioning this Court's current role in the districting process, the proposed amendment summary in this case falsely implies that this Court has no such role. This false implication hides that important information from voters.

5. The amendment summary fails to inform the voters of the effect the proposal would have on our representative form of government and equal rights of minorities.

The Federal and Florida constitutions require a representative or republican form of government, in which the people elect representatives who are charged with the duty to discern public opinion and create public policy based on the

people's will. In addition, under Article I, Section 2, Florida Constitution, no person may be deprived of any right based on race or national origin.

The makeup of the proposed redistricting commission would have a profound effect on these rights, yet the summary makes to mention of it. The voter does not know that the members of the commission could hail from as few as three of 67 counties. Presently, of course, the constitutional power to redistrict resides in 120 representatives and 40 senators from every part of Florida. Those representatives have detailed knowledge of the local conditions in every area of the state. Equally troubling, under this proposal there is *no* requirement for minority representation on the commission. It is no exaggeration to state that 15 white men from only three counties in Florida could decide the boundaries of districts for 120 house seats, 40 senate seats, and 25 congressional seats for more than 14 million Florida citizens.

The fact that the proposal does nothing to ensure racial diversity raises another important issue that is not explained to the voters. Under Section 5 of the Voting Rights Act, any change in a covered jurisdiction to a "standard, practice, or procedure with respect to voting" must be precleared by either the District Court for the District of Columbia or by the Attorney General of the United States. This requirement is in place to ensure that the "standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to

vote on account of race or color." *See* 42 U.S.C. § 1973c. "No new voting practice is enforceable unless the covered jurisdiction has succeeded in obtaining preclearance." *See Lopez v. Monterey County*, 519 U.S. 9, 20 (1996). Section 5 was "designed to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process." *Id.* at 23 (quotation marks omitted). By transferring the authority to redistrict the state from the elected representatives of the people to fifteen appointed commissioners, the proposed amendment introduces a new practice with respect to voting which has the potential to "impair minority access to the electoral process." Therefore, the proposed amendment cannot and will not take effect unless its provisions receive preclearance from the federal government. And make no mistake—the Section 5 preclearance review will closely scrutinize the failure of this proposal to require minority representation.

Florida law requires that these types of substantial impacts of a proposed initiative be disclosed to the voters in the summary, so that voters can make an informed decision on the whole truth.

D. The Amendment Summary Fails to Address the Provisions of the Constitution that it Substantially Amends.

The proposed amendment fundamentally and substantially changes the state's constitutional separation of powers. When a proposed amendment substantially modifies a constitutional provision, that consequence must be

explained in the ballot summary. *Race in Pub. Educ.*, 778 So. 2d at 892; *see also Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984) (identifying the articles or sections of the constitution substantially affected "is necessary for the public to be able to comprehend the contemplated changes in the constitution").[4]

Redistricting is a legislative task. *See Uvalde Consol. Ind. Sch. Dist. v. United States*, 451 U.S. 1002, 1007 (1981); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *see also* Art. V, § 1, Fla. Const. (vesting authority to draw *judicial* districts in Legislature). According to Article III, section 1, of the Florida Constitution, "[t]he legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district." If the proposed amendment is adopted, the legislative power to redistrict will move to the commission and no longer be vested in the Legislature. Nevertheless, this significant effect on Article III, section 1 is not included in the summary.

[4] This Court has long held that "how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal." *See Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984). This proposed amendment substantially alters several branches of government, so it violates the single-subject rule. *See* Section II, *infra*.

The proposed amendment would also substantially affect Article III, section 15, which establishes the qualifications for legislators. "Each legislator shall be at least twenty-one years of age, an elector and resident of the district from which elected and shall have resided in the state for a period of two years prior to election." Art. III, § 15, Fla. Const. The proposed amendment adds a new qualification. Every commission member, as a condition of his appointment, must swear that he will not seek elected office as a legislator for four years after serving as a commissioner. Therefore, section 15 will be substantially modified; now legislators must be twenty-one years old, an elector and resident of their district, a resident of the state for two years, *and* have not served as a redistricting commissioner for the previous four years.

Next, the proposed amendment would substantially affect article V, section 1 of the Constitution. That section provides that the "judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." By granting the Chief Justice of this Court the legislative authority to select commissioners, and by granting the chief judges of the various district courts authority to recommend commissioners, the proposed amendment would affect Article V, section 1. The proposed amendment would have the effect of vesting judicial power *and* legislative power in the supreme court and the district courts of appeal.

Last, the constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches." Art. II, § 3, Fla. Const. The proposed amendment will grant tremendous power to the commission at the expense of all three branches. This significant change to this existing constitutional provision—and to the fundamental balance of power in the state government—is not mentioned in the summary.

In the *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, the proposed amendment sought to eliminate racial preferences in public education. 778 So. 2d at 889. The first provision of that amendment said simply that "[t]he state shall not treat persons differently based on race, color, ethnicity, or national origin in the operation of public education." *Id.* That amendment also included this provision: "This section does not invalidate any court order or consent decree that is in force as of the effective date of this section." *Id.* at 894. In striking down the amendment, this Court concluded that the amendment's latter provision would affect Article I, section 21, which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art I, § 21, Fla. Const. Because the amendment summary did not disclose the amendment's effect on this other constitutional provision, the summary was invalid. The result should be the same in this case.

This amendment summary does not address all of the constitutional provisions that the amendment will affect.

This Court's responsibility "is to determine whether the language of the title and summary, as written, misleads the public." *Advisory Opinion to the Atty. Gen. re: Prohibiting Public Funding of Political Candidates' Campaigns,* 693 So. 2d 972, 975 (Fla. 1997). For the reasons addressed above, the title and summary do just that. They do not provide voters with the whole truth, and the proposed amendment should not be permitted on the ballot. But even if the title and summary were not misleading and inaccurate, the proposed amendment should still be kept off the ballot because it violates the single-subject rule of the Florida Constitution.

II. THE AMENDMENT ENCOMPASSES MORE THAN ONE SUBJECT.

Citizen initiative petitions must only encompass a single subject. Art. XI, § 3, Fla. Const. The purpose of the single-subject rule is to protect against "precipitous" and "cataclysmic" changes in the constitution. *Advisory Op. to the Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353 (Fla. 1998). The Florida Supreme Court requires "strict compliance with the single-subject rule in the initiative process for constitutional change because our constitution is the basic document that controls our governmental functions." *Fine v. Firestone,* 448 So. 2d 984, 989 (Fla. 1984). This requirement applies only to

citizen initiative amendments because unlike other methods of constitutional amendments, citizen initiatives "do[] not afford the same opportunity for public hearing and debate that accompanies the proposal and drafting processes"of other methods of amending the constitution *Advisory Op. to the Att'y Gen. re Voluntary Univ. Pre-Kindergarten Ed.*, 824 So. 2d 161, 164 (Fla. 2002). The rule serves to "prevent 'logrolling,' a practice that combines separate issues into a single proposal to secure passage of an unpopular issue." *Id.* at 165. To defeat a "logrolling" challenge, a proposed amendment must have a "logical and natural oneness of purpose." *Fine v. Firestone,* 448 So. 2d 984, 990 (Fla. 1984).

Related to the logrolling concept is the prohibition of "all or nothing" amendments. Even where there are no unpopular issues—the concern expressed in the logrolling cases—a proposed amendment violates the single-subject rule when it "forces the voter who may favor or oppose one aspect of the ballot initiative to vote . . . in an 'all or nothing' manner." *Advisory Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Prov.*, 705 So. 2d 563, 566 (Fla. 1998).

As Justice Lewis recognized in his concurring opinion in *Ray v. Mortham,* 742 So. 2d 1276, 1287 (Fla. 1999), broad, catch-all initiatives present substantial problems. Justice Lewis agreed with Justice Kogan's opinion in *Advisory Opinion to the Attorney General re Limited Political Terms in Certain Elective Offices,* 592

So. 2d 225 (Fla. 1991) "As I cannot improve on Justice Kogan's cogent analysis, I quote him at length:"

> [T]he only proper way to resolve this issue is by looking to the fundamental policies underlying article XI, section 3. Why was the single-subject clause put into this provision? The obvious and unmistakable purpose underlying article XI, section 3 is to reserve to the voters the prerogative to separately decide discrete issues. *Therefore, one way of deciding the question before us today is to determine whether the proposed initiative contains more than one separate issue about which voters might differ.* In other words, is there at least one discrete, severable portion of the ballot language that reasonable voters might reject if given the choice, even while accepting the remainder of the ballot language? *If the answer is yes, then this Court must find that the initiative contains more than one subject and lacks oneness.*
>
> The policy underlying this requirement is self-evident. *Where reasonable voters may differ, then the voters should not be placed in the position of accepting an all-or-nothing grab-bag initiative.* Each discrete issue should be placed separately on the ballot so that voters can exercise their franchise in a meaningful way. No person should be required to vote for something repugnant simply because it is attached to something desirable. *Nor should any interest group be given the power to sweeten the pot by obscuring a divisive issue behind separate matters about which there is widespread agreement.*

Id. at 1288 (Lewis, J., concurring) (quoting *Limited Political Terms*, 592 So. 2d at 231-32 (Kogan, J., concurring in part and dissenting in part)) (marks, citations, and notes omitted).

The proposed amendment in this case addresses multiple subjects, does not have a logical oneness of purpose, and substantially affects multiple branches and

functions of government. Accordingly, the proposed amendment does not satisfy the single-subject rule, and it must not be permitted on a ballot.

A. Because the Proposed Amendment Creates a Redistricting Commission *and* Creates New Standards for Legislative Districts, it Encompasses More than One Subject and Violates the Single-Subject Rule.

The proposed amendment in this case improperly bundles multiple, distinct subjects into one amendment. As explained in Section I(C)(1), *supra*, the proposed amendment requires contiguous, single-member districts *and* establishes the commission and the new districting process. It would accomplish two major objectives—it would change the legislative body responsible for redistricting, and it would change the standards and requirements for new districts. These are two entirely different subjects, so there is no "logical oneness of purpose." Voters who prefer a redistricting commission, but wish to leave the current district standards in place (or *vice versa*), are forced to make an all-or-nothing decision.

There is no question that the amendment sponsors are improperly seeking to bundle or logroll changes to legislative district standards with their proposal to establish a redistricting commission. A former companion to the proposed amendment demonstrates the amendment sponsors' commitment to new and additional district standards. In addition to the proposed amendment at issue in this case, the sponsors proposed two related amendments. One of the other amendments would require redistricting to take place in 2007. The Attorney

General has petitioned this Court for an opinion as to the validity of that amendment, and that case is currently pending before this Court under case number SC05-1755.[5] The third proposed amendment was titled "Additional Standards to be Followed in Apportioning Legislative and Congressional Districts" (the "Standards Amendment"). The Standards Amendment would not have required contiguous or single-member districts, which are required under the amendment at issue in this case. Instead, it would have added other new standards by, for example, requiring that districts be compact and utilize existing political and geographical boundaries.

The new and additional standards in the Standards Amendment, like the new and additional standards in the proposed amendment in this case, represent an entirely different subject than the establishment of a redistricting commission. The provisions in the Standards Amendment were appropriately omitted from the proposal in this case, because they would have clearly violated the single-subject rule. But the proposal of a second amendment to accommodate some, though not all, of the sponsors' new standards agenda, does not save the proposed amendment in this case. *No* new standards for districts belong in this proposed amendment,

[5] The title and summary of that proposed amendment, like those in this case, are inaccurate and misleading. Contemporaneous with this filing, The Honorable Allan G. Bense has filed a brief opposing that proposed amendment. *See* Br. of Hon. Allan G. Bense, Case No. 05-1755 (2005).

because its chief purpose is to create a redistricting commission. (The Standards Amendment is not before this Court. Its summary included more words than are permitted under Section 101.161, Florida Statutes, so the Secretary of State properly refused to submit the petition to the Attorney General. The sponsor challenged the Secretary of State in circuit court, but its challenge was rejected and not appealed. *Committee for Fair Elections v. Hood*, Case No. 2005-CA-002145 (Fla. Cir. Ct. Sep. 20, 2005 hearing)).

B. Because the Proposed Amendment Alters the Way State Legislative Districts and Congressional Districts are Created, it Encompasses More than One Subject and Violates the Single-Subject Rule.

The proposed amendment lacks oneness of purpose because it would change the way both state legislative *and* congressional districts are formed. Under current law, the process for apportioning state legislative districts is entirely different than the process for apportioning congressional districts. State legislative districts are created by joint resolution of the Florida Legislature pursuant to Article III, section 16 of the Florida Constitution—the very section that the proposed amendment would replace. As with any other joint resolution of the Florida Legislature, no action is required by the Governor. On the other hand, the apportionment of congressional districts is not addressed by Article III, section 16. That apportionment is done by the Legislature's enactment of a plan, which, like other legislative enactments, is subject to the Governor's veto. *See* § 8.0002, Fla.

Stat. (statute delineating congressional districts); Art. III, § 8, Fla. Const. (governor's veto authority).

Although proposed amendments affecting different classes of elected officials do not necessarily violate the single-subject rule, the proposed amendment here does more than that. It substantially impacts two entirely different processes. Therefore, this case is unlike this Court's decisions in *Advisory Opinion to the Attorney General re Limited Political Terms in Certain Elective Offices,* 592 So. 2d 225 (Fla. 1991) and *Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns,* 693 So. 2d 972 (1997). In those cases, the proposed amendments applied generally to different elected officers, and there was no distinction made among different officers.

In *Limited Political Terms*, the amendment sought to limit terms of political officers, including both state and federal legislators. 592 So. 2d at 227. The amendment in that case modified article VI, section 4 of the Florida Constitution, which already limited the eligibility of those seeking office. *Id.* at 227-28. In *Prohibiting Public Funding*, the proposed amendment sought the addition a new constitutional provision that generally prohibited public funding of campaigns for various state offices. 693 So. 2d at 974. In both of those cases, this Court concluded that there was no single-subject violation. In the first, the proposed amendment modified a constitutional provision that already addressed various

officeholders consistently; in the second, the proposed amendment created a new constitutional provision that addressed various officeholders consistently.

The case at hand is like neither of those cases. Under current law, the manner in which state and federal districts are created is *not* consistent. The proposed amendment modifies the existing constitutional provision that provides for state legislative districting, and for the first time, it includes congressional districting in the same scheme. These two distinct purposes prevent a oneness of purpose, so the proposed amendment violates the single-subject rule.

C. Because the Proposed Amendment Adds a New Qualification for Legislators, in Addition to its Other Purposes, It Violates the Single-Subject Rule.

As explained above, the proposed amendment would substantially affect Article III, section 15, which establishes the qualifications for legislators. The proposed amendment's addition of a new qualification does not enjoy oneness of purpose with the chief purpose of the amendment—the fundamental change in how legislative and congressional districts are created. The creation of a districting commission and the addition of new legislator qualifications are substantially different subjects, so the proposed amendment violates the single-subject rule.

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

Another purpose of the single-subject rule is to "prevent a constitutional amendment from substantially altering or performing the functions of multiple aspects of government, or from affecting other provisions of the constitution." *Advisory Op. to the Att'y Gen. re Voluntary Univ. Pre-Kindergarten Ed.*, 824 So. 2d 161, 165 (Fla. 2002). Many proposed amendments will have *some* effect on other aspects of government, but the single-subject rule is violated when the effects are *substantial*. *Advisory Op. to the Att'y Gen. re Limited Casinos*, 644 So. 2d 71, 74 (Fla. 1994).

As noted throughout the brief, the proposed amendment would dramatically alter the balance of power among the coordinate branches. Due to the nature of the separation of powers doctrine, changes in the allocation of duties among the branches created by this proposal will have a substantive effect on all three branches of government, which in turn violates the one subject requirement of Article XI, section 3, of the Constitution.

The intent of the separation of powers in the federal and Florida constitutions was to "preserve liberty 'by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.'" *United States v.*

Williams, 15 F.3d 1356, 1360 (9th Cir. 1994) (quoting The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)). To do so, the constitution included a system of checks and balances by "positively ascribing power to a particular branch and negatively proscribing the power of a particular branch." *Id.* at 1361. As a result, when one branch acquires power formally ascribed to another, that shift of power has an effect on all branches. "At a minimum, a positive ascription of power to a particular branch may be taken to imply a negative prohibition on the exercise of similar power by the other two branches." *Id*. Thus, as the following will demonstrate, the shifts in constitutional powers mandated by this proposal will produce a chain reaction effect on all three branches of Florida government.

1. The proposed amendment substantially affects the Judicial Branch.

As discussed in Section I(c)(2), *supra*, the proposed amendment introduces a brand new role for the judiciary in the redistricting process. The Chief Justice is given the new and significant duty of selecting three of the fifteen commission members. This appointment authority will give the judiciary an unprecedented impact on the initial redistricting plans. The new power of the judiciary cannot be overstated. Under the proposed amendment, the Chief Justice will be the *only person* outside of the Legislature to appoint commissioners. The chief purpose of the amendment is to remove the redistricting process from the Legislature. Absent

the Chief Justice's role, the commission would comprise only commissioners appointed by members of the Legislature.

In addition, the new legislative role will have a major impact on the makeup of the Court. Executive appointments will now have to include consideration of how prospective Justices would execute their legislative discretion. Therefore, the proposed amendment substantially affects the judicial branch.

2. The proposed amendment substantially affects the Executive Branch.

Under current law, state legislative districts are created by joint resolution of the Florida Legislature. Art. III, § 16(b), Fla. Const., *supra*. No action is required by the Governor. *Id*. But 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. This significant role would be entirely eliminated by the proposed amendment.

The proposed amendment at issue in *Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding* would have required that forty percent of all state funds be allocated to education. 703 So. 2d 446, 447 (Fla. 1997). Because appropriation was a function of the Legislature, the legislative branch was substantially affected. *Id*. at 449. But "the Governor also has a significant function in respect to appropriation" including the ability to exercise a line-item veto over certain appropriations. *Id*. The amendment in that

case would have limited the Governor's constitutional authority in the appropriation process, so it failed the single-subject test. *Id.*

In this case, like in *Adequate Public Education Funding,* the Governor's veto authority will be affected—in fact, it will be eliminated. And for that same reason, this case is unlike *Advisory Opinion to the Attorney General re Florida Transportation Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 367 (Fla. 2000). There, the Court noted that "some restrictions or limits on the veto power" may not constitute a single–subject violation. *Id*. at 371.

In the case at hand, though, the proposed amendment does much more than place some restrictions or limits on the veto power regarding congressional redistricting—it completely eliminates that power. And in doing so, it substantially affects the executive branch.

The Governor's important power to appoint Justices to this Court will also be substantially affected. *See* Art. V, § 11, Fla. Const. The Governor will now have to consider how a prospective Justice would execute his or her new legislative authority. This consideration will be particularly important, because it will represent the only role in the redistricting process that the Governor will now have.

Because the proposed amendment substantially affects more than one branch of government, it violates the single-subject rule and must not be permitted to appear on a ballot.

III. THE UNAPPROVED FORMAT AND LANGUAGE OF THE CONSOLIDATED PETITION FORM VIOLATE THE EXPRESS MANDATE OF THIS COURT AND THE SINGLE-SUBJECT RULE.

In addition to the misleading title and summary, the petition forms circulated by the amendment sponsors contain misleading language not approved by the Secretary of State. The unapproved forms themselves, and the unapproved and misleading language included on them, violate the constitutional single-subject rule.

It is evident that the sponsors are violating election law in their distribution of petition forms and their solicitation of signatures. The signatures collected in violation of the law are invalid. The purpose of this advisory opinion proceeding is to determine whether the proposed amendment's summary is clear and unambiguous and whether the proposed amendment violates the single-subject rule. *See, e.g., Advisory Op. to the Att'y Gen. re Fla. Locally Approved Gaming,* 656 So. 2d 1259, 1262 (Fla. 1995). Nevertheless, this Court has indicated its preference for resolving at this advisory opinion stage the related issues of the validity and permissibility of petition forms. In *Advisory Opinion to the Attorney General re Fee on the Everglades Sugar Production*, this Court ordered the

transfer to this Court of a circuit court case challenging the use of unapproved petition forms. 681 So. 2d 1124, 1126-27 (Fla. 1996). This Court then considered that issue at the same time it considered its advisory opinion. *Id.* In this case, like in *Everglades*, such consideration of the related issue of the petition form is entirely appropriate. At any rate, the petition forms in this case violate the constitutional single-subject rule, so no consideration beyond that important issue is necessary.

The amendment sponsors originally proposed three separate amendments. *See supra.* After the Secretary of State approved the individual forms, the sponsors created a new consolidated form. But they never submitted this new form for approval. The new form consists of three sheets of paper—one for each initiative—bound at the top and separable along a perforation. The top sheet is white, the middle sheet is yellow, and the bottom sheet is pink. When bound, only a one-inch strip of the bottom sheet appears below the middle sheet, and only a one-inch strip of the middle sheet appears below the top sheet. Thus, in its closed position, nothing printed on the middle or bottom sheets of the form appears, except the signature lines and required disclosures. The signature lines are stacked, with one directly above another. The ballot title, summary, and text of the middle and bottom sheets are not visible unless the form is opened, so a voter can easily sign all three petitions without reading—or even seeing—the bottom two.

Again, the amendment sponsors never requested or received the approval of the Secretary of State with respect to the three-color, consolidated petition booklet.

By consolidating three petitions into one booklet form and allowing signatures on all three petitions without any clear indication that they are, in fact, three separate amendments, the sponsors have violated the single-subject rule. The purpose of the single-subject rule, of course, is to protect against "precipitous" and "cataclysmic" changes in the constitution. *Advisory Op. to the Att'y Gen. re Fish & Wildlife Conservation Comm'n*, 705 So. 2d 1351, 1353 (Fla. 1998). It serves to "prevent 'logrolling,' a practice that combines separate issues into a single proposal to secure passage of an unpopular issue." *Advisory Op. to the Att'y Gen. re Voluntary Univ. Pre-Kindergarten Ed.*, 824 So. 2d 161, 164 (Fla. 2002). The effect of the booklet form is exactly that—it combines separate issues into a single proposal. The voter is presented with three attached petitions (only one of which has anything visible on it other than the signature line) that appear to be a single proposal. This consolidation of the petitions into a single proposal violates the single-subject rule.

After circulating this consolidated form for some period of time, the sponsors then circulated a new form, which is otherwise identical, except that it includes additional misleading and unapproved language. The top of the new form states: "SIGN ALL THREE PETITIONS AND MAIL THEM TO POST OFFICE

BOX 10130 TAMPA, FL 33769." This unqualified directive further transforms the three petitions into one single proposal—the voter is expressly instructed to "SIGN ALL THREE" forms. Making matters worse, the sponsors continued to circulate the consolidated petition form with unapproved language *after* the Secretary of State disallowed one of the three initiatives.[6] *See* Section II(A), *supra.* Worse still, the proposed amendment that the Secretary of State disallowed *occupies the top spot in the consolidated form*.

The incredible result is that voters are presented with a three-color form on which only a disapproved initiative, three signature lines, and an unconditional instruction to "SIGN ALL THREE" are immediately apparent. The booklet form now amounts to two approved individual forms covered by an unapproved form with the instruction to "SIGN ALL THREE."

In *Advisory Opinion to the Attorney General re Fee on the Everglades Sugar Production*, this Court was presented, under different circumstances, with a similar

---

[6] The use of the consolidated form is a plain violation of Section 100.371(3), Florida Statutes, which makes the approval of the Secretary a precondition of circulating an initiative. Section 100.371(3), Florida Statutes, provides in relevant part:

> The sponsor of an initiative amendment shall, *prior to obtaining any signatures*, register as a political committee pursuant to s. 106.03 and submit the text of the proposed amendment to the Secretary of State, with the form on which the signatures will be affixed, and shall *obtain the approval of the Secretary of State of such form*.

Id. (emphasis added).

issue. 681 So. 2d 1124 (1996). The sponsor of the proposed amendments in that case combined three initiatives on a single form and made wording changes after obtaining the approval of the Secretary of State. *Id.* at 1131. At the top of the consolidated form appeared the words "THREE PETITIONS. READ EACH CAREFULLY. SIGN AND DATE *ANY OR ALL*." *Id*. (emphasis added). The opponents of the proposed amendments in that case attacked the form on two fronts. First, they argued that the wording changes invalidated the initiatives, citing Rule 1S-2.009, Florida Administrative Code, which prohibits changes in "a previously approved petition form" or the use of "additional types of petition forms" unless submitted to the Secretary of State for approval.[7] *Id.* The offending wording changes were (1) in the ballot summary, the insertion of the word "as" after the word "sugar" in the phrase "raw sugar grown in the Everglades Agricultural Area," and (2) in the amendment text, the apparently inadvertent substitution of the word "of" for the word "or." *Id*.

[7] Rule 1S-2.009(10), Florida Administrative Code, provides, in relevant part:

> Any change in a previously approved petition form, or additional types of petition forms to be circulated by a previously approved circulator, shall be submitted in accordance with the provisions of this rule. A change to a petition form or an additional type of petition form means a change in the wording of the text of the proposed amendment, the ballot title, or ballot summary, including changes in punctuation . . . .

With respect to this argument, this Court held that strict compliance with Rule 1S-2.009 was not necessary because "the underlying purpose of the rule is to have an approved petition presented to signers *substantially unchanged*." *Id*. (emphasis added). Quoting the Court of Appeals of Oregon, this Court explained that the question of invalidating initiatives on account of subsequent changes to the petition format:

> is a matter of balancing the seriousness of the defect against the consequences of invalidation. Before the electorate will be disfranchised by anyone's failure to comply with the statute, the failure must be one of considerable magnitude . . . . In determining the magnitude of the failure, we must consider the likelihood that the error misled the signers of the petition.

Id. at 1132 (quoting *Barnes v. Paulus*, 588 P.2d 1120 (Or. Ct. App. 1978)). Balancing the "seriousness of the defects" against the "consequences of invalidating the petitions," this Court held in *Everglades Sugar* that the relevant wording changes were "*de minimis*." *Everglades Sugar*, 681 So. 2d at 1131. This Court concluded that "it is unlikely . . . the noted wording changes . . . misled, deceived, or produced confusion in signers' minds concerning the impact of the proposed amendments." *Id*. at 1132. Noting that the errors are "without substance" and that "there was no attempt to mislead," the Court nevertheless expressly "caution[ed] drafters to exercise care in the future because doubts regarding changes in meaning will work against proponents." *Id*.

In this case, the additional, unapproved words "SIGN ALL THREE PETITIONS," coupled with the unapproved three-colored bound format, present a far different case than did the "*de minimis* wording changes" that this Court excused in *Everglades Sugar.* The changes at issue here are not formal or technical changes that have no tendency to mislead or confuse voters. To the contrary, they are sure to have "misled, deceived, or produced confusion in signers' minds." *See id*. Most significantly, the consolidated format and unapproved "SIGN ALL THREE" language flouts the admonition that this Court issued in *Everglades Sugar* to the drafters of petition forms that doubts arising from changes made after obtaining the approval of the Secretary of State "will work against proponents." *See id*.

Second, the opponents in *Everglades Sugar* argued that the consolidated form—without more—violated the single-subject rule by leading voters to believe that the initiatives were an "all or nothing" proposal. This Court recognized that a consolidated petition format could give rise to a violation of the constitutional single-subject rule. In concluding that there was no violation of the single-subject rule in that case, this Court relied on the words "THREE PETITIONS. READ EACH CAREFULLY. SIGN AND DATE ANY OR ALL," which appeared at the top of the consolidated form. "[A]s presented to signers of the unified petition,

each proposal addresses a single subject, each is clearly freestanding, and signers could support or reject one or more of them." *Id*. at 1131.

In this case, the proposed amendments on the consolidated petition form are not presented as "clearly freestanding," nor do the format and language used by the sponsors clearly indicate that "signers could support or reject one or more of them." *See id*. Both the peculiar arrangement of the forms, which leaves only the signature lines of the second and third sheets visible until and unless the form is opened, and the three-color scheme, mislead signers into believing that the form contains a single proposal that requires a signature in triplicate. Most significantly, however, the language at the top of the consolidated form in this case—"SIGN ALL THREE PETITIONS"—has an effect directly contrary to the language at the top of the consolidated form in *Everglades Sugar*—"THREE PETITIONS. READ EACH CAREFULLY. SIGN AND DATE *ANY OR ALL*." While the cautionary language in *Everglades Sugar* warned voters to "READ EACH CAREFULLY" and clearly and correctly stated the legal right of the signer to sign "ANY OR ALL," the language employed in the present case commands voters to "SIGN ALL THREE PETITIONS," casting doubt on the right of the voter to sign "ANY OR ALL."

The single-subject rule applies at every stage of the petition initiative process; it applies equally when amendments are proposed—at the signature-

gathering stage—and when they are ratified. *Cf. Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984) (the single-subject rule "was placed in the constitution by the people to allow the citizens, by initiative petition, to propose and vote on singular changes in the functions of our governmental structure"). Its ends are subverted not only by the union of unconnected substantive proposals in a single initiative, but also when consolidated petition forms lead voters to believe that separate initiatives constitute an "all or nothing" deal. The practice of logrolling is not more permissible when employed to obtain ballot placement than when employed to secure the final adoption of particular proposals. The integrity of the ballot initiative process, and of the constitution itself, demand that the single-subject rule be given full effect to accomplish its intended ends, and that all avenues of circumventing its purposes be closed.

Accordingly, the consolidated and unapproved form does not comply with Florida law. Any signatures collected on it should be deemed invalid.

CONCLUSION

The proposed amendment says one thing but does another. Its summary is wholly inadequate. The summary misrepresents the nature of the amendment and ignores critical components of the amendment. It is incomplete and inaccurate. 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 to accomplish the purposes of the proposed amendment. But no amendment may be adopted without complying with constitutional and statutory requirements that ensure ballot integrity and a fair election process. The proposed amendment in this case violates those requirements. It must not be permitted on the ballot.

Respectfully submitted,

J. Dudley Goodlette
Florida Bar No. 156018
Goodlette, Coleman & Johnson, P.A.
Northern Trust Bank Building
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103
Telephone (239) 435-3535
Facsimile (239) 435-1218

George N. Meros, Jr.
Florida Bar No. 263321
Allen C. Winsor
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311

Attorneys for Honorable Allan G. Bense,
Speaker of the Florida House of Representatives

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by U.S. Mail on October _____, 2005, to the following:

The Honorable John Ellis "Jeb" Bush
Governor of Florida
Executive Office of the Governor
The Capitol
Tallahassee, Florida 32399-0001

The Honorable Charlie Crist
Attorney General
State of Florida
PL 01, The Capitol
Tallahassee, Florida 32399-1050

Ms. Glenda E. Hood
Secretary of State
Florida Department of State
The R.A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250

Ms. Dawn Kimmel Roberts
Florida Department of State
The R.A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250

The Honorable Tom Lee
President, Florida Senate
Suite 409, The Capitol
404 South Monroe Street
Tallahassee, FL 32399-1100

The Honorable Allan G. Bense
Speaker, Florida House of Representatives
420 The Capitol
Tallahassee, FL 32399-1300

Mr. Mark Herron
Committee for Fair Elections
215 South Monroe Street
Suite 701
Tallahassee, Florida 32302

Office of Economic &
Demographic Research
Financial Impact Estimating Conference

J. Dudley Goodlette
Florida Bar No. 156018
Goodlette, Coleman & Johnson, P.A.
Northern Trust Bank Building
4001 Tamiami Trail North, Suite 300
Naples, Florida 34103
Telephone (239) 435-3535
Facsimile (239) 435-1218

George N. Meros, Jr.
Florida Bar No. 263321
Allen C. Winsor
GrayRobinson, P.A.
Post Office Box 11189
Tallahassee, Florida 32302
Telephone (850) 577-9090
Facsimile (850) 577-3311

Attorneys for Honorable Allan G. Bense,
Speaker of the Florida House of Representatives

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.

_____

George N. Meros, Jr.
Florida Bar No. 263321