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

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Certification of Type Face and Type Size

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

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STATEMENT OF THE CASE AND OF THE FACTS

On March 23, 2005, the Florida Division of Elections received the petition form, ballot summary, and text of the proposed amendment for an initiative from the Committee for Fair Elections, a registered political action committee seeking to amend the Florida Constitution, and assigned it serial number 05-14. Pursuant to section 15.21, Florida Statutes (2004), the Secretary of State notified the Attorney General of the State of Florida that that the sponsors of the petition that it had designated as serial number 05-14 had obtained 10 percent of the signatures required from one-fourth of the Congressional districts.

On August 29, 2005, in accordance with the provisions of Article IV, Section 10 of the Florida Constitution, and section 16.061, Florida Statutes (2004), the Attorney General petitioned this Court for a written opinion as to whether the text of the initiative petition complies with Article XI, Section 3, Florida Constitution, and whether the proposed ballot title and summary complies with Section 101.161, Fla. Stat (2004).

The initiative petition is entitled:

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

The ballot summary of the proposed amendment is:

> 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.

The text of the proposed amendment is as follows:

> 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 legis lative 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.

This Court's order dated September 30, 2005 directed interested parties to file briefs on or before October 20, 2005 addressing whether the amendments comply with the requirements of Article XI, Section 3, Florida Constitution, and Section 101.161, Florida Statutes.

Mario Diaz-Balart is a Member of the United States House of Representatives from the 25th Congressional District of Florida. During the 2002 session of the Florida House of Representatives, Congressman Diaz-Balart was the Vice Chairman of the House Procedural & Redistricting Council and Chairman of the Congressional Redistricting Committee. Lincoln Diaz-Balart is a Member of the United States House of Representatives from the 21st Congressional District of Florida. Ileana Ros-Lehtinen is a Member of the United States House of Representatives from the 18th Congressional District of Florida. As interested

parties, Congressman Mario Diaz-Balart, Congressman Lincoln Diaz-Balart, and Congresswoman Ileana Ros-Lehtinen submit this brief.

SUMMARY OF ARGUMENT

In this proceeding, this Court is limited to determining two legal issues. First, it must decide whether the proposed amendment violates the single-subject requirement of Article XI, Section 3 of the Florida Constitution. Then, it must determine whether the ballot title and summary of the proposed amendment are misleading, that is, in violation of Section 101.161, Florida Statutes (1997). *See Advisory Opinion to the Attorney General re People's Property Rights Amendments*, 699 So. 2d 1304, 1306 (Fla. 1997); *Advisory Opinion to the Attorney General re Tax Limitation*, 644 So. 2d 486, 489-90 (Fla. 1994); *Advisory Opinion to the Attorney General re Term Limits Pledge*, 718 So. 2d 798, 801 (Fla. 1998).

The initiative petition violates the single-subject requirement of Article XI, Section 3, Florida Constitution, and the ballot title and summary of the initiative petitions is misleading, in violation of Section 101.161, Florida Statutes.

The initiative petitions presented for review in this proceeding violates the single-subject requirement of Article XI, Section 3, Florida Constitution, in two respects. First, the proposed amendment embraces multiple subjects, impermissibly "logrolling" two separate and discrete issues into a single initiative in order to secure approval. Voters are asked to cast a single vote as to whether

both the reapportionment of the Florida House and Senate *and* the redistricting of the State into Congressional Districts should be performed by a newly created body, rather than the Florida Legislature, asking, in essence, two separate and distinct questions.

The initiative also violates the single-subject requirement by altering separate functions of multiple branches of government. Currently, the Governor plays a role in the approval or veto of the State's Congressional redistricting plan. Under the proposed amendment, that role would be eliminated. Moreover, the amendment expands the role of this Court in the reapportionment process, introducing a new burden to the Chief Justice – the appointment of three members of the commission who had not been registered in the two largest parties in the House and Senate for the previous two years, as well as requiring the participation of the Chief Judges of each District Court of Appeal. It also imposes upon this Court an obligation to review the Congressional reapportionment plan, a duty it does not presently have.

The title and ballot summary of the initiatives fail to advise the voters of the true meaning and ramification of the initiative, as required by Section 101.161, Florida Statutes. The title and ballot summary of the petition mislead the voters to believe that the commission will be "nonpartisan" when, in reality, at least 12 of the 15 members are appointed by political partisans. The ballot summary is also

misleading by implying that an independent commission has the authority to redistrict the State into Congressional districts. Article I, section 4 of the United States grants the exclusive authority to set the "time, place, and manner" of Congressional elections to the legislatures of the respective states. The summary states that the amendment would limit "commission members from seeking office under plan for four years after service on commission." However, the ballot summary is misleading on two bases. First, the text of the amendment does not actually limit members from seeking office, but only requires that a person serving on the panel "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." There is no enforcement mechanism provided for in the amendment, nor any prohibition for such person from qualifying for office. Second, assuming *arguendo* that this vague language were an enforceable bar to qualification for candidates for the Florida Legislature, it would be unenforceable with regard to candidates for the United States House of Representatives. The United States Supreme Court in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), held that states cannot impose qualifications or disqualifications for candidates for Congress. The failure to alert the voters to this fact renders the ballot summary misleading.

The ballot summary fails to alert voters that the Governor's present role in Congressional redistricting, approving the measure or vetoing it, will be eliminated.

The ballot summary is also misleading in that, by stating that if the commission fails to file a valid plan, the Supreme Court shall "apportion districts", it implies that this Court has no present role in redistricting. Under the present language of Article I, section 16, this Court is required to review legislative redistricting plans passed by joint resolution, and is required to reapportion the Florida House and Senate if an extraordinary apportionment session of the Legislature fails to adopt a resolution of apportionment or if this Court determines that the apportionment made is invalid.

ARGUMENT

I.

THE INITIATIVE VIOLATES THE SINGLE-SUBJECT REQUIREMENTS OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION BECAUSE IT "LOGROLLS" SEPARATE AND DISTINCT ISSUES INTO A SINGLE INITIATIVE PROPOSAL

Article XI, section 3 of the Florida Constitution, sets forth the single-subject requirement for a proposed constitutional amendment arising via the citizen initiative process and provides in full:

> SECTION 3. Initiative.--The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, *provided that,* any such revision or amendment, except for those limiting the power of government to raise revenue, *shall embrace but one subject and matter directly connected therewith*.

(Emphasis supplied.) *See, Advisory Opinion to the Attorney General re Term Limits Pledge, supra*, 718 So. at 801. *See, e.g., Advisory Opinion to the Attorney General re Amendment to Bar Government From Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 890-91 (Fla. 2000); *Advisory Opinion To The Attorney General Re Referenda Required For Adoption And Amendment Of Local Government Comprehensive Land Use Plans*, 902 So. 2d 763, 765 (Fla. 2005). The single-subject requirement applies only to the citizen

initiative method of amending the State Constitution. *Id*. In *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission*, 705 So. 2d 1351, 1353 (Fla. 1998), this Court held:

> [T]he single-subject limitation exists because section 3 does not afford the same opportunity for public hearing and debate that accompanies the proposal and drafting processes of sections 1, 2 and 4. Accordingly, section 3 protects against multiple "precipitous" and "cataclysmic" changes in the constitution by limiting to a single-subject what may be included in any one amendment proposal.

The single-subject rule prevents "logrolling", which this Court defined as follows:

> Logrolling is "a practice whereby an amendment is proposed which contains unrelated provisions, some of which electors might wish to support, in order to get an otherwise disfavored provision passed." *Advisory Op. to Att'y General re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation Sys.*, 769 So. 2d 367, 369 (Fla. 2000) (quoting *Advisory Op. to Att'y General re Limited Casinos*, 644 So. 2d 71, 73 (Fla. 1994)). In addressing this issue the Court determines whether the amendment manifests a "logical and natural oneness of purpose." *Advisory Op. to Att'y Gen. re Fla.'s Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (quoting *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984)). A proposed amendment meets this test when it "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. Unity of object and plan is the universal test." *Fine*, 448 So. 2d at 990 (quoting *City of Coral Gables v. Gray*, 154 Fla. 881, 19 So. 2d 318, 320 (1944)).

This Court has repeatedly struck down initiatives that engaged in logrolling. In *In re Advisory Opinion to the Attorney General — Save Our Everglades*, 636 So. 2d

1336 (Fla. 1994), this Court concluded that an initiative that would create a trust to be funded by the sugar industry to restore the Everglades constituted logrolling because it contained two objectives. First, it sought to restore the Everglades, which this Court noted was "politically fashionable". *Id*. at 1341. Second, it sought to compel the sugar industry to fund the restoration, which was "more problematic." *Id*. This Court explained that "[m]any voters sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing." *Id*. In *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998), this Court concluded that the ballot initiative at issue constituted logrolling because it

> combine[d] two distinct subjects by banning limitations on health care provider choices imposed by law and by prohibiting private parties from entering into contracts that would limit health care provider choice. The amendment forces the voter who may favor or oppose one aspect of the ballot initiative to vote on the health care provider issue in an "all or nothing" manner.

The single-subject rule requires one discrete question that a voter may wholeheartedly accept or reject. The proposed amendment requires voters to cast a single vote on the two separate matters: state legislative redistricting and Congressional reapportionment. The duty of the State to reapportion the districts of the Florida House and Senate derives from the present language of Article III,

section 16. The Florida Constitution is silent on the issue of Congressional redistricting. That duty flows from the United States Constitution and federal statutes. Article I, section 4 of the U.S. Constitution provides:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Presently, Congress has enacted legislation regulating reapportionment in accord with the grant found in Article I, Section 4. Section 2a of Title 2 of the United States Code dictates how the information concerning the number of Representatives a state will be entitled to is communicated from the President to the House, and then ultimately out to the Governors of the States and presently provides:

> 2a. Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk
>
> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in

> the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2a. Congress, by enacting section 2c of Title 2 in 1967, expressed a requirement that Representatives be elected only from districts, and not at-large, which would be permitted by the Constitution. Section 2c provides:

> 2c. Number of Congressional Districts; number of Representatives from each District
>
> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. § 2c. The duties and obligations placed upon the several states by the United States Constitution and by federal statutes with regard to Congressional reapportionment are different than those which the Florida Constitution places upon the Florida House and Senate for legislative redistricting.[1]

[1] For instance, states must approach a zero deviation standard when drawing Congressional reapportionment plans. *Karcher v. Daggett*, 462 U.S. 725, 738-40 (1983)("[e]ven deviations smaller than the census margin of error must be the

The initiative petition before the Court requires voters who may feel more strongly about state redistricting or Congressional reapportionment to cast an all or nothing vote on the initiative. This initiative suffers the same defect as other proposed amendments that this Court has invalidated for logrolling. It must not be permitted to proceed to the ballot.

II.

THE INITIATIVE VIOLATES THE SINGLE-SUBJECT REQUIREMENT OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION BECAUSE IT ALTERS SEPARATE FUNCTIONS OF MULTIPLE BRANCHES OF GOVERNMENT

The single-subject provision of Article XI, Section 3 has a second requirement: that an initiative petition must manifest a "logical and natural oneness of purpose." *Fine v. Firestone, supra* at 990. In determining "oneness of purpose," this Court must consider "whether the proposed amendment affects separate functions of government, as well as how it affects other provisions of the constitution." *Advisory Opinion to the Attorney General re Term Limits Pledge, supra* at 802.

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result of a good faith effort to achieve population equality.") Generally, state legislative redistricting plans with a maximum population deviation under 10 percent are deemed insufficient to create a *prima facie* case of intentional discrimination under the Fourteenth Amendment. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983).

The fact that a single amendment may "affect" multiple areas of government is insufficient to invalidate an amendment on single-subject grounds. *Advisory Opinion to Attorney General re Limited Casinos*, 644 So. 2d 71, 74 (Fla. 1994). Further, "the possibility that an amendment might interact with other parts of the Florida Constitution is not sufficient reason to invalidate the proposed amendment." *Id*. "[R]ather, it is when a proposal substantially alters or performs the functions of multiple branches that it violates the single-subject test." *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission*, *supra*, 705 So. 2d at 1354. The requirement prevents a single amendment from substantially altering or performing the functions of multiple branches of government and thereby causing multiple "precipitous" and "cataclysmic" changes in state government. *Advisory Opinion to the Attorney General re Right to Treatment and Rehabilitation for Non-Violent Drug Offenses*, 818 So. 2d 491, 495 (Fla. 2002).

Presently, the Legislature enacts both the redistricting plan for the Legislature and the Congressional reapportionment. However, the method of the adoption of each is different. The legislative redistricting plan is enacted by way of a joint resolution of the House and Senate. Article III, section 16(a), Fla. Const. (1968). *See In re Constitutionality Of House Joint Resolution 25E*, 863 So. 2d 1176 (Fla. 2003). The Governor plays no role in process, neither approving nor vetoing

the joint resolution. Thereafter, it is presented to this Court for a limited review. This Court, in *In re Constitutionality Of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002), held:

> Our review afforded under article III, section 16(c) is extremely limited. In our first opinion examining the jurisdictional basis of article III, section 16(c), Florida Constitution, after its adoption, we observed:
>
> > At the outset, we emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination. Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites. If these requisites are met, we must refrain, at this time, from injecting our personal views into the proposed reapportionment plan. Even though we may disagree with the legislative policy in certain areas, the fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the Legislature.
>
> *In re Apportionment Law Senate Joint Resolution 1305, 1972 Regular Session*, 263 So. 2d 797, 799-800 (Fla. 1972). We explained that in this review we would only pass upon the facial validity of the plan and not upon any as-applied challenges. *See id*. at 808. The claims we could review included adherence to the one-person, one-vote constitutional requirement, *see id*. at 802, and the state constitutional requirement that the districts contain contiguous, overlapping, or identical territory. *See id.* at 805-7. We made clear that we are without authority to declare a legislative apportionment plan invalid unless it

> violated some prohibition in the constitution. *See id. at 805*.

This Court plays no role in the adoption of the State's Congressional reapportionment. Congressional districts are adopted by statute. *See* Sec. 8.0002, Fla. Stat. (2005). Under the Florida Constitution, the Legislature passes bills, which are thereafter presented to the Governor for his approval or veto. Article III, Section 6 through 8, Fla. Const. (1968). There is no role for this Court in that Constitutional scheme. However, under the initiative, the Governor's role in approving or vetoing the Congressional reapportionment plan has been gutted. This Court in *Advisory Opinion To The Attorney General Re Requirement For Adequate Public Education Funding*, 703 So. 2d 446, 449 (Fla. 1997), held that a proposed amendment that would have eliminated the Governor's power to veto certain appropriations removed from his office a "significant function" and, on that basis, found that the proposal "substantially affect[s] more than one function of government and multiple provisions of the Constitution. The amendment fails to comply with the single-subject requirement and, therefore, must be stricken from the ballot." *Id*. at 450. The instant amendment likewise removes a significant function from the Governor: his or her ability to approve or veto the Congressional reapportionment plan.

The role of the Legislature also changes under the proposed amendment. Currently, the Legislature, as a body, crafts, deliberates, debates, and determines

whether a proposed plan is adopted. The role of the presiding officers and minority leaders is qualitatively the same as that of other members of the Legislature. They have the right to propose, debate, and vote on the legislative propositions before them and their votes carry no more weight than that of the other members of the Legislatures. In the proposed scheme, the presiding officers of the House and Senate will be required to each appoint three members of the commission, while the members of "minority parties" in the House and Senate will elect one from their number who will select and certify three commissioners. The Legislature would change from being the body which creates and adopts the legislative and congressional plans to the body that chose the officers who then chose the members of the body that creates and adopts the state and federal districting plans.

Additionally, this Court has new burdens with regard to the Congressional plan. Under the initiative, new duties will be placed upon the Chief Justice of this Court, as well as the Chief Judges of each District Court of Appeal, to choose members of the commission. This duty comes on top of the Court's obligation to review the redistricting of the House and Senate, as well as a new duty to review and determine whether the Congressional apportionment has been established "in accordance with the constitution of this state and of the United States." Moreover, in the event that the commission fails to apportion the State within the time frame

set forth in the initiative, the duty to draw legislative and Congressional districts will shift to this Court.

This Court has stated that "[a]lthough a proposal may *affect* several branches of government and still pass muster, no single proposal can substantially *alter* or *perform* the functions of multiple branches." *In re Advisory Opinion to the Attorney General — Save Our Everglades*, *supra* at 1340 (emphasis in text) (footnote omitted). In this regard

> [t]he test … is functional and not locational, and where a proposed amendment changes more than one government function it is clearly multi-subject … [W]e recognize that all power comes from the people and that the citizens of the state have retained the right to broaden or to restrict that power by initiative amendment. But where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation the people have incorporated into article XI, section 3, Florida Constitution.

Evans v. Firestone, 457 So. 2d 1351, 1354 (Fla. 1984). The initiative petitions significantly alter the powers of the executive, legislative, and judicial branches of Florida government. Although the text of the proposed amendment only notes that it will alter Article III, Section 16 of the Florida Constitution, it will impact, and by implication modify, Article V, Section 2(b) and 2(c) and Article III, Sections 6 though 8.

As the foregoing discussion affirms, the amendment put forth by the initiative petition substantially alters the functions of multiple branches of government, thereby violating the single-subject test.

III.

THE PROPOSED BALLOT SUMMARY IS NOT LEGALLY SUFFICIENT UNDER SECTION 101.161, FLORIDA STATUTES, BECAUSE IT FAILS TO INFORM VOTERS THAT THE STATE HAS NO AUTHORITY TO EFFECT THIS CHANGE FOR CONGRESSIONAL DISTRICTS

Section 101.161, Florida Statutes (2004), sets forth the requirements for the ballot title and summary of a proposed constitutional amendment and provides in relevant part:

> Whenever a constitutional amendment or other public measure is submitted to a vote of the people, the substance of the amendment or other public measure shall be printed in clear and unambiguous language on the ballot . … The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

The purpose of Section 101.161, Florida Statutes, is "to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982). *See also In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination*, 632

So.2d 1018, 1020 (Fla. 1994). ("[S]ection 101.161, requires that the ballot title and summary state in clear and unambiguous language the chief purpose of the measure.") *Askew v. Firestone*, *supra* at 154-155. *See also Advisory Opinion to the Attorney General re Florida Locally Approved Gaming*, 656 So. 2d 1259, 1262 (Fla. 1995). The ballot summary is not required to include all possible effects. *Grose v. Firestone*, 422 So. 2d 303, 305 (Fla. 1982). *See also Advisory Opinion to the Attorney General re Prohibiting Public Funding of Political Candidates' Campaigns*, 639 So. 2d 972, 975 (Fla. 1997). Nor must the ballot summary "explain in detail what the proponents hope to accomplish." *Advisory Opinion to the Attorney General English — The Official Language of Florida*, 520 So. 2d 11, 13 (Fla. 1988).

The ballot title and summary however, must be "accurate and informative" and "give voters sufficient notice of what they are asked to decide to enable them to intelligently cast their ballots." *Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466, 468 (Fla. 1995) (quoting *Smith v. American Airlines, Inc.*, 606 So. 2d 618, 620-21 (Fla. 1992)).

The ballot title and summary mislead voters into the conclusion that the State has the authority to delegate the task of drafting Congressional districts to a body which is not the Legislature.

Presently, the Congressional reapportionment plan is created and enacted in the same manner as any other law of the State of Florida. Both chambers of the State's Legislative body must adopt the plan by a majority vote of its members. Art. III, Sec. 7, Fla. Const. (1968), as amended. The Governor has the authority to review and veto the legislation. *Id*. at Sec. 8(a). The Governor's veto may be overwritten by a two-thirds vote of both chambers of the Legislature. *Id*. at Sec. 8(c).

As discussed *supra*, while the power to redistrict the State Legislature flows from the State Constitution, the authority to redistrict Congressional seats flows from Article I, Section 4, Clause 1 of the United States Constitution, which provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

(Emphasis supplied.) *U.S. Term Limits v. Thorton*, 514 U.S. 779, 805 (1995) ("The power to regulate the instances of the Federal System is not a reserved power of the States, but rather is *delegated* by the Constitution.")(emphasis supplied).

The Supreme Court has not held that the language of Article 1, Section 4 restricts redistricting exclusively to a state's Legislature. Indeed, as discussed *infra*,

several cases have validated the participation of a state's Governor, who either approves or vetoes a plan. It has even held that the people of the State, where their Constitution made their participation a part of the legislative process, may participate directly in the reapportionment process via a referendum approving or rejecting the district plan. Florida's constitution does mandate the participation of the Governor, but has no mechanism for involvement of the state's voters.

In *Davis v. Hildebrant,* 241 U.S. 565 (1916), the Court upheld the Ohio Supreme Court's decision to dismiss a complaint challenging the validity of a referendum provision that invalidated a redistricting plan adopted by the State Legislature. Ohio's Constitution reserved to its people the right to approve or disapprove, by popular vote, a law enacted by its General Assembly. Subsequent to adoption of the redistricting plan, and its approval by the Governor, a requisite number of electors petitioned and a referendum was held on the measure. The citizens of Ohio disapproved the law. Suit was filed seeking mandamus directing the State to disregard the vote of the people and to proceed with elections on the Ohio Assembly's adopted plan. The Ohio Supreme Court dismissed the challenge. The Court relied on the Ohio Supreme Court's finding that the referendum process was part of the legislative function of the state and noted Congressional approval of the referendum procedure.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court also looked to the State of Minnesota's Constitution to determine whether an apportionment plan, adopted by the State's Legislature and vetoed by the Governor, was a valid enactment. The Minnesota Supreme Court had grounded its opinion validating the act in its interpretation of Article 1, Section 4 of the United States Constitution.

The Court rejected the narrow analysis of Minnesota's Supreme Court and concentrated instead on the function to be performed under Article 1, Section 4. In analyzing the language of the constitutional provision, the Court determined that the participation of the Governor was an integral part of Minnesota's legislative process, and within the State's authority to set forth its manner of legislating.

> As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, *that the exercise of the authority must be in accordance with the method which the state has prescribed the legislative enactments*. We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the State with power to enact laws in any manner other than that in which the Constitution of the State has provided that laws be enacted. Whether the Governor of the State, through veto power, shall have a part in the making of State laws, is a matter of state polity.

Id. at 367-368 (emphasis added).

In *Dummit v. O'Connell*, 181 S.W. 2d 691 (Ky. 1944), Kentucky's Supreme Court held that a law passed by the Kentucky Legislature allowing absentee voting in congressional elections by citizens absent from their precinct during times of

war was valid, despite the State Constitution's requirement that all elections be conducted by secret ballot, marked and deposited by the voter at the polling location. Kentucky's Supreme Court held that because the legislative process by which the law was passed was completed in the manner prescribed by the State Constitution, it resulted in a valid enactment under Article 1, Section 4 of the U.S. Constitution, despite the State's constitutional restriction. The Kentucky Supreme Court stated:

> While the opinion the case of *Smiley v. Holm*, Secretary of State of Minnesota, holds that a legislature must function in the method prescribed by the State Constitution in directing the times, places, and manner of holding elections for Senators and Representatives in Congress, since in so doing it is exercising the function of lawmaking, it does not necessarily follow that when functioning in the manner prescribed by the State Constitution, the scope of its enactment of the indicated subjects is also limited by the provisions of the State Constitution. *In short, we think that the holdings of the Supreme Court in the case last referred to, so far as they applicable to the question before us, may properly be said to mean no more than that the legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment***,** even though that enactment be one which the Legislature is authorized by the Federal Constitution to make.

Id. at 694 (emphasis added).

The inescapable conclusion to be drawn from *Hildebrandt*, *Smiley*, and *Dummit* is that, so long as the state's legislative process is utilized, a Congressional redistricting plan is valid, even if it would otherwise run afoul of other provisions

of the State's Constitution. It logically follows, therefore, that f the plan is not enacted through the legislative process, it is not in conformance with the circumscribed delegation of power flowing from the United States Constitution.

Two other state supreme court cases have analyzed these issues. In *Brady vs. The New Jersey Redistricting Commission*, 131 N.J. 594, 622 A.2d 843 (N.J. 1992), the New Jersey Supreme Court held that a redistricting commission *created by the State Legislature with the approval of the Governor* did not run afoul of Article I, Section 4 of the United States Constitution, or 2 U.S.C. Section 2c. Again, that court looked to its Constitution for guidance on what constitutes a valid legislative process. New Jersey's Supreme Court noted that in its state, the legislature could delegate some legis lative powers so long as the delegation was constrained by standards sufficiently definitive to guide the exercise of that power. New Jersey's constitution allowed for the creation of temporary commissions for special purposes to be established by law.

> *Temporary Commissions for special purposes, however, must be "established by law", which requires both legislative and executive action.* Such Commissions constitute a specialized form of administrative agency. We view congressional redistricting as one of those limited "special purposes" in respect to which a "temporary commission" may be established under Article V, Section IV, Paragraph 1 [of the New Jersey Constitution]. Therefore, assuming satisfaction of the other requisite of a valid delegation of law making authority, namely, sufficiently-detailed guidelines to hem in the exercise of that power, the Commission could exercise the same type of

> legislative power as any other administrative agency that had received a similar delegation.

Id. 131 N.J. at 608-609 622 A.2d at 850 (emphasis added)**.** The Court then analyzed the precedents cited by plaintiffs in their brief, which included *Smiley v. Holm*.

> Those cases are clearly distinguishable from the present challenge: *both houses of the New Jersey Legislature passed the act by the necessary majorities, and the Governor signed the bill into law on January 21, 1992. The act does not attempt an "end run" around a required participant in the law making process***.**

Id. 131 N.J. at 610, 622 A.2d at 851. (emphasis added)

The Colorado Supreme Court, in *Salazar v. Davidson* 79 P. 3d 1331 (Col. 2003) considered an original action by Colorado's Attorney General challenging the constitutionality of the General Assembly's congressional redistricting bill. Colorado's Constitution contained an implied limitation on redistricting, requiring the General Assembly to redistrict congressional seats "when a new apportionment shall be made by Congress."[2]. Article V, section 44, Col. Const. The General Assembly was unable to pass a Congressional plan, despite efforts in a regular and two special sessions. The voters petitioned the court for relief, requesting that the Denver district court enact a new Congressional plan. The district court considered

[2] Colorado's Constitution was amended to create a reapportionment commission to redistrict the state legislature, but the provisions governing Congressional redistricting were not substantially changed.

competing proposals and even delayed its decision to provide the legislature with another opportunity to pass a plan during the 2002 session. Finally, because the General Assembly failed to act, the district court proposed a redistricting plan in time to qualify for the November elections. Colorado's Supreme Court unanimously affirmed the districts court's decision.

In 2003, the newly elected General Assembly enacted a Congressional redistricting plan, which was signed into law by the Governor. The Colorado Supreme Court held that the 2003 plan adopted by the General Assembly violated the Colorado Constitution, basing its opinion on a provision of the Constitution prohibiting Congressional redistricting more than once per decade.

> *We recognize and emphasize that the General Assembly has primary responsibility for drawing Congressional districts.* But we also hold that when the General Assembly fails to provide a constitutional redistricting plan in the face of an upcoming election and courts are forced to step in, these judicially-created districts are just as binding and permanent as districts created by the General Assembly. We further hold that regardless of the method by which the districts are created, the state constitution prohibits redrawing the districts until after the decennial census.

Id. at 1231 (emphasis supplied).

This holding in *Salazar* can be reconciled with the holding in *Smiley*. To the extent that the Colorado Supreme Court acknowledged the primary role of the General Assembly, and in fact found that it was only upon failure of the legislative process to produce a law, that the judicially created plan was adopted, it is

consistent with the language of Article I, Section 4. In effect, the question before the Supreme Court, correctly framed, was whether the people of Colorado, through their Constitution, could create a limitation on the number of times that Congressional seats may be redistricted within a decennial cycle.[3]

The Founding Fathers clearly intended to have the powers set forth in Article I Section 4 to be exercised through the legislative process. Indeed, both Alexander Hamilton and James Madison were quite concerned with the States ability to sabotage the nascent national government. Madison's debates clearly demonstrate that the Framers of the Constitution intended to initially delegate the right to adopt procedural rules to the State Legislature, subject always to the power of Congress to overrule the states on this matter. Madison stated the following:

> The necessity of a Genl. Govt. supposes *that the State Legislatures* will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the

[3] However, the Colorado court gratuitously, and we would argue, erroneously notes that Congressional plans may be enacted by any method which the state desires to implement, we respectfully submit that this reasoning is in direct conflict with the language of the United States Constitution. Colorado's Supreme Court states in its opinion that: "[T]he U.S. Constitution does not grant redistricting power to the State Legislatures exclusively, but instead to the States generally. The State may draw Congressional districts via any process that it deems appropriate." *Id.* at 1231. This portion of the *Salazar* opinion, with no authoritative citations, clearly runs afoul of *Smiley* and *Hildebrandt.* Whereas the United States Supreme Court has held that the term "the legislature thereof" in Article I Section 4 focuses not on the body but on the legislative function, those holdings cannot be understood to allow a State unfettered discretion to enact a Congressional plan "via any process it deems appropriate".

> House of Representatives to the people and not the legislatures of the States supposes that the result will somewhat be influenced by the mode. *This view of the question seems to decide that the legislatures of the States are not to have uncontrouled right of regulating the times places and manner upholding elections* … It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, should all vote for all representatives; or all in the district vote for a number allotted to the district; these & many other points would depend on *the Legislatures*. And might materially affect the appointments. Whenever the *State Legislatures* had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. … What danger could there be in giving a controuling power to the Natl. legislature?

II *Records of the Federal Convention of 1787* at 240-241 (M. Farrand, ed. 1987) (emphasis added).

Indeed, Madison was prophetic in foreseeing some of the inherent danger of delegating this power to the state's legislative process, which is why the Framers of the Constitution created a mechanism in Article I, Section 4 by which Congress could address these potential abuses.

Hamilton and Madison defended the structure of the Elections Clause by repeatedly insisting that the nascent national government needed to be given the

tools to curb the likely impulses of *state legislatures* to disrupt the functions of the federal government.[4] These debates make clear, that the intent of our Founding Fathers was to delegate limited authority to *the Legislatures of the States* to regulate time place and manner through a Legislative Process and not, as the Colorado Court surmised, to the States unfettered discretion to employ "any process that it deems appropriate".

As would be expected, the Elections Clause generated an enormous amount of commentary and debate during the constitutional convention and at the ratifying conventions. Uniformly, the framers viewed the Elections Clause as a grant to *the state legislatures* of the initial opportunity to adopt procedural rules, with retention of supervisory power by the federal government.

The argument put forth by Hamilton and Madison with regard to the structure of the Election Clause was echoed in the ratifying conventions. At the Massachusetts convention, Mr. Parsons described the constitutional structure introduced by the Elections Clause as follows: "regulations introduced by the *state legislatures* will be the governing rule of elections, until Congress can agree upon alterations." *The Debates in the Several State Conventions on the Adoption of the*

[4] Hamilton believed that "an exclusive power of regulating elections for the national government, in the hands of the state legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs … " *The Federalist No. 59*, at 363 (Hamilton) (Clinton Rossiter, ed. 1961).

Federal Constitution (Jonathon Elliot, 2d ed., 1836), Volume II at 27. (emphasis added). Mr. Strong noted that he knew of "but two bodies wherein [the authority to regulate elections] can be lodged — *the legislatures of the several states, and the general Congress."* II *Elliot's Debates* at 24 (Italics in original). Cabot, arguing for the necessity of a congressional check on the plenary authority of the state legislature, insisted that without such a provision "the *state legislatures* [could] regulate conclusively the elections of the democratic branch…" *Id.* at 26 (emphasis added). Also, Parsons noted in the same context that "if therefore, the power of making and altering the regulations defined in this section, *is vested absolutely in the legislatures*, the Representatives will very soon be reduced to an undue dependence …" *Id*. at 26.

In the North Carolina convention, Mr. Steele pointed out that the state legislatures had the initial power to regulate the time, place and manner of election, which provided the North Carolina legislature the opportunity to regulate the first election "as they think proper." IV *Elliot's Debates* 71. James Wilson, during the Pennsylvania convention, indicated that the Election's Clause placed "into the hands of the state legislature" the authority to set forth regulations for congressional elections. IV *Elliot's Debates* 440.

Respectfully, if the provisions of Florida's Constitution were capable of restricting or abrogating the Legislature's plenary congressional redistricting

authority delegated by the Elections Clause, then the voices of our Founding Fathers during the ratification debates must be muffled silent and we will have to turn our backs on those whose quill pens intoned our Constitution on parchment and vellum.

The State is not free to ignore the clear mandate of the United States Constitution and proceed to reapportion the State's Congressional districts. The State of Florida is bound by the Supremacy Clause of the United States Constitution: "This Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, Cl. 2, U.S. Const.

The Florida Constitution, in provisions unaffected by the proposed amendment, places the authority to enact laws with the legislature, checked and balanced only by the Governor's power to veto legislative enactments. Therefore, in Florida, in order for a Congressional redistricting plan to be validly enacted, it must be adopted by the Florida House and Senate, following the mandate of our own Constitution.

This Court has previously recognized that it has the responsibility to consider a facial violation of the Constitution of the United States in proposed amendments to the Florida Constitution. In *Gray v. Winthrop*, 115 Fla. 721, 156

So. 270 (1934), and *Gray v. Moss*, 115 Fla. 701, 156 So. 262 (1934), this Court considered violations of the United States Constitution before allowing a proposed amendment to the state Constitution to be placed on the ballot. In doing so, this Court stated:

> If a proposed amendment to the state Constitution by its terms specifically and necessarily violates a command or limitation of the Federal Constitution, a ministerial duty of an administrative officer, that is a part of the prescribed legal procedure for submitting such proposed amendment to the electorate of the state for adoption or rejection, may be enjoined at the suit of proper parties in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances.

Winthrop, 115 Fla. at 726-27, 156 So. at 272.[5] More recently, this Court in *Weber v. Smathers*, 338 So. 2d 819, 821 (Fla. 1976), stated that the citizens of Florida "have a right to change, abrogate or modify [the Florida Constitution] in any manner they see fit *so long as they keep within the confines of the Federal Constitution*." (Emphasis supplied.) Any hesitation in striking down a proposed amendment that violates the United States Constitution imposes on the State the considerable expense of a futile election and requires both proponents and opponents of the amendment expend considerable sums, only to have the provision later held to be unconstitutional. By failing to apprise the voters of the fact that the

[5] This Court has not expressly overruled either *Winthrop* or *Moss*.

commission will not have the authority to draft a Congressional plan, the ballot summary is misleading.

IV.

THE PROPOSED BALLOT SUMMARY IS NOT LEGALLY SUFFICIENT UNDER SECTION 101.161, FLORIDA STATUTES, BECAUSE IT FAILS TO ADVISE THE ELECTORATE OF THE SUBSTANCE OF THE AMENDMENT

A. The Commission is not "Non-Partisan"

The ballot title for the initiative petition states that the amendment will create an "Independent Nonpartisan Commission To Apportion Legislative And Congressional Districts Which Replaces Apportionment By Legislature." The summary states, in part: "Establishes non-partisan method of appointment to commission." The title and summary, as worded, are misleading as to the contents and purpose and effect of the initiative.

The commission, as envisioned by the amendment, is not "non-partisan". Members of the commission are appointed in a partisan manner. The presiding officers of the two chambers of the Florida Legislature each pick three members of the commission. These two constitutional officers are usually elected by the vote of the political party holding a majority of the seats in their respective bodies. The task of appointing the first six members of the commission is, thus, given over to partisans who are not required to appoint persons who have no political party

affiliation or who are not political partisans. The proposed amendment then directs that:

> 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.

Again, the task of appointing the next six members of the commission is given over to partisans who are not required to appoint persons who have no political party affiliation. Finally, the last three members of the commission are to be appointed by the Chief Justice of this Court from a slate of 15 members nominated by the Chief Judges of the five District Courts of Appeal "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 is not required to appoint persons without a party affiliation, only persons who do not belong to the either of the two largest parties in the Legislature.[6] Thus, at least 12 of the 15 members of the commission

[6] According to the Florida Division of Elections, at the time of the November 2004 General Election were over 10.3 million registered voters in the State. The breakdown of registered voters by party in that statewide election was as follows:

Party	Registrants	Percent
Republican	3,892,492	37.8%
Democrat	4,261,249	41.4%
No Party Affiliation	1,886,013	18.3%
Minor	261,536	2.5%

will be selected on a partisan basis. The remaining three members can be persons with no party affiliation, or members of recognized Florida minor parties, such as the British Reformed Party of Florida, the Christian Party, Independent Democrats of Florida, the Reform Party, or even the Florida Socialist Workers Party. While the ballot title speaks of nonpartisanship, the amendment itself does not assure nonpartisanship, much less partisan balance. The title, therefore, is misleading.

Even in the title, this initiative petition flies under false colors. As stated by this Court in *In re Advisory Opinion to the Attorney General - Save Our Everglades, supra* at 1341 (Fla. 1994): "A voter responding to emotional language of the title could well be misled as to the contents and purpose of the proposed amendment. A proposed amendment cannot fly under false colors; this one does."

B. The Amendment Does Not Bar Members from Seeking Office, Contrary to the Ballot Summary

The summary states that the amendment would limit "commission members from seeking office under plan for four years after service on commission." However, the text of the amendment does not actually limit members from seeking office, but provides:

Total	10,301,290	100.0%

See, County Voter Registration by Party, October 4, 2004, at http://election.dos.state.fl.us/voterreg/pdf/2004/2004genParty.pdf.

> 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.

(Emphasis supplied.) On its face, the ballot summary is misleading, because the language of the amendment does not automatically act to bar a commissioner's candidacy, but only requires him or her to "take an oath". The proposed amendment fails to detail the consequences that would befall a commissioner who would attempt to become a candidate for a Congressional seat. Currently, candidates for Congress qualify by filing paperwork with the Florida Department of State and by paying the appropriate filing fee. Sections 99.061, 99.092 and 101.253, Fla. Stat. (2004). In order to effectuate a bar to accepting qualification paperwork from commissioners, the Secretary of State will have to promulgate regulations. The ballot language, however, makes no mention of this grant of power to the Secretary of State. This Court in *Advisory Opinion To The Attorney General Re Term Limits Pledge*, *supra*, faced the identical issue. In *Term Limits Pledge*, the ballot summary for a proposed constitutional amendment provided:

> Directs Secretary of State to permit but not require candidates for the United States Congress to pledge to serve a maximum of 3 terms if elected to the House of Representatives and 2 terms if elected to the Senate and to indicate on all primary, special and general election ballots which candidates have taken the pledge and

> which have taken and broken the pledge. Affects powers of Secretary of State under Article IV.

Id., 718 So. 2d at 800. The proposed amendment in *Term Limits Pledge* provided that "The Secretary of State shall implement this section by rule." This Court found that the ballot summary in *Term Limits Pledge* was misleading on the following grounds:

> The omissions in this ballot summary are far more critical. This proposed amendment, if approved by the electorate and incorporated into the state constitution, would substantially impact 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.
>
> The powers that the proposed amendment would bestow on the Secretary of State would not be purely ministerial in nature. Under the proposed amendment, the Secretary of State would have discretion to promulgate rules regarding the implementation of the amendment. Such rules would be necessary to address currently unanswered questions such as whether a candidate who voluntarily took the term limits pledge could thereafter voluntarily repudiate the pledge without ballot repercussions; whether a candidate who has served three terms in the House of Representatives would break the term limits pledge by seeking election to the Senate; whether a Florida candidate's prior service as a United States Representative or Senator from another state would be part of the term limit; or whether the term limits pledge applies only to consecutive terms, or to interspersed terms as well.
>
> The power to answer these and other decisive questions would be, in large part, the power to ultimately determine

> which candidates would suffer the "Broke Term Limits Pledge" notation next to their name on the ballot. This cuts to the very core of the chief purpose of the proposed amendment — to identify on the ballot those candidates who have taken and broken the term limits pledge. *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*.
>
> In short, the problem "lies not with what the summary says, but, rather, with what it does not say." *Fish & Wildlife Conservation Comm'n*, 705 So. 2d at 1355 (quoting *Askew*, 421 So. 2d at 156). When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken. For the reasons expressed, we direct that this proposed ballot summary be stricken and the proposed amendment not be placed on the ballot.

Id. at 800 (emphasis supplied)(footnote omitted.)

The ballot summary before the Court is even more flawed than the one that confronted this Court in *Term Limits Pledge.* The instant ballot summary and amendment leave unanswered the question of whether a commissioner who took an oath not to be a candidate for office could repudiate that oath and, thereby, gain access to the ballot. While the ballot summary in *Term Limits Pledge* failed to mention that under that proposed amendment, the Secretary of State would have to promulgate rules, the present proposed amendment does not even hint that rules

must be promulgated.[7] The ballot summary here must likewise fail and the proposed amendment must not be permitted to move to the next stage of the process.

C. The Qualifications Clause of the United States Constitution prohibits the ban on Commission members running for Congress

There is a deeper and much more fundamental problem with the ballot summary in that it fails to inform voters that the amendment cannot constitutionally prohibit a commissioner from qualifying as a candidate for Congress. In *U.S. Term Limits, Inc. v. Thornton*, *supra*, an action was brought challenging an amendment to the Arkansas Constitution, adopted via initiative petition, which precluded persons who had served three terms in the United States Congress from having their names placed on the ballot for election to Congress. The trial court and the Arkansas Supreme Court each found that the provision violated the United States Constitution. The Supreme Court found that the term

[7] Moreover, the text of the amendment is vague in another way. The amendment would seek to bar persons from receiving compensation as a paid registered lobbyist. However, it is not clear as to whether it is intended to act as bar to persons acting as a lobbyist before the Legislature or Congress. The broad wording of the language may attempt to bar persons from acting as registered lobbyists at any level in the federal government or in the State, perhaps even precluding commission members from lobbying county commissions or city councils. The vagueness of the language will necessitate the Secretary of State to issue regulations explaining this portion of the proposed amendment, as well.

limit provision conflicted with the Qualifications Clause of the United States Constitution which provides for members of Congress as follows:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Article I, Section 2, Clause 2, U.S. Const. Justice Stevens, writing for the majority, held:

> In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand. To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded. More importantly, allowing States to evade the Qualifications Clauses by "dress[ing] eligibility to stand for Congress in ballot access clothing" trivializes the basic principles of our democracy that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960), quoting *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 594 (1926).

514 U.S. at 831. Justice Stevens noted the method by which a State-imposed qualification was originally adopted had no effect on determining its constitutionality.

> There is little significance to the fact that Amendment 73 was adopted by a popular vote, rather than as an Act of the state legislature. *See* n. 19, *supra*. In fact, none of the petitioners argues that the constitutionality of a state law would depend on the method of its adoption. This is proper, because the voters of Arkansas, in adopting Amendment 73, were acting as citizens of the State of Arkansas, and not as citizens of the National Government. *The people of the State of Arkansas have no more power than does the Arkansas Legislature to supplement the qualifications for service in Congress.* As Chief Justice Marshall emphasized in *McCulloch*, "Those means are not given by the people of a particular State, not given by the constituents of the legislature, ... but by the people of all the States." 4 Wheat., at 428-429.

514 U.S. at 822, n. 32 (emphasis supplied).

The failure to alert the voters to the fact that imposing a qualification on Congressional candidates cannot be enforced under the United States Constitution renders the ballot summary misleading. In accord with this Court's rulings in *Gray v. Winthrop*, *supra*, and *Gray v. Moss*, *supra*, a proposed state constitutional amendment that violates the United States Constitution must not be placed before the voters.

D. The Summary Fails to Inform Voters that the Governor's Current Role in Congressional Reapportionment is Eliminated

The summary is also misleading in that it fails to alert the voters that the Governor will be stripped of his role in the Congressional reapportionment

process. As discussed earlier, the Governor, in accord with his Constitutional prerogative, can sign the bill rewriting the boundaries of Florida's Congressional districts, allow it to become law without his signature, or veto the bill, sending it back to the Legislature for further consideration. The proposed amendment removes the Governor's involvement in the Congressional reapportionment process. Yet, the ballot summary is silent as to this effect, "hiding the ball" from the voters.

E. The Summary Fails to Inform Voters Of This Court's Current Role in Redistricting

The ballot summary also misleads in another way. By stating that, if the commission fails to file a valid plan, the Supreme Court shall "apportion districts", it implies that this Court has no present role in redistricting. Under the present language of Article III, section 16, this Court has extensive involvement with the redistricting of the Florida House and Senate. Article III, Section 16(b) through (f) presently provides:

> (b) FAILURE OF LEGISLATURE TO APPORTION; JUDICIAL REAPPORTIONMENT. In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, *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 state records an order making such apportionment.

(c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, *the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment.* The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) EFFECT OF JUDGMENT IN APPORTIONMENT; EXTRAORDINARY APPORTIONMENT SESSION. *A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid*, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which *the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.*

(e) EXTRAORDINARY APPORTIONMENT SESSION; REVIEW OF APPORTIONMENT. Within fifteen days after the adjournment of an extraordinary apportionment session, *the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature*, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment shall be had as provided for in cases of such joint resolution adopted at a regular or special apportionment session.

(f) JUDICIAL REAPPORTIONMENT. Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court determine that the apportionment made is invalid, *the court shall, not later than sixty days after receiving the*

> *petition of the attorney general, file with the custodian of state records an order making such apportionment.*

(Emphasis supplied.) In *Advisory Opinion To The Attorney General, Re Amendment To Bar Government From Treating People Differently Based On Race In Public Education*, *supra*, this Court struck down ballot language that suffered the same flaws as the instant summary. In *Treating People Differently*, the proposed ballot summary provided:

> Amends Declaration of Rights, Article I of the Florida Constitution, to bar state and local government bodies from treating people differently based on race, color, ethnicity, or national origin in the operation of public education, whether the program is called "preferential treatment," "affirmative action," or anything else. Does not bar programs that treat people equally without regard to race, color, ethnicity, or national origin. Exempts actions needed for federal funds eligibility.

This Court found the ballot language improper in that it implied that there was no present bar to discrimination based upon race or national origin, when Article I, section 2 of the Florida Constitution, expressly states:

> Section 2. Basic rights.-All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

This Court noted that the proposed amendment "would simply duplicate the Equal Protection Clause of the Florida Constitution and would have no practical effect — despite language suggesting otherwise." 778 So. 2d at 903-04. This Court found that the ballot summary's failure to disclose, among other things, that some of the effects of the proposed amendment were already present in the Constitution, to be misleading. This Court specifically found:

> While the vague and obfuscating language employed in the ballot titles and summaries might be viewed by some as a deft campaign tactic, such a practice is inimical to the constitutional processes in Florida and is patently impermissible in an initiative petition. A constitutional referendum is not a high stakes poker game where voters must guess the sponsors' hand by discounting the hype and spin and calculating the odds themselves. Whenever constitutional rights are in issue, accuracy and truthfulness are the hallmarks. 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.

Id. at 906 (emphasis in original).

In the instant case, a potential voter might be persuaded to vote for the amendment on the belief that involving this Court in the redistricting process is a worthy goal, without ever being informed of the redistricting portfolio that this Court already carries.

The voters of today should expect that they will be given the "full truth" with regard to this amendment. However, as the foregoing discussion

demonstrates, the sponsors of this amendment have not only failed to place all of their cards on the table, they hold several aces up their sleeves. The Court should find that the proposed ballot language lacks both accuracy and truth and find that it does not deserve a place on a Florida ballot.

CONCLUSION

The initiative petition and ballot summary at issue should be stricken from the ballot for failure to comply with the requirements of Article XI, Section 3, Florida Constitution, and Section 101.161, Florida Statutes.

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CERTIFICATE OF SERVICE

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