IN THE SUPREME COURT OF FLORIDA

Case No. SC08-986

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

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ANSWER BRIEF

OF THE FLORIDA LEGISLATURE

IN OPPOSITION TO THE PETITION

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SUMMARY OF THE ARGUMENT

The sponsors' contention that the proposal's eight apportionment standards are "integrated" does not hold up. Unpacking the standards from the proposal and scrutinizing them plainly shows they have different goals and objectives which have nothing to do with each other and often conflict. Because voters can disagree about the desirability of one discrete standard over another, forcing them to accept this package is a classic exercise in logrolling.

The proposal substantially affects multiple branches of government. Historically apportionment is a legislative function. But the proposed standards will inevitably involve the courts in the process, far more than they are today — to the point that the courts will end up writing the plans instead of the Legislature.

Despite the sponsors' dismissive argument that the Legislature is picking nits, the defects the Legislature has identified are fatal. They are substantial and clearly violate the Constitution and court's case law. The summary uses material terms that very from those in the text:

- Dropping “intent” from the summary’s first sentence so the voter is left with the impression he or she is voting to outlaw plans that effectively favor a party or incumbent.
- Substituting “city and county boundaries” in the summary when the text speaks of districts delineated by “political boundaries.” This material divergence leaves voters with the impression that they are voting on a measure requiring districts to mirror city and county boundaries when the text does not.

The sponsors have put forward no meaningful argument that these disparities fail to violate this Court’s precedents.

The proposals inclusion of “contiguity” as a standard wrongfully implies that no reapportionment standards exist, an implication this Court has disfavored. The sponsors belated contention that inclusion of “contiguity” does not really mean anything effectively would read the term out of the amendment and the Constitution itself, should the amendment pass, contrary to the well-accepted precept that all terms in the Constitution must be given the meaning the voters intended. Here, because the proposal purports to include the only standards for reapportionment, voters may well intend to write out of the Constitution the

prevailing standards, which include the ability to provide for multi-member districts.

ARGUMENT

I. Single subject flaws.

A. The amendment's standards are not integrated.

The supporters contend that the amendment is all right because its eight standards are "integrated." How are they integrated? "Because the standards influence the shape of districts that make up a single whole, the application of every standard can affect all others."[1] But the sponsors do not make any effort to describe how this is so. Unpacking the proposal shows that the claim is just not true.

It is worth remembering that the amendment requires the following:

1. No plan or district shall be drawn with the intent to favor or disfavor a political party.
2. No plan or district shall be drawn with the intent to favor or disfavor an incumbent.
3. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
4. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
5. Districts shall consist of contiguous territory.

[1] Sponsors' answer brief at 9.

The second paragraph would establish these independent, freestanding standards, which are to be met unless doing so conflicts with a requirement in paragraph 1 or with federal law:

6. Districts shall be as nearly equal in population as is practicable.
7. Districts shall be compact.
8. Districts shall, where feasible, utilize political and geographic boundaries.

Thus, the amendment establishes eight independent requirements for any apportionment plan.

But if one looks at these requirements more closely, we see that they address two discrete, but broad, subjects: anti-discrimination (1, 2, 3, 4, 6) and geographic integrity (5, 7, 8).[2]

The anti-discrimination requirements provide protection for five different classes:

- Political parties.
- Non-incumbents.
- Racial minorities.
- Language minorities.

[2] Although the Legislature suggested in its initial brief that one might see five broad general purposes, if one is generous perhaps as few as two are apparent.

- All voters, who apparently are to be entitled to the most stringent interpretations of the "one person/one vote" requirement of the equal protection clause.

It doesn't take intellectual heavy lifting to see that — on their face — not one of the standards meshes with, or supports, another, the hallmark of integration. Each standard addressing discrimination has the separate goal of protecting a class. Whether a plan is drawn to favor racial, ethnic or language minorities, has nothing whatever to do with drawing a plan that is not intended to benefit a party or incumbent. Equality of population has nothing to do with compactness, and neither of them has anything to do with using political or geographic boundaries. In fact, as the bare text of the amendment acknowledges, some of the standards openly clash with others so that one must be sacrificed at the expense of another. (So if the standards "affect all others" they do so by cancelling another out.) Thus, while, rhetorically speaking, the proposal may address the artificial single subject of "standards for redistricting," each of the standards flies off in a different direction, aiming at different targets and having different, unrelated, and sometimes conflicting objectives. The proposal's "integration" is an illusion and the single subject proposed here is just clever labeling.

The sponsors struggle to distinguish the controlling case, In re Advisory Opinion to Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994), but the Court's reasoning in that case applies directly here. The proposal at issue in Laws Related to Discrimination prohibited all governmental entities from enacting "any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status." Id. at 1019. The Court rejected the proponents' contention that the measure addressed the single subject of discrimination. In fact, the Court concluded that the label "discrimination" was merely an unacceptable "broad generality" which could not be relied on to sail past the one subject bar. Id. at 1020. The Court rejected the amendment for several reasons, but for our purposes, it is significant that the Court found that the amendment was an exercise in logrolling because "it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed." Id. The enumeration of these classifications required "voters to choose which classifications they feel most strongly about, and then [required] them to cast an all or nothing vote on the classifications listed in the amendment." Id.

The amendment before us today forces voters to make the same sort of choice. It proposes a "broad generality" as a chief purpose, then enumerates eight standards for redistricting, five of which provide anti-discrimination protections to distinct classes in the same way as the amendment in Laws Related to Discrimination, and others that address geographic integrity (a separate goal entirely). Voters must accept or reject the entire package, although they may agree with one classification but strongly disagree with another. Ending discrimination or having voting standards thus is a broad generality that will not by itself constitute the chief objective of an amendment for one subject purposes.

The Court has taught us in its one subject cases that the task is to look at the goal of each individual standard. Where all the standards serve the same purpose, they pass constitutional muster. But where each serves a separate purpose, has an independent target or are so controversial that voters may disagree with some standards but not others, they do not. Thus, where ending discrimination against a defined class is the goal and each standard protects a distinct class, then each standard has a separate independent purpose.

If the Court accepts the sponsors' view, the single subject requirement of Article 11, s. 3, Fla.Const., will be significantly weakened.

B. The Court's authorship of redistricting plans is not speculative; it is inevitable. Thus, the proposal necessarily substantially affects multiple branches of government.

In its initial brief, the Legislature pointed out that the amendment would substantially alter the functions of multiple branches of government. We said that it would be impossible for the Legislature to avoid a finding that it intended a political result because the consequences of drawing the lines — which inevitably favor one party or another — would be known to the Legislature. Since the Legislature must know the result of its line drawing has a political effect, it is a short inferential hop to the conclusion that the Legislature must have intended the result. For instance, the legislature has to know the political and demographic makeup of the state to comply with the Federal Voting Rights act. In support of this argument the Legislature quoted Davis v. Bandemer, 478 U.S. 109, 128-129 (1986), which stated:

> "As long as redistricting is done by a legislature, it should not very difficult to prove that the likely political consequences of the reapportionment were intended."

The argument boils down to this simple formulation: because drawing districts has political consequences, the legislature will have a very good idea of what those consequences are when the lines are drawn; therefore, any court which looks at the districts that are drawn will have to assume those the consequences were intended.

In fact, it is an inference courts are required to make.[3] Because the Legislature will be unable to draft a plan without contemplating political consequences, the Court necessarily will be compelled to draw district lines.

In their answer brief , the sponsors dismiss this very real concern as pure speculation. But this unsupported argument ignores all the case law that says it is impossible to draw politically neutral districts, and that the legislature will not be able to comply with the standards.[4] In fact, the sponsors contradict themselves, recognizing that Court involvement is inevitable:

> Moreover regardless of the language of the amendment, courts might ultimately look to the effect of the plan in order to apply an objective test to the intent requirement, something often done when statutes include an intent requirement"[5]

When a court reviews the districts, the best, and probably only, evidence of intent will be the effect of the line drawing which will inevitably not be politically neutral. This is what the precedents cited in the Legislature's initial brief tell us time and again. Clearly, the sponsors know the underlying realities of

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[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Patterson v. McLean Credit Corp. 491 U.S. 164, 186-187 (1989) (discriminatory acts raise presumption of discriminatory intent).

[4]Sponsors' answer brief at p.9.

[5]Sponsors' answer brief at p. 12.

redistricting, but hope by mere rhetoric to convince their audience that the real is a mirage.

The second element of this argument is that the Constitution has provisions which provide for the Court to draw lines if the Legislature cannot. When those circumstances arise the Court will be bound to the same impossible standards as the Legislature. Yet, the sponsors gloss over this as speculative when the Constitution goes to great lengths to explain the role of the Court in the process.

Consequently, the proposal substantially rewrites the roles of both the Legislature and the judiciary, and constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent. Advisory Opinion to the Atty. Gen. Re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006); Advisory Opinion to the Attorney General Re: Independent Nonpartisan Commission to Apportion Legislature and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1224 (Fla. 2006).

II. The ballot title and summary are misleading.

The sponsors do not address the Legislature's criticisms of the ballot title. So perhaps they agree with them. But they have taken issue with the Legislature's identification of obvious defects in the ballot summary. Calling the Legislature's

issue spotting nit-picking does not make the problems disappear, nor does it confer protection from this Court's case law.

A. "Drawn with the intent to favor . . ."

There is a material difference between the summary and the text of the proposal. The summary says: "Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party." On the other hand, the text says, "No apportionment plan or district shall be drawn *with the intent* to favor or disfavor a political party or incumbent . . ." Missing from the summary are the crucial words "with the intent." Without the missing words, a reasonable voter can, and probably will, read the summary to mean that he or she is voting on a standard requiring plans that do not *effectively* favor a party of incumbent.

The sponsors dismiss this fatal flaw with the sophistry that "the term 'drawn to' [in the summary] is more reasonably read to imply intent than effect."[6] But this misses the point. We should judge summaries not by how lawyers would read them, or how they could be read, but by how the average voter is likely to do so, and by whether they are subject to multiple readings or leave important things out. Here, the words of the summary leave out something really important. And they

[6] Sponsors' answer brief at 12.

are subject to multiple interpretations, the mostly likely of which is that the text bans plans that *effectively* favor a party or incumbent.

The sponsors then go on to argue that the summary is all right because, well, a court might look at the effect of a plan and from that infer the Legislature *intended* the effect, which of course nullifies the plan. (Remember, we said this not only was likely but inevitable?) But what reasonable voter is going to think about the legal tests the court might eventually impose while he or she stands in the polling place, marker poised over the ovals on the ballot? That answer is easy: none.

This lapse alone is enough to bring down the proposal.

B. The missing "political boundaries."

The summary replaces the phrase "political boundaries" from the text with "city and county boundaries." Like the AWOL "intent" in the summary's first sentence, this is a material deviation from the amendment's text that will lead a reasonable voter (and should lead any reasonable lawyer) into thinking he or she is voting for one thing when in fact they are voting for something altogether different.

The sponsors suppose this is no problem because, "It is difficult to conceive of why a voter would be moved to change his or her vote, and therefore, be mislead

. . .”[7] But the point of this Court’s case law is not whether it is difficult for lawyers to “conceive” if a voter “would be moved to change his or her vote” over the inconsistency. Rather, the point is whether the inconsistency exists at all. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 (Fla. 1998) (summary said “citizens” while text said “natural person”). When a retailer offers a customer a bait-and-switch, the point is not whether some customers might be happy with the switch, but whether the bait was offered in the first place. Here, the inconsistency is clearly material, since city/county boundaries are not synonymous with political boundaries. Thus, the impression voters take way from the summary is utterly inconsistent with the demands of the text. That is inherently misleading and warrants striking this measure from the ballot by itself.

C. Language minorities.

The sponsor contends that “the Legislature fails to explain what meaning the term ‘language minority’ can be interpreted by a voter to mean other than a native language other than English.”[8] Since the sponsors seem unable fairly to restate our position before they try hacking it apart, we re-emphasise: Our position is that the

[7] Sponsors’ answer brief at 13.

[8] Sponsors’ brief at 13.

term a technical term susceptible to multiple interpretations. Because it is vague and vulnerable to multiple interpretations, voters are invited to put whatever spin they wish on the term, which this Court has held is a fatal defect. Advisory Opinion to the Attorney General re Amend to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 899 (Fla. 2001) (holding that when voters are "not informed of its legal significance. . . . voters would undoubtedly rely on their own conceptions of what constitutes a bona fide qualification," the amendment summary is fatally vague). The citation to Polish American Congress v. City of Chicago, 211 F.Supp.2d 1098, 1107 (N.D. Ill. 2002), supports this view because there the plaintiffs, as a small group of Polish speakers, reasonably thought they constituted a language minority, but found to their dismay that they did not. Their confusion is emblematic of any reasonable person's confusion when confronting this inherently vague term.

Nonetheless the sponsors raise an interesting point. They imply that the term means any language other than English. But does it really? Certainly, not on its face. Given recent immigration patterns, English could be the "language minority" for an area. This raises another question: What geographical area do you use to gauge when a language is a "language minority": by voting precinct? By city? By county? By a "political boundary" such as a special tax district? By the entire

state? Moreover, how many people does it take to constitute a language minority? Could Creole be a language minority in a predominantly Hispanic area? What should be done then? The term is just too fraught with uncertainties to expect the reasonable voter, let alone seasoned lawyers and legislators, to be able to work this out consistently.

The sponsors go on to state that just because a term is vague and ambiguous does not mean a voter would be misled.[9] Under the Court's unambiguous case law, the point of the ballot summary is to give the voters a *clear picture* of what they are voting on. While the average voter may not foresee every possible consequence of a constitutional amendment, clearly a voter cannot reasonably know what he or she is voting on if the terms included are vague and ambiguous. Allowing such misleading terms on the ballot does not comport with the goals of section 101.161, Fla.Stat. Citizens have a right to know the general impact of an amendment's provisions.

III. The proposal eliminates multi-member districts; but if the reference to "contiguity" alone is not intended to do that, the summary is misleading.

The Legislature and the Attorney General both point out that the language in the initiative prohibits multi-member districts — something now within the

[9] See Sponsor Brief p. 13.

Legislature's authority to permit. The Constitution currently allows districts to be "of either contiguous, overlapping, or identical territory." Art III, s. 16(a), Fla. Const. This provision allows districts be multi-member. Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218, 1225-1226 (Fla. 2006). Claiming to impose redistricting standards — as if there are no others now in force — the initiative requires districts to be contiguous but drops any mention of overlapping or identical territory. Thus, presumably, the new standards are to be the only ones applicable, superceding those in the Constitution as the people's most recent statement on the matter. Since the new standards mention only contiguity, one must assume that the people intend to eliminate the criteria allowing districts to be overlapping or identical; otherwise mentioning contiguity in the proposal is simply redundant and meaningless. Yet the Court does not presume that any words of the Constitution are meaningless.

The sponsors cite this Court for the notion that "contiguous" means touching along a boundary or at a point other than a common corner, a common definition for the word that essentially means "connected".[10] Then they say that this

[10] See Sponsors Initial Brief at p. 7.

definition includes "overlapping" and "identical." How that can be is a mystery, since the terms are not synonymous[11] — a fact underscored by the people's separate enumeration of these terms in Article 3, s. 16(a).

Even if the sponsors are correct in their assertion that the term is meaningless — an unfounded presumption, since all terms in the Constitution are presumed to mean something[12] — and makes no change to the Constitution, it still misleads voters because it implies that no apportionment standards already exist, a result this Court has forbidden. See Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 898 (Fla. 2000). By stating in the summary that the initiative creates a requirement that districts must be contiguous, and then stating that this provision does nothing to change the current law, the sponsors acknowledge the summary is defective.

CONCLUSION

[11] "Contiguous" means "sharing an edge or boundary; touching . .. neighboring; adjacent . . . connected in time or space without a break." The American Heritage Dictionary, 3d ed. (Houghton Mifflin Co., New York 1993) at 301. "Overlapping" means "to lie over or partly cover something." Id. at 974. One needs no help to understand what "identical" means.

[12] In re Apportionment, 263 So.2d 797, 807 (Fla. 1972). The Court could rely on this concept to find that the proposal has not written out of the Constitution the standards of "overlapping" and "identical." But as the text above points out, the proposal wrongly implies that apportionment standards do not exist.

For these reasons, the petition fails the one-subject requirement and contains a defective ballot title and summary. Consequently, the court should order it stricken from the ballot.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by U.S. mail on, on Attorney General Bill McCollum and Scott Makar, Solicitor General, PL-01, The Capitol, Tallahassee, FL 32399; Barry Richard and Hope Keating, Greenberg Traurig, 101 East College Ave., Tallahassee, FL 32301; and Mark

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