IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1149, SC08-1165

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

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BRIEF

OF THE FLORIDA LEGISLATURE

IN OPPOSITION TO THE PETITION

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STATEMENT OF THE CASE AND FACTS

The Attorney General seeks review of a constitutional amendment brought by citizens' initiative, pursuant to Article 4, s. 10, Fla.Const.

The ballot title and summary read:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING
>
> Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographic boundaries.

The text of the petitions reads:

> Add a new section 20 to Article III
>
> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(2) Unless compliance with the standards in this subsection, conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; districts shall, where feasible, utilize political and geographic boundaries.

(3) The order in which the standards within subsections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within the subsection.

The amendment's first paragraph would establish these independent, freestanding standards:

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.

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 proposed amendment creates a list of eight independent redistricting objectives to be achieved by any entity drafting an apportionment plan or drawing any individual district.

The use of the passive voice in paragraph 1 — "No apportionment plan or district *shall be drawn*" — indicates that any entity drafting an apportionment plan or creating a district must comply with these criteria, including the courts.

SUMMARY OF THE ARGUMENT

The language of the proposed amendment in this matter is virtually identical to that in SC08-986. The only difference is that this petition involves an amendment addressing congressional reapportionment. SC08-986 addresses state

legislative reapportionment. Consequently, both petitions share largely the same defects. For this reason, with one significant exception, the arguments made here repeat those made in the Legislature's brief in opposition in SC08-986. We reiterate them for the Court's convenience so that it does not have to refer to another paper.

The one exception, which we highlight here, is the fact that the amendment will devolve to the courts the ultimate responsibility to conduct reapportionment. This will violate Article 1, s. 4, U.S. Constitution, which authorizes only state legislatures to reapportion congressional districts.

The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore,

one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 1, s. 4, U.S. Const., and which potentially threatens the courts' independence.

In short, the amendment constitutes the kind of precipitous, spasmodic, cataclysmic governmental change that the single subject rule is intended to prevent.

The ballot summary is vague and misleading.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent with those in the amendment, words that have very different meanings. For instance, the summary states districts should be drawn to respect city or county boundaries; the amendment's text instead refers to

"political boundaries," a far broader term. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

STANDARD OF REVIEW

> The overall standard of review for the proposed amendment and the ballot title and summary are the same. In 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 (Fla. 2000), this Court summarized its standard of review in initiative petition cases as follows:
>
> > The Court's inquiry, when determining the validity of initiative petitions, is limited to two legal issues: whether the petition satisfies the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999). In order for the Court to invalidate a proposed amendment, the record must show that the proposal is clearly and conclusively defective on either ground. In determining the propriety of the initiative petitions, the Court does not review the merits of the proposed amendments.

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, 1190-1191 (Fla. 2006).

Article 11, s. 3, Fla.Const. states than an amendment proposed by citizen initiative can only "embrace but one subject and matter directly connected therewith."

Article 1, s. 4, U.S. Const., states: “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 added.

ARGUMENT

I. The proposed amendment violates the single subject rule.

The proposed amendment violates both facets of the Constitution's single subject rule. First, the amendment establishes eight independent objectives to be achieved in redistricting, depriving it of sufficient "oneness" to comply with the Constitution. These objectives, embodied in the amendment's standards, are disparate, unconnected goals so that the proposal constitutes impermissible logrolling.

Second, the amendment will substantially alter the constitutional roles of the Legislature and the judiciary. The amendment's vague standards ensure that no legislatively drafted redistricting plan will escape judicial challenge. Furthermore, one goal of the amendment — to eliminate politics from legislative redistricting decisions — is humanly impossible to achieve. The combined force of these standards will inevitably compel the judiciary to make the ultimate decision — a result which is contrary to Article 1, s. 4, U.S. Const., and which potentially threatens the courts' independence.

In short, the amendment 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).

A. The amendment addresses separate purposes and constitutes logrolling.

"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.'" Hazards of Using Tobacco, 926 So.2d at 1190. The single subject rule prohibits initiative amendments that contain such unrelated provisions. Id.; Apportionment by Legislature, 926 So.2d at 1224-1225; In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1339-1340 (Fla. 1994).

To determine if a measure constitutes impermissible logrolling, the court examines the text for whether it exhibits "oneness of purpose." Save our Everglades, 636 So.2d 1340; In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018, 1020 (Fla. 1994) ("to comply with the single-subject requirement, the proposed amendment must manifest a 'logical and natural oneness of purpose.'"). The proposal must be

complete within itself relating to one subject. Adams v. Gunter, 238 So.2d 824, 831 (Fla. 1970). "'[U]nity of object and plan is the universal test' . . . 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. [internal citations omitted].'" Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-taxed Services Where Exclusion Fails to Serve Public Purpose, 953 So.2d 471, 480-481 (Fla. 2007). An amendment's parts must be functionally and facially unified, so that any one aspect is a necessary component of a single dominant plan, and is logically related to the amendment's purpose. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 730 (Fla. 2002); Advisory Opinion to the Attorney General re Funding of Embryonic Stem Cell Research, 959 So.2d 195, 197 (Fla. 2007).

Proposals that force voters to choose "in the 'all or nothing' fashion" when they might disagree with unrelated parts of an amendment violate the one subject rule. Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts, 926 So.2d at 1226. Save Our Everglades, 636 So.2d at 1341.[1]

[1] "One objective — to restore the Everglades — is politically fashionable, while the other — to compel the sugar industry to fund the restoration — is more problematic. Many voters sympathetic to restoring the Everglades might be

The proposal at issue today fails these fundamental tests. The various standards in the proposal are independent and freestanding. They have nothing to do with one another and do not work together toward a common goal. In fact, each standard establishes an independent goal by itself. By their nature, these elements are not functionally and facially unified so that each aspect is a necessary component of a single dominant plan. In reality, they are not unified in any meaningful sense; they are just a list of unrelated standards aiming toward unrelated targets. A voter easily could favor one standard and reject another. But because they are wrapped in a single package, the voter must make the classic "all or nothing" judgment which this Court has repeatedly condemned.

These disparate elements are:

- No plan or district shall be drawn with the intent to favor or disfavor a political party.
- No plan or district shall be drawn with the intent to favor or disfavor an incumbent.
- 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

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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."

the political process or to diminish their ability to elect representatives of their choice.

- 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.
- Districts shall consist of contiguous territory.

A district also must meet another set of standards unless compliance with them conflicts with the requirements listed above. This second set says a district:

- shall be as nearly equal in population as is practicable.
- shall be compact.
- shall, where feasible, utilize political and geographic boundaries.

The most obvious defect is that the proposal does not have the necessary oneness of purpose. The fact that the amendment's drafters are willing to sacrifice the second set of standards to satisfy the first set shows that even they realized that the amendment's standards were in conflict. That one set has to be subordinated to the other set demonstrates on its face that there are separate and conflicting goals set out by the different standards.

In fact, the proposal has eight unrelated purposes, because each standard establishes its own goal. Even if one struggles to find commonality among the standards, five separate objectives are apparent. First, the amendment strives for political neutrality or balance when it prohibits districts favoring any party or an incumbent. Second, it aims to eliminate two types of discrimination. Third, it seeks to dictate districts' geography by requiring contiguity, compactness and conformity with political and geographic boundaries. Fourth, it hopes to ensure equal populations among districts. Fifth, the contiguity requirement in paragraph 1 also apparently would require single-member districts.[2]

No matter how one parses the objectives, whether by eight parts or five, each stands alone and none works together with, nor buttresses another, as is to be expected in a proposal whose elements have "a natural relation and connection as component parts or aspects of a single dominant plan or scheme." Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-taxed Services Where Exclusion Fails to Serve Public Purpose, 953 So.2d 471, 478 (Fla. 2007); Advisory Opinion to the Attorney General re Independent Nonpartisan

[2] The Attorney General appears to agree with this view. See Attorney General's letter to the Chief Justice dated June 18, 2008.

As it happens, federal law already requires single member congressional districts. See 2 U.S.C. s. 2(c); Larios v. Perdue, 306 F.Supp.2d 1190, 1207 (N.D. Ga.. 2003).

Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So.2d 1218 (Fla. 2006) (proposal invalid because it had two purposes, creation of an apportionment commission and establishment of apportionment standards); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1341 (Fla. 1994) (duality of purposes in requiring restoration of the Everglades at the expense of the sugar industry).

Because the amendment is merely a list of standards or classifications (each with a separate goal or objective), it is more like the amendment at issue in In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994), than any other proposal to come before this Court. In Laws Related to Discrimination, the proposed amendment would have altered Article 1, s. 10, Fla.Const., to prohibit the state and any other units of Florida government from enacting or adopting any law, ordinance or rule

> 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. This Court concluded that the amendment constituted impermissible logrolling, in violation of the single subject rule, "because it enumerates ten

classifications of people that would be entitled to protection from discrimination if the amendment were passed. The voter is essentially being asked to give one 'yes' or 'no' answer to a proposal that actually asks ten questions. . . . Requiring voters to choose which classifications they feel most strongly about, and then requiring them to cast an all or nothing vote on the classifications listed in the amendment, defies the purpose of the single-subject limitation." Id. at 1020.

The current proposal is defective for the same reason. It presents the voter with eight independent standards for what is desirable in writing a redistricting plan, none of which has any more to do with the others than the 10 standards for public employment listed in Laws Related to Discrimination. For instance, whether a redistricting plan or district is politically neutral has nothing to do with whether the plan discriminates against minorities or provides for contiguous districts. Thus, the proposal requires voters "to choose which classifications they feel most strongly about," but also compels them to vote all-or-nothing for the whole package of standards, even if they agree with some and disagree with others. For instance, a voter may believe strongly about prohibiting racial discrimination in redistricting, but could have reservations about the vague category "language minority." Similarly, a voter may like the notion that districts should be drawn so as not to favor a particular party, but be less enthusiastic about a prohibition

against favoring incumbents. Yet either way, the voter must accept the bitter with the sweet. See also 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, 1226 (Fla. 2006) (where the court regarded a standard requiring the creation of single-member districts, which this amendment again attempts to require, as a stand alone goal).

The Court addressed the permissibility of multiple classifications or standards again in 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, 892-893 (Fla. 2000), where it held an initiative petition violated the single subject rule because it contained three separate classifications.[3] See also Fine v. Firestone, 448 So.2d 984, 991 (Fla. 1984) (taxes and user fees created separate classifications or subjects).

Furthermore, the amendment subordinates some goals to others. A voter very well could disagree with that setting of priorities.

Because of these deficiencies, the amendment involves impermissible logrolling. This Court should bar the amendment from the ballot.

B. The amendment substantially alters the functions of multiple branches of government.

[3] Education, employment and contracting. Id. at 893.

A proposal that substantially alters the functions of more than one branch or level of government violates the one subject rule. Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-taxed Services Where Exclusion Fails to Serve Public Purpose, 953 So.2d 471, 478 (Fla. 2007); Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding, 703 So.2d 446, 449 (Fla. 1997); In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1340 (Fla. 1994). A proposal that substantially affects more than one constitutional provision is also impermissible. Adequate Public Education Funding, 703 So.2d at 449-450. Furthermore, a proposal that substantially affects a constitutional provision must advise voters of this fact to avoid single subject problems. Race in Public Education, 778 So.2d at 894-895.[4]

It cannot be disputed that the proposal substantially alters the Legislature's power to establish appropriate legislative districts: it substantially constrains the Legislature's broad discretion under Article 1, s. 4, U.S. Const.

What is not so obvious to the casual reader is how clearly the proposal's practical effect divests the Legislature of its constitutional responsibilities to

[4] Although one would think this point goes to the adequacy of the summary, the court in Race in Public Education saw the failing as both a single subject violation and a summary defect. Id. at 894-895, 898.

regulate congressional elections pursuant to Article 1, s. 4, U.S. Const., and transfers them to the judiciary. The most troublesome provisions are those requiring the intent behind a plan or district to be politically neutral, neither favoring nor disfavoring any party or incumbent. This objective is humanly impossible to achieve. As the U.S. Supreme Court has observed, political neutrality simply cannot be achieved in any practical way because politics and political considerations inevitably play major roles in redistricting decisions:

> Indeed, quite aside from the anecdotal evidence, the shape of the House and Senate Districts, and the alleged disregard for political boundaries, we think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win. . . '*it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another*. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. *District lines are rarely neutral phenomena.* They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. *The reality is that districting inevitably has and is intended to have substantial political consequences*.'
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> * * *
>
> '*The key concept to grasp is that there are no neutral lines for legislative districts ... every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place*." Dixon, Fair Criteria

> and Procedures for Establishing Legislative Districts 7-8, in Representation and Redistricting Issues (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).
>
> *As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended*.

Davis v. Bandemer, 478 U.S. 109, 128-129 (1986) (emphasis added). See also Vieth v. Jubelirer, 541 U.S. 267, 281 , 285-286 (2004).[5]

Because — by its very nature — legislative redistricting cannot be politically neutral or devoid of political intentions, any plan propounded by the Legislature necessarily will be subject to judicial challenge. See Vieth v. Jubelirer,

[5] Quoting Bandemer; and also making the point that: "The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. See Miller, supra, at 914, 115 S.Ct. 2475 ('[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition ...'); Shaw, supra, at 662, 113 S.Ct. 2816 (White, J., dissenting) ('[D]istricting inevitably is the expression of interest group politics ...'); Gaffney v. Cummings, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ('The reality is that districting inevitably has and is intended to have substantial political consequences')."

541 U.S. at 286.[6] See also, Nadler v. Schwarzenegger, 137 Cal.App.4th 1327, 41 Cal.Rptr.3d 92, 99 (Cal.App. 3 Dist. 2006).[7]

Likewise, any plan or district adopted pursuant to the proposal *necessarily will be subject to judicial nullification*. Because the Legislature will be unable to draft a plan or create all districts in compliance with paragraph 1 of the proposed amendment, the courts will step in and impose their own plan.[8] See e.g., In re Constitutionality of Senate Joint Resolution 2G, 601 So.2d 543 (Fla. 1992) (Supreme Court had jurisdiction to impose its own state legislative districting plan to conform to federal law where Legislature failed to act); Brown v. Butterworth,

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[6] "Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation . . ." Emphasis the court's.

[7] "So, too, has the United States Supreme Court recognized that the difficulty of reapportionment requires that state legislatures be allowed the discretion necessary to balance competing interests. (Miller v. Johnson, supra, 515 U.S. at p. 915, 115 S.Ct. at p. 2487, 132 L.Ed.2d at p. 779.) Courts should not be 'second-guessing *what has consistently been referred to as a political task for the legislature*, a task that should not be monitored too closely [by the courts].' (Davis v. Bandemer, supra, 478 U.S. at p. 133, 106 S.Ct. at p. 2810, 92 L.Ed.2d at p. 106.)." Emphasis added.

[8] Some of the standards in the proposal call for intensive fact-finding (such as gerrymandering and protecting racial and language minorities) which this Court has said properly belong in the circuit court in the first instance. See In re Constitutionality of House Joint Resolution 1987, 817 So.2d 819, 829 (Fla.2002). Nonetheless, the courts, and more particularly this Court, will be the final decision-maker in apportionment matters if the proposal passes.

831 So.2d 683 (Fla. 4th DCA 2002) (circuit court had jurisdiction re congressional districting plan). This effect is certain, not speculative. See e.g., In re Advisory Opinion to Atty. Gen. English--The Official Language, 520 So.2d 11, 13 (Fla. 1988) (speculative impact not enough by itself to create a single subject problem).

This Court will find the task of eliminating political considerations as impossible as it is for the Legislature. See Vieth v. Jubelier, where a plurality of justices held that gerrymandering cases are nonjusticiable because of the lack of any meaningful standards. Courts attempting politics-free plans have been unable to avoid them. In fact, judges find themselves facing the fact that no substantive standards exist for such an effort, and the resulting districts end up favoring one party or individual over another anyway. Even when judges attempt to avoid political considerations, the question arises whether it is humanly possible to do so. See e.g., Henderson v. Perry, 399 F.Supp.2d 756, 768 (E.D.Tex. 2005)[9]. Because

[9] "The map drawn by this court in 2001 perpetuated much of this gerrymander. It did so because this court was persuaded that it could not achieve 'fairness' to political parties without some substantive measure of what is 'fair.' Simply undoing the work of one political party for the benefit of another would have forced this court to make decisions that could not be defended against charges of partisan decision-making — again, for the lack of a substantive standard. As the panel explained, it would follow only 'neutral' redistricting standards. Once the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas — such as placing the two gained seats in the areas of growth that produced them, following county lines, avoiding the pairing of incumbents and the splitting of voting precincts, and undoing transparent offsetting

of this inherent problem, the courts will be subject to accusations that they are partisan rather than neutral bodies, putting their credibility and independence at risk.

The dramatic shift of responsibility to the courts upsets the scheme established in Article 1, s. 4, U.S. Const., authorizing only state legislatures to impose districting plans. See e.g., Davis v. Hildebrant, 241 U.S. 565 (1916); Smiley v. Holmes, 285 U.S. 355 (1932). Both cases, the only to define the Founders' use of the word "legislature" in Article 1, s. 4, stand for the proposition that the U.S. Constitution empowers only state legislatures to adopt congressional redistricting plans, and that "legislature" means the "legislative process," so that any actor with a role to play in a state's legislative process can participate in congressional redistricting. Thus, an Ohio constitutional provision enabling voters to nullify general legislation by popular referendum permitted popular nullification of a congressional apportionment plan. Davis v. Hildebrant. And a governor could veto a redistricting plan because the veto power was part of the state's legislative

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movements of the same number of residents between districts — the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote. Make no mistake, this undertaking, while shorn of partisan motive, had political impact in the placement of every line. The results of this court's plan did ameliorate the gerrymander and placed the two districts gained by Texas in the census count; however, doing more necessarily would have taken the court into

process. Smiley. However, the courts do not play a part in Florida's legislative process. The power to set fundamental public policy, which necessarily includes the power to establish congressional districts, belongs exclusively to the Legislature. See Florida House of Representatives v. Crist, --- So.2d ----, 2008 WL 2669767 (Fla. July 3, 2008); Art. 3, s. 7, Fla.Const. Besides the Legislature, only the governor plays a role in the legislative process because of the veto power. Art. 3, s. 8, Fla.Const.[10] Thus, the practical effect of the amendment, shifting real responsibility for adopting a redistricting plan to the judiciary, removes the matter from the legislative process in contravention of Article 1, s. 4, U.S. Const. Yet the amendment does not advise voters of this substantial change.

Thus, the amendment in fact substantially affects two branches of government, which initiative amendments cannot do, Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-taxed Services Where Exclusion Fails to Serve Public Purpose, 953 So.2d 471, 478 (Fla. 2007), because not only does the amendment throw to the courts final redistricting decisions but

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each judge's own notion of fairness. The practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan."

[10] Hawthorne v. Wiseheart, 28 So.2d 589, 601 (Fla. 1946): "The bill providing for such increase had passed both Houses of the legislature, but the legislative process had not ended on June 3, 1943, because the Governor, under the constitution, had ten days after the adjournment of the legislature in which to approve or to veto the bill, or to permit it to become a law without his approval."

substantially broadens the courts' scope of review, which presently is limited. In re Constitutionality of House Joint Resolution 25E, 863 So.2d 1176, 1178 (Fla. 2003).

In addition, an amendment may not substantially affect more than one constitutional provision. Adequate Public Education Funding, 703 So.2d at 449-450. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 566 n. 1 (Fla. 1998) (violation of single subject rule when amendment affected rights of privacy and collective bargaining). For instance, as already pointed out, the amendment substantially affects the Legislature's authority under Article 1, s. 4, U.S. Const. In addition, the equal protection clause in Article 1, s. 2, Fla.Const., is substantially affected as is the Fourteenth Amendment to the U.S. Constitution. Martinez v. Bush, 234 F.Supp.2d 1275, 1281 (S.D. Fla. 2002). The amendment permits gerrymandering claims, which seem to be foreclosed now under the equal protection clause. Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion). Thus, the proposal substantially alters the constitutional test so that the standards under the equal protection clause no longer would apply.

Finally, nothing in the proposal announces the intention to radically circumscribe the Legislature's discretion. As Race in Public Education, 778 So.2d

at 894-895, points out, the failure to identify substantially affected constitutional provisions is a single subject violation. In addition, constant litigation and the uncertainty it brings would disrupt both the electoral and legislative processes so that Article 3, ss. 2, 3, 4 and 7, Fla.Const., would be substantially adversely affected. See e.g., Dean v. Leake, --- F.Supp.2d ----, 2008 WL 728543 *9 (E.D.N.C. 2008). Yet the proposal does not identify Article 1, s. 2; and Article 3, ss. 2, 3, 4 and 7 — or Article 1, s. 4, U.S. Const.

For these reasons, the proposal violates the single subject provision of Article 11, s. 3, Fla.Const., and the proposed amendment presents the precipitous, cataclysmic change this Court has rejected in the past. Consequently, the Court should deny it a place on the ballot.

II. The ballot title and summary are defective.

The ballot title is misleading because it says the amendment addresses standards the Legislature must follow in redistricting. However, the text of the amendment requires the Court, when imposing a redistricting plan pursuant to its constitutional authority, to obey those same standards as well.

The ballot summary is misleading because it misrepresents the amendment's goal and purposes. For instance, the summary clearly implies that the *effect* of

districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. In addition, the summary uses words inconsistent to those in the amendment, words that have very different meanings. Some terms used in the summary are vague and misleading. Finally, the summary fails to identify constitutional provisions that are substantially affected.

The Court reviews the title and ballot summary of initiative petitions for compliance with s. 101.161(1), Fla.Stat., which requires "the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot."

This Court has said that the "clear and unambiguous" command in s. 101.161(1) requires two things. First, the ballot title and summary must describe the amendment's chief purpose, which is the specific thing the amendment does or is intended to do — or more to the point, the legal effect of the amendment. Advisory Opinion to the Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, 902 So.2d 763, 771 (Fla. 2005). The summary should not contain editorial comment, but rather should be a dispassionate, informative and accurate synopsis. Id. In short, the summary should be a fully informative analysis of the amendment's meaning and

effect and should not "fly under false colors" or "hide the ball." In re Advisory Opinion to the Attorney General — Save Our Everglades, 636 So.2d 1336, 1342 (Fla. 1994); Advisory Opinion to the Attorney General re Additional Homestead Tax Exemption, 880 So.2d 646, 653 (Fla. 2004); Armstrong v. Harris, 773 So.2d 7, 17-18 (Fla. 2000). However, the summary need not detail every ramification of an amendment. 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).

As part of this requirement, the Court has held that an amendment summary must identify substantially affected constitutional provisions in order for the public to fully comprehend the proposed changes. Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers, 705 So.2d 563, 565-566 (Fla. 1998) ("it is imperative that an initiative identify the provisions of the constitution substantially affected by the proposed amendment in order for the public to fully comprehend the contemplated changes and to ensure that the initiative's effect on other unnamed provisions is not left unresolved and open to various interpretations."). Identification is unnecessary if the impact is potential. Advisory Opinion to the Attorney General re Local Trustees, 819 So.2d 725, 731 (Fla. 2002).

Second, the title and summary should not be vague, ambiguous or misleading. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; 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) ("ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated.").

The Ballot Title

The ballot title is misleading because it describes the amendment as "STANDARDS FOR *LEGISLATURE* TO FOLLOW IN CONGRESSIONAL REDISTRICTING." (Emphasis added.) But the amendment's text does not say this. Certainly it would require the Legislature to follow its standards — but its plain language would also require this Court to comply with them. The text of the amendment says "Congressional districts or districting plans may not *be drawn* . . ." (Emphasis added.) The use of the passive voice leaves unclear the identity of the actor doing the drawing (the main literary crime of the passive voice). The obvious intent of this language, then, is that anyone drafting and imposing a redistricting plan must comply with the proposed amendment. Because this Court has the

authority to impose a redistricting plan, it defies common sense to suppose that the Legislature must comply with the amendment but the courts can ignore it.

The amendment's title (as distinguished from the ballot summary title) supports the notion that the amendment is intended to apply to this Court as well. The title in the text identifies the amendment as "STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES." There is no limitation to the Legislature here.

Thus it is clear that the amendment is drafted to apply both to the Court and to the Legislature. Consequently, the title is grossly misleading.

The Ballot Summary

The ballot summary is misleading in several places. First, the summary says, "Congressional districts or districting plans shall not be drawn to favor or disfavor an incumbent or political party." The amendment's text is significantly different: it says "shall not be drawn with the *intent* to favor or disfavor." The summary clearly implies that the *effect* of districts or reapportionment plans cannot be to favor or disfavor anyone or any party. But under the amendment, proof of *intent* alone must be shown. The two are not the same. Relying on the summary, the voter will undoubtedly think he or she is voting to prohibit redistricting plans *whose effect* is to favor a party or incumbent. However, the amendment itself theoretically would

allow districts that favor a party or incumbent so long as the lines were drawn without intending that result. Such misleading discrepancies between the summary and the amendment's text warrant exclusion from the ballot. Right of Citizens to Choose Health Care Providers, 705 So.2d at 566; Race in Public Education, 778 So.2d at 897; Save Our Everglades, 636 So.2d at 1341.

Misleading as to the effect of the change is also impermissible. 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, 1228-1229 (Fla. 2006) (amendment suggested nonpartisan selection of apportionment commission when appointment was in fact highly partisan); Save Our Everglades, 636 So.2d at 1341 (claiming that Everglades needed to be saved in the summary where the text addressed restoring the Everglades); Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So.2d 1304, 1311 (Fla. 1997) (misleading because text eliminated 10 millage property tax cap; summary silent). Here, the summary is misleading because one purpose of the amendment is to eliminate political partisanship from the redistricting process, an effort we have already seen is humanly impossible, and which will result in the courts writing the plans rather than

the Legislature. The summary does not inform the voters of this significant, inevitable effect.

Nor does it inform the voter that the amendment substantially diminishes the Legislature's constitutional redistricting powers. The Legislature has considerable discretion in establishing district boundaries that can take political concerns into consideration. Vieth v. Jubelirer.

Second, the summary fails to inform voters of the massive transfer or authority from the Legislature to the judiciary that will occur under the amendment in contravention to Article 1, s. 4 U.S. Const.

Third, the ballot summary misleads as to the substance of the proposed amendment because terms in the summary are different from those used in the text of the amendment. For example, the summary says that district boundaries "where feasible must make use of existing city, county and geographical boundaries." The amendment, however, does not say this. Rather, it says districts must use "existing *political* and geographical boundaries." "Political boundaries" is a broader term than "city/county" boundaries. For instance, a similar term in the Florida Statutes, "political subdivision," is defined to "include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all

other districts in this state." Sec. 1.01(8), Fla.Stat. Likewise, Florida courts have viewed "political boundary" to mean more than a city/county boundary:

> Political boundaries are artificial divisions that may and sometimes should be transcended when planning for the most beneficial use of our state's water resources. The borders of water management districts are also artificial divisions, and the area on either side of the boundaries of neighboring districts are in the same geographical region.

Osceola County v. St. Johns River Water Management Dist., 486 So.2d 616, 619 (Fla. 5th DCA 1986) (concerning the boundaries of a water management district); *approved* Osceola County v. St. Johns River Water Management Dist., 504 So.2d 385 (Fla. 1987). Courts in other states also have viewed "political boundary" as meaning more than city/county boundaries. Springfield Utility Bd. v. Emerald People's Utility Dist., 125 P.3d 740 (Or. 2005) ("people's utility district," an entity charged with the provision of electricity, had political boundaries); Bexar Metropolitan Water Dist. v. City of Bulverde, 234 S.W.3d 126 (Tex. App. 2007) (water management district). Florida has many special districts whose borders would constitute "political boundaries": voting precincts, water management districts, fire control districts, children's services districts, community development districts, independent special districts, regional special districts, neighborhood preservation and enhancement districts, health care districts, and so on. See ss. 101.001, 125.901, 163.524, 189.404, 190.004, 191.014, 373.069, Fla.Stat. It follows

that the summary's use of "city/county" boundaries rather than "political boundaries" is inaccurate and therefore misleading.

The use of inconsistent terms which have different meanings is inherently misleading. See People's Property Rights Amendments , 699 So.2d at 1308 (summary used the word "owner," text used the word "people"); Race in Public Education, 778 So.2d at 897; 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").

Here, a voter reading the summary will certainly believe that he is voting for a requirement that legislative districts track city or county lines. But that is a bait-and-switch because the term "political boundary" also encompasses lines of a very different nature.

Fourth, the summary is misleading because it relies on vague, ambiguous terms. "Language minority" is one such term. It may have a legal definition well known to some specialty lawyers, but it is unlikely to be readily understood by the lay voter. See Polish American Congress v. City of Chicago, 211 F.Supp.2d 1098, 1107 (N.D. Ill. 2002), where the plaintiffs reasonably thought that they constituted a language minority only to find that they fell outside the very narrow statutory definition of "language minority" in 42 U.S.C. s. 1973l(c)(3). In such

circumstances, the failure to define the term is a substantial, fatal defect. See e.g., Race in Public Education, 778 So.2d at 899 (failure to define legal term "bona fide qualification based on sex," voters "not informed of its legal significance. . . . voters would undoubtedly rely on their own conceptions of what constitutes a bona fide qualification," which rendered the summary fatally vague); People's Property Rights Amendments , 699 So.2d at 1311 ("the absence of a more complete definition of the term 'exemption' is misleading because the voting public would not readily understand the distinction between an exemption and immunity from taxation").

Fifth, the summary is misleading because it gives the impression that no law exists addressing discrimination in voting and requiring equality of population among districts. Such negative implications in ballot summaries render the summary defective. 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 888, 898 (Fla.. 2000) (ballot title "defective because of the misleading negative implication that no such constitutional provision addressing differential treatment currently exists, and for the negative implication that the government is presently practicing discrimination"). Here, the summary implies there is no law preventing discrimination against racial or language minorities.

However, there is, Article 1, s. 2, Fla.Const. Furthermore, federal law implementing the Fifteenth Amendment and the equal protection clause protects these classes as well. See In re Constitutionality of Senate Joint Resolution 2G, 597 So.2d 276, 280-282 (Fla. 1992) (explaining the purpose and impact of s. 2 of the federal Voting Rights Act); Riley v. Kennedy, 128 S.Ct. 1970 (2008) (discussing s. 5 of the Voting Rights Act); 42 U.S.C. s. 1973b(f)(2), addressing language minorities and voting.[11] In addition, federal law already requires equality among congressional district populations to the extent practicable. See Karcher v. Daggett, 462 U.S. 725, 730 (1983). Yet the summary says nothing about any of this, thus clearly implying that these standards are new.

Sixth, the summary is misleading because it varies in a material way from the text of the amendment. The summary says, "Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process ***and*** elect representatives of their choice." The amendment's text is slightly, but significantly, different: "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process ***or*** to diminish their ability to elect representatives

[11] "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny

of their choice." The summary tracks the language of 42 U.S.C. s. 1973(b), which gives the impression that the drafters may intend to import the standards of that statute into the Florida Constitution. The effect of that language is well known. See e.g., Thornburg v. Gingles, 478 U.S. 30 (1986). So the average voter might think that he is simply voting to conform the state Constitution with federal law. However, the amendment's text varies in a way that appears intended to do something broader, as was the case in Armstrong v. Harris, 773 So.2d 7, 17-18 (Fla. 2000), where the use of "or" in the state constitutional phrase "cruel or unusual punishment" was found to confer broader rights than the contemplated change, which read "cruel and unusual." Here however, the voter is not told in the summary of any intention either to conform the state Constitution to federal law — or to confer even broader rights than already exist. This failure to inform the voter of such a crucial purpose is a significant defect in the summary.

Seventh, the summary fails to identify the constitutional provisions substantially and certainly affected by this amendment. As pointed about above, the amendment substantially and certainly affects the equal protection clause in Article 1, s. 2 and Article 3, ss. 2, 3, 4, and 7, Fla.Const., as well as the Legislature's authority under Article 1, s. 4, U.S. Const. But the summary fails to point this out.

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or abridge the right of any citizen of the United States to vote because he is a

For these reasons, the ballot summary is vague and misleading and fails adequately to inform voters of the chief purpose of the amendment.

CONCLUSION

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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member of a language minority group."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by hand delivery on, on Attorney General Bill McCollum and Scott Makar, Solicitor General, PL-01, The Capitol, Tallahassee, FL 32399; on July 15, 2008.

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Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

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Jason Vail