IN THE SUPREME COURT OF FLORIDA

Case No. SC05–1755

IN RE: ADVISORY OPINION TO THE ATTORNEY GENERAL RE IMPLEMENTATION OF APPORTIONMENT AND DISTRICTING COMMISSION IN 2007

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

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF CASE

Pursuant to Article XI, Section 3 of the Florida Constitution, the Committee for Fair Elections, a political committee registered with the Division of Elections, has proposed an initiative amendment to the Florida Constitution entitled "Implementation of Apportionment and Districting Commission in 2007."

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

THE PROPOSED AMENDMENT

Ballot Title:

Implementation of Apportionment and Districting Commission in 2007

Ballot Summary:

Requires that state legislative and congressional districts be established in accordance with the provisions of the amendment to Article III, Section 16, creating an Apportionment and Districting Commission in 2007, provided that amendment is adopted by the electorate at the general election of 2006, and that elections for state legislative and congressional districts in 2008 shall be held pursuant to plans adopted by the Commission in 2007.

Full Text:

Article XII, Section 26, Florida Constitution, is created to read:

Section 26. Implementation Schedule for Apportionment and Districting Commission.—If the proposed amendment to Article III, Section 16, establishing an Apportionment and Districting Commission is adopted by the electorate at the general election of 2006, 15 commissioners shall be certified by the respective appointing authorities, as provided for in Article III, Section 16(a) of that amendment, on or before March 1, 2007. Following certification of the members of the Commission by the respective appointing authorities, the Commission, on or before December 31, 2007, shall establish state legislative and congressional districts in the manner provided in Article III, Section 16. Elections for state legislative and congressional districts in 2008 shall be held pursuant to plans adopted by the Commission in 2007.

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

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

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

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

SUMMARY OF ARGUMENT

The ballot summary to the proposed amendment entitled "Implementation of Apportionment and Districting Commission in 2007" is misleading and inaccurate. The summary omits important facts leading voters to a false negative implication. Specifically, the summary does not mention that current law *already* provides for regular periodic redistricting and that, with or without the adoption of this amendment, legislative districts will be adjusted.

Equally fatal, the summary fails to inform voters that the inescapable effect of late-decade redistricting will be the use of obsolete census data and the creation of malapportioned districts—in violation of the one person, one vote standard—and will lead to likely challenges under the Voting Rights Act.

The summary also leads voters to the incorrect conclusion that another provision of the constitution already provides for redistricting in 2007. This conclusion suggests that the amendment's only effect would be to mandate the use of already-existing districting plans for the 2008 election. Instead, the chief purpose of the proposed amendment is to empanel the commission early to create new districting plans. Therefore, the summary is inaccurate.

Because the proposed amendment does not include a "clear and unambiguous" summary of the amendment as required by Section 101.161, Florida Statutes and by decisions of this Court, it should be excluded from the ballot.

ARGUMENT

The summary of this proposed amendment is not clear or unambiguous. It materially misleads voters regarding the purpose of the proposed amendment. A ballot title and summary must "state in clear and unambiguous language the chief purpose of the measure." *Askew v. Firestone*, 421 So. 2d 151, 154-55 (Fla. 1982). They must "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *In re Advisory Op. to the Att'y Gen. re Fee on the Everglades Sugar Production*, 681 So. 2d 1124, 1127 (Fla. 1996). Because the voter will not have the actual text of the amendment in the voting booth with him, the accuracy requirement is extremely important. *Armstrong v. Harris*, 773 So. 2d 7, 12-13 (Fla. 2000). "The gist of the constitutional accuracy requirement is simple: A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." *Id*. at 16. This Court has interpreted this requirement to encompass several specific factors; among those are the requirements that (i) the summary not omit facts necessary to prevent an inaccurate negative implication, and (ii) the title and summary be complete and accurate. In this case, the proposed amendment violates these requirements.

A. The Summary Omits Facts Necessary to Prevent the Inaccurate Implication that Redistricting Will Not Occur Without the Adoption of the Proposed Amendment.

By omitting critical information, the summary misleads voters as to the usefulness of the proposed amendment. In this respect, the issue is not with what the summary says, "but, rather, with what it does not say." *In re Advisory Op. to the Att'y Gen. re Term Limits Pledge*, 718 So.2d 798, 804 (Fla. 1998). The purpose of the proposed amendment is to require a late-decade redistricting process in 2007. According to the summary, "Following certification of the members of the Commission[[1]] . . ., the Commission, on or before December 31, 2007, shall establish state legislative and congressional districts . . . ." But nowhere in the summary is it mentioned that redistricting is *already* constitutionally required to take place regularly, with the next redistricting scheduled to take place after the 2010 census.

Under article III, section 16 of the Florida Constitution "[t]he legislature at its regular session in the second year following each decennial census, by joint

[1] The effectiveness of the proposed amendment is conditioned on the adoption of a second amendment, which would establish a new commission to replace the Legislature in drawing districts. (The title and summary of that proposed amendment, like those in this case, are inaccurate and misleading. That proposed amendment also violates the constitutional single-subject rule. Contemporaneous with this filing, The Honorable Allan G. Bense has filed a brief opposing that proposed amendment. *See* Br. of Hon. Allan G. Bense, Case No. 05-1754 (2005)).

resolution, shall apportion the state." Consistent with this provision, the last redistricting was in 2002. By its own terms, the proposed amendment in this case will have no effect absent the adoption of a second amendment, entitled "Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts which Replaces Apportionment by Legislature" (the "Commission Amendment"). The Commission Amendment would entirely replace existing article III, section 16. But it would retain a provision for regular, periodic redistricting. Under the Commission Amendment, "[i]n the year following each decennial census or when required by the United States or by court order, a commission shall divide the state into . . . districts."

Therefore, pursuant to the Commission Amendment, redistricting would take place no later than 2011. But this critical fact is ignored in the summary at issue here. There are undoubtedly voters who believe that adjusting legislative and congressional districts is appropriate. Those voters may favor this amendment, not realizing that redistricting will take place in 2011 regardless of this amendment's adoption. By not mentioning this fact, the summary falsely implies that this amendment is *necessary* to have redistricting. Instead, the true effect of this amendment would serve only to duplicate redistricting efforts in four short years. Voters who understood the true purpose of this amendment might not favor the state's incurring the tremendous cost of redistricting, and its considerable upset to

the state's electoral system and the sixty-seven supervisors of elections, only to repeat the process four years later.[2]

A summary or title is misleading if it leads to an incorrect negative implication. In *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, for example, the ballot title stated: "Amendment to Bar Government from Treating People Differently Based on Race." 778 So. 2d 888, 898 (Fla. 2000). This Court concluded that the title falsely implied that there currently was no provision addressing differential treatment for racial classification, which there was. *Id.* In *Advisory Opinion to the Attorney General re Tax Limitation*, this Court held that the title and summary were misleading because they implied that the constitution

---

[2] According to the Financial Impact Estimating Conference, the costs of implementing this amendment would be substantial:

> If the constitutional amendment creating the commission is adopted, the one-time costs for the 2007 redistricting that will result from adoption of this amendment are estimated to range from $6.7 million to $13.4 million for state government and $6.5 million to $7.5 million for local governments. These estimates include the state costs of the commission and associated staff, data, technology and legal expenses, and the local government costs to the supervisors of elections.

Financial Impact Statement of The Financial Impact Estimating Conference for Implementation of Apportionment and Districting Commission 2007, #05-16. Available through http://edr.state.fl.us/.

did not already have a cap or limitation on taxes, when it actually it did. 644 So. 2d 486, 494 (Fla. 1994). Similarly, in *Advisory Opinion to the Attorney General re Casino Authorization, Taxation and Regulation*, this Court decided that the summary included a false implication that casinos were already allowed in the state, which they were not. 656 So. 2d 466, 469 (Fla. 1995).

The negative implication here is similar to those in the cases above. To allow voters to make an informed and intelligent decision regarding the wisdom of this amendment, the summary must contain facts indicating that redistricting will, in fact, regularly occur whether the amendment is adopted or not. The omission of this critical fact is fatal.

B. The Proposed Amendment's Summary is Inaccurate, Confusing, and Misleading.

The proposed amendment's summary misleads voters into concluding that the Commission Amendment already creates an Apportionment and Districting Commission in 2007. It does not. The entire summary reads:

> Requires that state legislative and congressional districts be established in accordance with the provisions of the amendment to Article III, Section 16, creating an Apportionment and Districting Commission in 2007, provided that amendment is adopted by the electorate at the general election of 2006, and that elections for state legislative and congressional districts in 2008 shall be held pursuant to plans adopted by the Commission in 2007.

The summary, then, requires that districts be established *in accordance with the amendment to Article III, Section 16*. (The proposed amendment to Article III, Section 16 is the Commission Amendment described in the preceding section.) Immediately following "Article III, Section 16," the summary includes a non-restrictive phrase, set off by commas, that modifies "the amendment to Article III, Section 16."[3] That non-restrictive, parenthetic phrase provides additional information about the Commission Amendment—specifically that it "creat[es] an Apportionment and Districting Commission in 2007."

The problem, of course, is that the Commission Amendment does not do that. The Commission Amendment would establish a redistricting commission "[i]n the year following each decennial census or when required by the United States or by court order." The amendment at issue in *this* case—not the Commission Amendment—would mandate redistricting in 2007. By stating that the Commission Amendment serves that purpose, the summary materially misleads voters.

The defective summary is a result of a critical error in drafting. The parenthetic explanatory phrase apparently was intended to be: "creating an

[3] Parenthetic phrases must be enclosed between commas. *See* William Strunk, Jr., & E.B. White, The Elements of Style, Fourth ed., 2-3 (1979).

Apportionment and Districting Commission"—without including the words "in 2007." But because the entire phrase, including "in 2007," is enclosed between commas, the phrase is appropriately read to modify the "amendment to Article III, Section 16."

This error is material and significant. It recasts the entire summary and will lead voters to believe that the purpose of the amendment is different than it actually is. The critical error is more than a mere punctuation problem—it makes the ballot summary false. Whether an inaccuracy is caused by a single word, a series of words, or even punctuation, an amendment summary cannot escape the requirements of Section 101.161, Florida Statutes, that it be "clear and unambiguous."

Because the summary wrongly indicates that the commission will already exist in 2007, many voters will believe the true purpose of the amendment is to require that the plan adopted in 2007 be used for the 2008 elections. This logical reading of the summary will induce voters to support the amendment, reasoning that if the commission is already established, it makes sense to use its work product in the 2008 elections. It is one thing to support using an already-created redistricting plan for the next election cycle. It is quite another to support the creation of a commission for a late-decade redistricting, when the redistricting will take place regardless after a short period of time.

C. The Summary Ignores Important Effects of the Proposed Amendment.

In addition to failing to inform voters that the proposed amendment would require a late-decade redistricting, when redistricting is constitutionally required just a few years later, the summary also fails to inform voters that the effect of a late-decade redistricting would include countless significant problems.

Mid- or late-decade redistricting, if followed by another redistricting after the completion of the ensuing census, "creat[es] instability and dislocation in the electoral system and . . . impos[es] great financial and logistical burdens." *White v. Daniel*, 909 F.2d 99, 104 (4th Cir. 1990). Such redistricting also requires the use of census data that does not reflect population shifts and increases occurring since the beginning of the decade. As a result, any late-decade redistricting plan is virtually certain—in a society as mobile, growing, and shifting as that of Florida—to be founded on false data. It would produce districts that fail to comply with constitutional and federal statutory requirements.[4]

[4] The Census Bureau estimates that the population of Florida increased from 15,982,378 in 2000 to 17,397,141 in 2004. United States Census Bureau, Population Finder, available at http://www.census.gov. These data represent an increase of almost 1,000 people per day, and, if extrapolated to the year 2007, show an increase in population of approximately 2.5 million people over the seven-year period since the 2000 census.

In this case, the ballot summary fails to inform voters that any plan adopted by the proposed commission in 2007 would rely on data gathered in the 2000 census, and consequently of the legal deficiently of inaccurate and obsolete census data, improperly drawn districts, and endless and expensive legal challenges.

Article I, section 2 of the United States Constitution requires a decennial census to form the basis of congressional districting plans, and the Florida Constitution avails itself of the same census in the apportionment of state legislative districts. *See* Art. III, § 16(a), Fla. Const. Accurate census data is indispensable to the redistricting process. Article I, sections 2 and 4 of the United States Constitution mandate an equal apportionment among congressional districts. *See Wesberry v. Sanders*, 376 U.S. 1 (1964). And the Equal Protection Clause of the Fourteenth Amendment requires, on the principle of "one person, one vote," that state legislative districts be composed "as nearly of equal population as is practicable." *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Even more exacting, congressional districts must be drawn with virtually *zero* population deviation among them. *See Kirkpatrick v. Preisler,* 394 U.S. 526, 530-31 (1969) ("[T]he State [must] make a good-faith effort to achieve precise mathematical equality."). Make no mistake—if a commission or Legislature redraws congressional lines in 2007 based on the 2000 census, the districts will violate the zero deviation rule and would be invalid.

Furthermore, Section 5 of the Voting Rights Act prohibits "changes . . . that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," requiring an examination of the population distribution of minority individuals. *See Beer v. United States*, 425 U.S. 130, 141 (1976). The use of flawed data will render compliance with Section 5 problematic and will result in inevitable legal challenges to the redistricting.

The failure of the proposed amendment to inform voters that any redistricting plan adopted by the proposed commission in 2007 would rely on inaccurate and obsolete census data, and would therefore be peculiarly susceptible to being stayed pending endless and costly legal challenges, is a material omission.

Last, the summary fails to inform the voters that the proposal would shorten the terms of office of some state senators, but not others. If this proposal became effective, its complex interplay with staggered senatorial terms under article III, Section 15 of the constitution, and with term limits under article VI, section 4, will mean that some state senators will be permitted to serve two more years in the Senate than other senators. The summary does not mention this. A voter will have no idea that an affirmative vote on this proposal could mean that his or her effective and popular senator will be taken from office two years before the senator in an adjoining district.

Voters are entitled to be fully informed and to understand the full truth so that they can cast an "intelligent and informed ballot." *In re Advisory Op. to the Att'y Gen. re Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994).

D. The Unapproved Format and Language of the Consolidated Petition Form Violate the Express Mandate of This Court and the Single-Subject Rule.

In addition to the misleading title and summary, the petition forms circulated by the amendment sponsors contain misleading language not approved by the Secretary of State. The unapproved forms themselves and the unapproved and misleading language included on them violate the constitutional single-subject rule. The use of these inappropriate, unapproved, and misleading forms violates Florida law and should not be permitted.

These issues relate equally to the proposed amendment in this case and to the Commission Amendment. In his brief opposing the Commission Amendment, which the Speaker of the House has filed contemporaneously with this brief, the Speaker argues in detail why the unapproved and misleading forms do not comply with the law. *See* Br. of Hon. Allan G. Bense, Case No. 05-1754 (2005). The Speaker incorporates those arguments into this brief.

CONCLUSION

The proposed amendment in this case says one thing but does another. Its summary is wholly inadequate. The summary misrepresents the nature of the amendment and ignores critical components of the amendment, and it omits critical information that is necessary to have a fully-informed electorate.

The people of Florida have every right to amend their constitution to accomplish the purposes of the proposed amendment. But no amendment may be adopted without complying with the constitutional and statutory requirements that ensure a fair petition and election process. The proposed amendment fails to comply with those requirements. It must not be permitted on the ballot.

Respectfully submitted,

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

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

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by U.S. Mail or Hand Delivery on October 21, 2005, to the following:

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

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

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

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

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

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

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

Office of Economic & Demographic Research
Financial Impact Estimating Conference

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

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Rule 9.210, Florida Rules of Appellate Procedure.

_____

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