IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF STATE,
an agency of the State of Florida, *et al.*,

Appellants,

v.

Case No. SC10-1375
L.T. Case No. 2010-CA-1803

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

References to the record shall be by "R" followed by the volume number and page number(s), e.g., (R1–25-26). Supplemental Volume 1 shall be designated "RS1."

References to Appellees' Answer Brief shall be by "Br." followed by the page number(s), *e.g.*, (Br. at 12).

All recordings of the proceedings of the Florida Senate are on file with the Secretary of the Senate.

All emphases are supplied.

ARGUMENT

Amendment 7 adds two new redistricting standards and places them on equal footing with other constitutional standards. It commands the Legislature to harmoniously balance and implement all standards. No standard may be violated.

Appellees dodge this sensible interpretation and instead advance an implausible one. Appellees labor to show, through unsupported assertions, that "implement" does not mean "implement," and that Amendment 7 will devour all other redistricting standards, present and future, in the Florida Constitution.

Appellees prefer their tortured interpretation—which they concede is not compelled by the words of the proposed amendment—because it yields illogical consequences that were never intended and therefore not mentioned in the ballot language. This Court must reject their interpretation for the very same reason.

If courts grant deference to political opponents over the Legislature, and strike legislatively proposed amendments whenever those opponents contrive a misinterpretation of them, precious little will remain of the constitutional authority of the Legislature to propose amendments to the Florida Constitution.

I. Amendment 7 Does Not Affect Contiguity.

The phrase "without subordination" makes clear that the standards in Amendment 7 are not second-class standards, but on a par with the standards in Amendments 5 and 6. To create a supposed inaccuracy in the summary, Appellees

urge the Court to interpret this phrase to elevate the standards in Amendment 7 to a superior position, and to annihilate all other standards, without notice to the voters.

But even Appellees concede—as they must—that *nothing* compels their interpretation. Appellees state that "without subordination" does "not *necessarily* mean on equal footing," and "*could just as well* mean higher." (Br. at 12.) Thus, according to Appellees, the phrase "without subordination" could mean equal or superior. "Equal," of course, avoids any alleged defect in the ballot language.

This concession alone proves that Appellees cannot show "without any doubt that the ballot language is deficient." (Br. at 8.) But Appellees go further. They tempt the Court to make an astonishing leap: to reject a concededly valid interpretation that *avoids* inaccuracy, and to embrace an interpretation that (they claim) *creates* inaccuracy.[1] This Court's precedents, respectful of a coordinate branch of government, counsel against the unnecessary invalidation of legislative acts. If possible, the Court must adopt interpretations that sustain legislative acts. *See Capital City Country Club v. Tucker*, 613 So. 2d 448, 452 (Fla. 1993).

Once again, Appellees fail to address the illogical consequences of their interpretation. Under their interpretation, the Legislature could ignore not only

[1] In discussing the legislative history of Amendment 7, Appellants do not, as Appellees claim, concede that Amendment 7 is ambiguous. Appellants stated that the meaning of Amendment 7 is "apparent from the face of the amendment." (Initial Brief at 11.) An alternative argument is not a concession.

contiguity, but also the numerical limitation on state legislative districts, *see* Art. III § 16(a), Fla. Const., and create *any* number of districts to promote communities of common interest. Appellees never address this inevitable conclusion.

Appellees suggest that the command to "balance" standards permits the Legislature to violate standards, and thus destroys the command to "implement" standards. (Br. at 13.) But Appellees misunderstand the nature of redistricting. Discretion to balance standards is essential to the complex task of redistricting. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

Discretion to balance standards is not, however, permission to violate them. Courts in states whose constitutions prescribe fact-intensive standards recognize that it is not only possible but essential to balance and implement all standards. *See, e.g.*, *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (commission may not "ignore any of the constitutional criteria" but enjoys "flexibility to give more emphasis to one goal over another"); *In re Reapportionment of Towns of Hartland, Windsor & West Windsor*, 624 A.2d 323, 330 (Vt. 1993) (state legislature must comply with "all constitutional and statutory requirements" but has "flexibility"); *Wilkins v. West*, 571 S.E.2d 100, 108 (Va. 2002) (state legislature must "satisfy a

number of state and federal constitutional and statutory provisions" but possesses "discretion in reconciling these often competing criteria").[2]

Appellees are plainly wrong to argue that contiguity is not a binary, objective standard. (Br. at 16.) The contours of this standard were "debated," but those questions are now settled. This Court has created bright-line rules to assess whether districts are contiguous. The creation of non-contiguous districts, contrary to those *per-se* rules, would violate the command to implement all standards.[3]

According to Appellees, this Court need not interpret the phrase "without subordination": the bare fact that Appellees dispute its meaning establishes its ambiguity. (Br. at 18.) This phrase is not ambiguous. But if it were, it would not invalidate Amendment 7. Where the words of a summary are borrowed from the amendment itself, this Court has not deemed uncertainties in meaning problematic. *See, e.g.*, *In re Adv. Op. to the Att'y Gen. re Prot. From Repeated Med. Malpractice*, 880 So. 2d 667, 673 (Fla. 2004) (holding that "medical doctor" and

[2] Appellees note that Amendment 7 requires the Legislature to *apply*—not *balance*—federal standards. (Br. at 14-15.) The reason for this difference is obvious, and harmless. Federalism dictates that federal law must prescribe the means of implementing federal standards. Whether federal standards must be balanced, or whether some federal standards are superior to others, is a matter for federal law. It does not follow that compliance with state standards is optional.

[3] Appellees also argue that the command to "implement the standards in this constitution" means some—not all—standards. (Br. at 14.) This makes no sense. When followed by a plural noun and a prepositional phrase, "the" invariably means

"three or more incidents" are not fatally ambiguous phrases, "because those words derive from the text of the proposed amendment itself").[4] Ambiguous phrases in ballot language that exactly mirror the actual text of the proposed amendment are "better left to subsequent litigation." *In re Adv. Op. to the Att'y Gen. re Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004); *accord Adv. Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1229, 1238 (Fla. 2006). Otherwise, no proposal could attain ballot placement, since no language can achieve perfect clarity and obviate the need for future interpretation.[5]

Finally, even if Appellees can show, clearly and without any doubt, that the words "without subordination" nullify all mandatory standards, the summary would not mislead. Because those very words appear in the summary, the voters

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"all." Any similar phrase—"the letters in the mailbox," or "the cars in the parking lot," or "the trees in the courtyard"—immediately disproves Appellees' suggestion.

[4] As a result, Appellees' complaints that the *amendment text* is complicated have no bearing on whether the ballot language accurately represents the proposed amendment. Ambiguities have proven fatal where (unlike this case) the summary has diverged from text of the proposed amendment. *See Adv. Op. to Att'y Gen. ex rel. Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 896-97 (Fla. 2000); *Adv. Op. to the Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998).

[5] In fact, if Appellees were correct, Amendments 5 and 6 would not be entitled to ballot placement. They contain various words and phrases of doubtful, ambiguous meaning. The term "language minorities," which this Court construed to mean "any language other than English," is defined differently by the federal Voting Rights Act and Florida Statutes. 42 U.S.C. § 1973l(c)(3); 28 C.F.R. § 55.1; § 101.2515, Fla. Stat. (2009). The word "compact" invites endless debate. And

would understand, with equal clarity, that Amendment 7 nullifies those standards.

II. The Ballot Title Is Accurate.

Appellees revive their contention that the word "standards" in the ballot title is misleading. According to Appellees, Amendment 7 creates no standards because its standards are permissive, and not mandatory. (Br. at 23-25.)

Amendment 7 creates standards under any rational understanding. It requires the Legislature to consider the ability of minorities to participate in the political process and elect representatives of their choice. It also authorizes the Legislature to promote communities of interest, other than political parties.

A "standard" is any "criterion for measuring acceptability." Black's Law Dictionary (8th ed. 2004). Clearly, Amendment 7 provides criteria to measure the acceptability of districts. When it draws districts, the Legislature will refer to the standards in Amendment 7 to measure acceptability. When it reviews redistricting plans, the Court will measure the acceptability of districts by reference to the same standards. Whether mandatory or permissive, the provisions of Amendment 7 will serve as criteria to validate the specific districts created by the Legislature.[6]

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the protections for minorities are derived from federal law, and have given rise to an immense body of judicial interpretation over a period of forty-five years.

[6] The ballot language, moreover, "may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters." *Adv. Op. to the Att'y Gen. re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002); *accord Adv. Op. to Att'y Gen. re Tax*

III. The Summary Correctly Expresses the Rationally-Related Standard.

Appellees argue that the ballot language should editorialize against the proposed amendment and advise voters that the term "rationally related" creates a "very weak" standard of review—essentially "no review" at all. (Br. at 25-27.)

Amendment 7 does not eliminate meaningful judicial review, or apply an equal-protection standard to redistricting plans. It merely recognizes that, in the delicate and complex task of redistricting, the Legislature must weigh and balance various interests and standards, and that redistricting plans should not be stricken based on reasonable differences of opinion. This approach is far from unusual in states where fact-intensive standards govern redistricting. As one court explained:

> We have traditionally accorded the Legislature substantial deference in determining how to strike the proper balance among the various directives and goals laid out by State and Federal law. . . . As long as the Legislature had a reasonable justification for drawing the districts as it did, we shall not question the Legislature's determination . . . . The Constitution does not require that the Legislature adopt the best plan that any ingenious mind can devise. If we required such a determination, any redistricting plan adopted by the Legislature would be subject to endless attack by those who are later able to devise what they contend is a superior plan that may indeed more closely approximate the constitutional commands.

Mayor of Cambridge v. Sec'y of the Commonwealth, 765 N.E.2d 749, 755-56 (Mass. 2002); *accord Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep.*

Limitation, 673 So. 2d 864, 868 (Fla. 1996). As in most cases, the brief ballot title of Amendment 7 derives clarity from the summary of the proposed amendment.

Redistricting Comm'n, 208 P.3d 676, 689 (Ariz. 2009) (holding that redistricting plan must be upheld, even if "debatable," unless "no reasonable commission would have adopted this plan"); *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 98-100 (Cal. Ct. App. 2006) (holding that the "inherent difficulty" of redistricting requires plans that "reflect a reasonable application" of standards to be upheld).

There is nothing unusual about Amendment 7's rationally-related standard. The word "rationally"—a word voters know and understand—accurately expresses that standard, without the derogatory, editorial description proposed by Appellees.

IV. "Communities of Common Interest" Is Not Misleading.

"Communities of common interest" is not legal jargon, but plain English. It is based on common sense. *See* American Heritage Dictionary (4th ed. 2009). (defining "community" to means a "group of people having common interests"). Amendment 7 may be overly explanatory, but the voter is clearly informed.

"Communities of common interest" has no contrary, technical definition under Florida law. It is not defined in the Constitution, in the Florida Statutes, or in the decisions of Florida courts. This Court has never required ballot language to prescribe definitions unknown to existing law or the proposed amendment.

Not all "important terms" must be specifically defined. (Br. at 27.) In *In re Advisory Opinion to the Attorney General re Medical Liability Claimant's Compensation Amendment*, this Court did not insist on a definition of "medical

liability," noting that "the precise meaning of his term is better left to subsequent litigation." 880 So. 2d at 679; *accord Adv. Op. to Att'y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d at 1237-38 (holding that the term "substantial equivalent" is "not within the field of undefined legal phrases" that will mislead).

This case is entirely unlike *Advisory Opinion to Attorney General ex rel. Amendments to Bar Government from Treating People Differently*, 778 So. 2d at 890 ("*Treating People Differently*"), where the phrase "bona fide qualifications based on sex" was inscrutable shorthand for specific provisions in the amendment itself, or *Advisory Opinion to the Attorney General re People's Property Rights Amendments*, 699 So. 2d 1304, 1309 (Fla. 1997), where the phrase "common law nuisance"—a phrase defined by and known only to the law—required definition.[7]

V. The Summary Is Not Inaccurate for Its Failure to Disclose an Imaginary Effect on Other Proposed Amendments.

Last, Appellees attempt to convince the Court that Amendment 7 would annihilate the protections afforded to minorities by Amendments 5 and 6, and that the summary must explain this supposed effect. On the contrary, Amendment 7

[7] Again, Appellees' argument would invalidate Amendments 5 and 6. The summaries of Amendments 5 and 6 contain several undefined phrases. The word "contiguous" has a legal definition, but the summary did not disclose it. Nor do the summaries define the word "compact," a term of art whose meaning can "vary significantly." (R1–87-88.) The summaries do not define their protections for minorities, though they use technical, legal phrases. *See Georgia v. Ashcroft*, 539 U.S. 461, 480-84 (2003). And this Court rejected the argument that the summaries

will enhance the opportunity of all Florida citizens to participate in the political process. Moreover, a ballot summary need not explain the proposed amendment's effect on other pending proposals—proposals the voters might never adopt.

On its face, Amendment 7 cannot logically be construed to impair the protections afforded to minorities by Amendments 5 and 6. Amendments 5 and 6 afford minorities two minimum protections. These specific protections establish a floor that must be satisfied at all events. They are not erased from the Constitution by the broadly applicable—and perfectly compatible—command in Amendment 7 to consider the interests of minorities. General provisions do not eliminate specific provisions, *Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009), and constitutional provisions must, if at all possible, be harmonized with each other, *Gray v. Bryant*, 125 So. 2d 846, 858 (Fla. 1960).

It defies common sense to suggest that Amendment 7's broad safeguards for minorities displace the specific but limited safeguards of Amendments 5 and 6. Since 1992, through redistricting, the Legislature has markedly increased minority representation. Far from undoing these historic achievements, the broad protection afforded by Amendment 7 serves all-important, complementary purposes:

Amendments 5 and 6 require the creation of certain "minority districts."

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must define the legal phrase "language minorities." *Adv. Op. to Att'y Gen. re Standards for Est'g Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

But, in the creation of all other districts, the Legislature must be guided *solely* by compactness and local boundaries. *See* Fla. S. Comm. on Reapp., recording of proceedings (Feb. 11, 2010) (comments of Ellen Freidin). Amendments 5 and 6 would severely limit legislative discretion to protect minorities in these districts.

In *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), the Court held that Section 2 of the Voting Rights Act (the "VRA") does not require the creation of districts to protect minority communities that are too small to comprise a majority in a single-member district. Thus, where state law requires adherence to local boundaries, the VRA does not protect such communities from division into different districts. And while Amendments 5 and 6 require adherence to local boundaries, Fair Districts has stated that the protections for minorities in Amendments 5 and 6 merely codify the VRA, creating no additional protections for minorities. (R1–94.) Amendment 7 provides discretion to protect minority communities that cross local boundaries.

Amendments 5 and 6 ensure that the opportunity of minorities to elect representatives of their choice will not *diminish*, but any attempt to *enhance* that opportunity is encumbered by the requirements of compactness and adherence to local boundaries. Amendment 7 affords the Legislature a measure of discretion to enhance the opportunities of minorities to elect the candidates of their choice.

The Legislature designed Amendment 7 in response to these concerns. Amendment 7 was crafted to supplement—not supplant—the limited safeguards

provided by Amendments 5 and 6. There is no support for the suggestion that Amendment 7 nullifies the protections for minorities in Amendments 5 and 6.[8]

In any event, this Court has rejected the argument that a ballot summary must disclose a proposed amendment's effect on other proposed amendments. In *Advisory Opinion to Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court upheld for a proposed amendment sponsored by Hometown Democracy, requiring voter approval of all amendments to comprehensive land-use plans. But before voters could adopt the amendment, this Court evaluated a "competing proposed amendment" *expressly* designed to "pre-empt or supersede" the earlier proposal. *Adv. Op. to Att'y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 119, 121 (Fla. 2008). Hometown Democracy argued that the "proposal is intended to pre-empt or supersede the Florida Hometown Democracy proposed initiative," without disclosure in the summary. *See* Answer Brief of Interested Person Florida Hometown Democracy, Inc., at 21 (*available at* 2008 WL 5373017). This Court found irrelevant the proposal's preemption of the earlier, still pending proposal.

Two Justices dissented, but the majority was unpersuaded. In approving the

[8] Amendment 7 will in no way affect the prohibition in Amendments 5 and 6 against an intent to favor or disfavor incumbents and political parties. In fact, it expressly excludes political parties from "communities of common interest."

"competing" amendment, three Justices noted that the proposal would not restrict any "existing" rights to subject growth management plans to referenda. 2 So. 3d at 123.[9] This Court thus confronted—and rejected—the same argument advanced by Appellees,[10] and did so in the context of a proposal that expressly declared, in the amendment text, its deliberate purpose to preempt another proposed amendment.[11]

No Florida court has ever stricken one proposed amendment because its summary did not explain its effect on another proposed amendment.[12] Summaries must explain effects upon *existing* constitutional law, *Treating People Differently*,

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[9] Appellees' attempt to distinguish this case is futile. (Br. at 33.) The fact that Hometown Democracy had not yet attained the needed number of signatures was never argued. The supposed distinction also opens a door to the relitigation of that case, now that Hometown Democracy has collected those signatures.

[10] An argument addressed in dissent, though not explicitly addressed by the majority, is implicitly rejected. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990); *State v. Lamar*, 659 So. 2d 262, 264 n.3 (Fla. 1995); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 11 (Fla. 5th DCA 2009).

[11] *Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), is easily distinguishable. There, the ballot asked voters whether the county commission should be the governing body of the fire and rescue service district. It did not advise voters that the proposal would eliminate the agency responsible for the district under *existing* law. It was this change to existing law that prompted the Court to invalidate the proposed amendment. *See id*. at 393 n.2.

[12] On Appellees' hypothesis, multiple proposals that affect one another—even unintentionally—would be mutually invalid, since the accuracy of the ballot on election day, and not political motivations, *see In re Adv. Op. to the Att'y Gen. re Med. Liab. Claimant's Comp. Amendment*, 880 So. 2d at 680 (Pariente, J., concurring), is dispositive. Amendments 5 and 6 would thus be invalid for failure of their summaries to explain their reciprocal effect upon Amendment 7. And the amendment process could even degenerate into gamesmanship, as competitors aim to invalidate disfavored amendments by proposing other, interacting amendments.

778 So. 2d at 894-95, but not *potential* constitutional law. A mere proposal has not attained the dignity of an existing constitutional provision formally adopted by the voters. And voters can easily compare ballot summaries—such as the summaries of Amendments 5, 6, and 7—that will appear consecutively on the same ballot.[13]

VI. Amendment 7 Should Be Presented to the Voters.

Appellees' opposition here is political, not legal. Appellees simply *say* that Amendment 7 would demolish all constitutional standards—and attempt to sell this to the Court, to create some discrepancy between the text and a verbatim summary.

In ten hours of debate and fifty pages of briefing, the Legislature has set forth the intent of Amendment 7. With no better support than illogical argument, Appellees declare that the Legislature is wrong, and that the ballot language must identify seismic consequences which none but Appellees could have discovered. The integrity of the judicial process, the separation of powers, and the authority of the Legislature to propose amendments are of little worth if such assertions negate the plain words of the amendment and a definitive exposition of legislative intent.

Legislators take the same oath as the Justices of this Court. *Armstrong v. Harris*, 773 So. 2d 7, 14 (Fla. 2000). Constrained by that oath, the Legislature discussed Amendments 5 and 6 in ten committee meetings; debated Amendment 7

[13] Finally, any suggestion that the ballot language must describe the effect of Amendment 7 upon Amendments 5 and 6 is premature. Because Amendments 5 and 6 might not pass, Amendment 7's supposed effect on them might be irrelevant.

extensively; and, by a three-fifths supermajority vote, approved the ballot language of Amendment 7. Appellees seek to overturn the legislative process on the ground that the ballot language does not include their distortions of the amendment.

The Legislature placed the verbatim words of the amendment on the ballot to avoid any charge of "wordsmithing." *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149 (Fla. 2008). Now, Appellees claim that the *absence* of wordsmithing is misleading. This would place the Legislature in an impossible position. Had the summary stated (as Appellees appear to desire) that Amendment 7 will eliminate all mandatory standards (perhaps including the numerical limitation on districts), undermine judicial review, and thwart Amendments 5 and 6, the summary would have been attacked as editorializing, and as inconsistent with the amendment text.

Indeed, if there were any summary that would have satisfied these political opponents, they have not shared it—despite their heavy burden to prove "without any doubt that the ballot language is deficient." (Br. at 8.) And rather than request that the Court alter the summary, as in *ACLU of Fla., Inc. v. Hood*, No. SC04-1671 (Fla. Sep. 2, 2004), they demand that it not be presented to the voters at all.

Appellees' arguments are better left to public discourse. They disserve this Court's ballot accuracy jurisprudence and invite the Court boldly to enter the political fray. They do equal violence to the express authority of the Legislature to propose amendments to the Florida Constitution. The Court should reverse.

Respectfully submitted, this __ day of August, 2010.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this Brief is Times New Roman 14 point and is in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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