

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
FLORIDA SENATE,

Intervening Plaintiffs,

v.

Case No. 2010-CA-1824

DAWN K. ROBERTS, in her capacity as the Interim
Secretary of State of the State of Florida

Defendant.

GOVERNOR CHARLIE CRIST'S MOTION FOR LEAVE TO APPEAR AS AMICUS
CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Governor Charlie Crist, by and through undersigned counsel, respectfully asks for leave to appear as amicus curiae and file the attached Memorandum of Law in Support of Defendant's Motion to Dismiss and Answer to Complaint for Declaratory and Injunctive Relief.

1. The subject of this litigation involves two redistricting measures, proposed constitutional amendments 5 and 6.

2. The particular issue to be addressed is whether the placement of Amendments 5 and 6 on the November election ballot violates article XI, section 3 of the Florida Constitution and section 101.161(1), Florida Statutes, which require that a proposed constitutional amendment embrace one subject and be accompanied by a statement of its "substance," printed in "clear and unambiguous language."

3. The Governor seeks to appear in this case in furtherance of his obligation to “take care that the laws be faithfully executed.” Article IV, § 1(a), Fla. Const. Specifically, the Governor seeks to ensure faithful execution of section 100.371, Florida Statutes, which provides for placement of citizen initiatives on the ballot; article XI, section 3, Florida Constitution, and section 101.161(1), Florida Statutes, which require ballot clarity; and article IV, section 10, and article V, section 3, of the Florida Constitution, which provide the Florida Supreme Court with exclusive jurisdiction to determine the validity of a citizen initiative petition.

4. The constitutional process balances essential judicial review of ballot clarity with the need for finality, providing the public with sufficient time to analyze and debate proposed amendments before votes are cast. To that end, the constitution limits the scope of review to whether the amendment embraces a single subject and whether the ballot title and summary are clear, *Advisory Op. to Att’y Gen. re Fla. Marriage Prot. Amendment*, 926 So. 2d 1226 (Fla. 2006), and confines the judicial forum to the Florida Supreme Court, *Advisory Op. to Att’y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995).

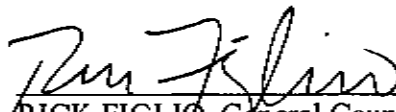
5. Section 101.161(1) arises from the constitutional mandate that all amendments be submitted to the people for a vote. See art. XI, §§ 1, 3, 5, Fla. Const. The Court must be circumspect in reviewing a citizen initiative, acting only “with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.” *Advisory Op. to Att’y Gen. re Fla. Minimum Wage Amendment*, 880 So. 2d 636, 639 (Fla. 2004) (quotation marks omitted) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Governor Crist seeks to appear as amicus curiae to help ensure that the public policy embodied in the statutes and constitutional provisions cited herein be preserved by ensuring that the citizen initiative process be as free of unnecessary and untimely hurdles as possible.

6. It is profoundly important to our system of constitutional democracy that the limited pre-election review process take place in the proper forum and involve only issues that are relevant to ballot clarity. The Governor appears as amicus curiae to help ensure that this State remains true to those sacrosanct provisions of law.

7. The Governor has requested and obtained the consent of the Defendant Dawn K. Roberts, Proposed Defendant Intervenor Bob Graham, and Plaintiff Intervenors Florida House of Representatives and Florida Senate. Plaintiffs Corrine Brown and Mario Diaz-Balart are opposed to this Motion.

WHEREFORE, the Governor respectfully requests the Court grant this Motion for Leave to Appear as Amicus Curiae.

RESPECTFULLY SUBMITTED this 22nd day of June, 2010.



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Defendant.

GOVERNOR CHARLIE CRIST'S MEMORANDUM OF LAW AS AMICUS CURIAE IN
SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Governor Charlie Crist, by and through undersigned counsel, hereby submits the following memorandum of law in support of Defendant's Motion to Dismiss the complaints filed by Plaintiffs Corrine Brown and Mario Diaz-Balart and Plaintiff Intervenors the Florida Senate and Florida House of Representatives (hereinafter "Plaintiffs"). For the reasons stated in the Defendant's motion to dismiss, and for the reasons stated herein, Governor Crist respectfully urges that this Court dismiss the Plaintiffs' complaints.

Interest of Amicus Curiae

Governor Crist appears as amicus curiae in this matter in furtherance of his constitutional obligation to "take care that all laws be faithfully executed." Art. IV, § 1(a), Fla. Const. The Governor seeks to ensure faithful execution of section 100.371, Florida Statutes, which provides

for placement of citizen initiatives on the ballot; section 101.161(1), Florida Statutes, which requires that a proposed constitutional amendment be accompanied by a statement of its “substance,” printed in “clear and unambiguous language;” and article IV, section 10, and article V, section 3, of the Florida Constitution, which provide the Florida Supreme Court with exclusive jurisdiction to determine the validity of citizen initiative petitions.

Section 101.161(1) arises from the constitutional mandate that all amendments be submitted to the people for a vote. *See* art. XI, §§ 1, 3, 5, Fla. Const. Accordingly, the Court must be circumspect in reviewing a citizen initiative, having “no authority to inject itself in the process, unless the laws governing the process have been clearly and conclusively violated.” *Advisory Op. to Att’y Gen. re Fla. Minimum Wage Amendment*, 880 So. 2d 636, 639 (Fla. 2004) (quotation marks omitted). The “Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.” *Id.* (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). Governor Crist appears as amicus curiae to oppose the Plaintiffs’ initiation of this proceeding, which can best be described as an end-run around the Supreme Court’s limited, exclusive review of the people’s ability to amend their constitution through the citizen initiative process.

In 1986 the Legislature proposed the amendments that are now article IV, section 10, and article V, section 3(b)(10), of the Florida Constitution, which provide for an orderly process to expeditiously vet citizen-proposed amendments for placement on the ballot. The system balances essential judicial review of ballot clarity with the need for finality, providing the public with sufficient time to analyze and debate proposed amendments before they cast their votes. To that end, the constitution limits the scope of review to whether the amendment embraces a single subject and whether the ballot title and summary are clear, *Advisory Op. to Att’y Gen. re Fla.*

Marriage Prot. Amendment, 926 So. 2d 1226 (Fla. 2006), and confines the judicial forum to the Florida Supreme Court, *Advisory Op. to Att’y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995).

Successive legal challenges such as those brought by the Plaintiffs contravene the purpose of the limited pre-election review process. By raising issues that are not relevant to ballot clarity, and by raising those issues in the wrong court (thereby creating the likelihood of district court and Supreme Court review), Plaintiffs turn the process on its head—prolonging a legal imbroglio at the expense of healthy political debate. The bringing of “multiple challenges to initiatives” has rightly been characterized as a “tactic[]” that “prevent[s] the electorate from voting,” where “each subsequent challenge unnecessarily wastes scarce judicial resources and acts as a de facto burden to the initiative process.” Robert M. Norway, *Judicial Review of Initiative Petitions in Florida*, 5 Fla. Coastal L.J. 15, 32–34 (2004). It is profoundly important to our system of constitutional democracy that the public policy embodied by the statutes and constitutional provisions cited herein be preserved by ensuring that the citizen initiative process be as free of unnecessary and untimely hurdles as possible. The Governor appears as amicus curiae to help ensure that this State remains true to those sacrosanct provisions of law, which can only be accomplished by this Court expeditiously dismissing Plaintiffs’ complaints.

Background

Article XI, section 3 of the Florida Constitution gives the people the power to revise or amend the Constitution through the initiative process. Two citizen initiatives proposing changes to how legislative and congressional districts are drawn have been placed on the November 2 election ballot. The Department of State has designated the citizen initiative relating to

legislative districts as Amendment 5, and the other, relating to congressional districts, as Amendment 6 (hereinafter “Amendments”).

There are currently no provisions in the Florida Constitution regarding the boundaries of congressional districts but the Constitution does provide for legislative districts.¹ Article III, section 16(a) requires the Legislature to “apportion the state in accordance with the constitution of the state and of the United States into” senatorial and representative districts “of either contiguous, overlapping or identical territory.” The current process allows the Legislature to fashion those districts with the intent to favor an incumbent or a certain political party. No directive in the Florida Constitution constrains the Legislature from shaping districts to ensure political success, or from favoring one candidate, party, or demographic group over another in the drawing of legislative and congressional boundaries. In fact, these practices have become the norm in Florida and elsewhere.

Amendments 5 and 6 are intended to reduce and eliminate partisanship and political favoritism in drawing legislative and congressional districts. The Amendments would add additional standards by requiring districts to be drawn in such a way as to not favor or disfavor any incumbent or political party or deny any racial or language minority the ability to participate in the political process or in the election of their representatives.

Article V, section 3 of the Florida Constitution, requires the Supreme Court to render an advisory opinion as to the validity of a citizen initiative when requested by the Attorney General. In *Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries*, 2 So. 3d 175, 191 (Fla. 2009) (hereinafter “*Legislative District Boundaries*”), the

¹ The United States Supreme Court has held that the responsibility of “apportionment of ... federal congressional and state legislative districts” falls upon the States. *Grove v. Emison*, 507 U.S. 25, 34 (1993).

Supreme Court held that Amendments 5 and 6 and their ballot titles and summaries comply with article XI, section 3 of the Florida Constitution and section 101.161(1), Florida Statutes, by embracing only one subject and using clear and unambiguous language.

Argument

The Florida Supreme Court unanimously concluded that Amendments 5 and 6 do not violate the single-subject requirement and that their titles and summaries are not misleading. *Legislative District Boundaries*, 2 So. 3d at 184, 191. The Legislature exercised its opportunity to appear in that litigation and argue against the amendments' validity. Now, sixteen months after the Florida Supreme Court issued its opinion, on the eve of the election season in which voters are to decide whether to amend their constitution, the Legislature and other Plaintiffs have filed an eleventh-hour lawsuit to stymie placement of the amendment on the ballot. Supporters of the citizen initiatives at great expense have already obtained the requisite signatures and defended against the prior legal challenge. Now the Legislature has launched a successive attempt to block the people's opportunity to weigh in on the way their congressional and legislative districts are drawn.

This gratuitous, second challenge, brought by parties who have or could have made their arguments when the Florida Supreme Court first analyzed these questions, unnecessarily inflates the cost of citizen-participation in our constitutional democracy. The Florida Constitution provides for judicial review of amendments proposed by citizen initiative in order to allow a determination of their "validity . . . before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot." *Armstrong v. Harris*, 773 So.2d 7, 14 n.18 (Fla. 2000) (emphasis in original). Here, that determination has been made and proponents of the amendments have spent their time, sweat, and treasure in

obtaining the requisite signatures. Plaintiffs' redundant legal challenge poses an unnecessary, additional hurdle to the people's opportunity to express their voice.

Plaintiffs' challenge should fail for a number of reasons. Firstly, the Florida Supreme Court has exclusive jurisdiction to review a constitutional amendment proposed by initiative petition. *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) (citing Art. V, § 3(b)(10), Fla. Const.); *Advisory Op. to Att'y Gen. re Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994). Consequently, jurisdiction does not lie in the circuit court, and this Court should dismiss Plaintiffs' complaint for lack of subject matter jurisdiction for that reason alone.

Further, Plaintiffs' complaints seek to relitigate issues already addressed by the Justices of the Florida Supreme Court in the *Legislative District Boundaries* case. The Florida Supreme Court in past decisions has expressed its strong disfavor for "relitigation of issues expressly addressed in an advisory opinion on a proposed amendment," an effort that "almost always will result" in the Court refusing to exercise jurisdiction. *Florida League of Cities v. Smith*, 607 So. 2d 397, 398-99 (Fla. 1992). Rather, the Supreme Court has made clear that "[r]enewed litigation" should be "entertained only in truly extraordinary cases, such as . . . where a vital issue was not addressed in the earlier opinion." *Id.* at 399. Where a party attempts to raise the same issue in a subsequent proceeding, the Florida Supreme Court has considered its prior advisory opinion "binding" on that issue and refused to "reconsider the issue and recede from [its] decision." *Ray v. Mortham*, 742 So.2d 1276, 1285 (Fla. 1999) (rejecting reassertion of a single-subject argument because it was "not new argument on an important issue not addressed in our earlier opinion").

Here, Plaintiffs assert ballot clarity and single-subject arguments, both of which were already adjudicated by the Florida Supreme Court. *Legislative District Boundaries*, 2 So. 3d at 184, 191. Accordingly, these issues should not be subject to further judicial review in a pre-election challenge. Viewed against the backdrop of this Supreme Court precedent, the weakness of Plaintiffs' case becomes crystal clear. Plaintiffs now seek relief in this Court—to address issues that either have already been addressed by the Florida Supreme Court (and thus dismissed by that Court) or related issues that the Supreme Court would choose not to address prior to ballot placement. Simply put, Plaintiffs have approached the wrong forum, with issues that would surely be dismissed by the right forum—the Florida Supreme Court.

The issues Plaintiffs seek this Court to adjudicate have either already been decided by the Florida Supreme Court or must not be decided prior to the election. Plaintiffs advance substantive arguments regarding the merits of Amendments 5 and 6 that are outside of the constitutionally limited scope of pre-election judicial review. Review of amendments proposed by petition initiative is “strictly limited” to “whether the proposed amendment comports with the single-subject requirement” and “whether the ballot title and summary are clear and unambiguous;” that review “does not include an evaluation of the merits or the wisdom of the proposed amendment.” *Advisory Op. to Att’y Gen. ex rel. Florida Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 367, 368–69 (Fla. 2000). Arguments regarding the “substance of the amendment” are not justiciable in the pre-election proceeding. *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla. 1982).

Plaintiffs assail the wisdom and merit of the proposed amendments and impugn its validity under federal and constitutional law. *See, e.g.*, Compl. of Florida Senate ¶¶ 14, 32, 38 (asserting the Amendments are “unworkable,” “violate paramount federal law,” and “violate the

separation of powers”). These are topics not cognizable at this stage of review. *See, e.g., Advisory Op. to Att’y Gen. re Term Limits Pledge*, 718 So. 2d 798, 801 n.1 (Fla. 1998) (declining to reach a federal constitutional issue because it was outside the Court’s “limited” “jurisdiction” to review “proposed amendments based on citizen initiative petitions”); *Advisory Op. to Att’y Gen.—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 226–27 (Fla. 1991) (declining to reach “various constitutional challenges” that were “not justiciable”).

Some of these substantive and policy-oriented arguments are disguised as single-subject or ballot clarity issues. *See, e.g.,* Plaintiffs’ Compl. ¶¶ 52–57 (arguing that, because the Amendments could violate the federal Voting Rights Act, the ballot summary is inaccurate); *see also id.* at ¶¶ 67, 73–78; (framing the argument that the Amendments would make legislative redistricting and judicial review unworkable as “misleading ballot summary” issues); Florida House of Representatives’ Mot. to Intervene ¶¶ 26–32 (advancing the argument that Amendment 5 would make judicial review of redistricting more difficult as a single-subject and ballot summary issue). However, courts must decline to pass on the merits of amendments proposed for placement on the ballot—even when such arguments are nominally mischaracterized as single-subject and ballot clarity issues.

Judicial removal of “a constitutional amendment from the vote of the people” should be undertaken only with “extreme care, caution, and restraint.” *In re Advisory Op. to Att’y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient*, 880 So. 2d 659, 666 (Fla. 2004) (“*In re Physician Fee*”) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla.1982)). As it has the potential to infringe “on the people’s right to vote on an amendment,” pre-election review should be constrained to determining whether “the ballot language would clearly mislead the public concerning material elements of the proposed

amendment and its effect.” *In re Physician Fee*, 880 So. 2d at 666; *Advisory Op. to Att’y Gen. re Extending Existing Sales Tax To Non-Taxed Services Where Exclusion Fails To Serve Public Purpose*, 953 So. 2d 471, 477 (Fla. 2007) (A court must “not address the merits or wisdom of the proposed amendment.”).

Indeed, an amendment “may be the subject of future litigation, and it will not be until that occurs that the full and complete application may be absolutely known.” *In re Physician Fee*, 880 So. 2d at 665. However, that fact should not preclude approval for placement on the ballot. *Id.* “The potential *practical* impact of the amendment is a matter for public debate by proponents and opponents of the measure as part of the political process.” *Id.* at 667 (Pariente, J., concurring) (“Our role is not to pass on the merits of the measure or the wisdom of its inclusion in our state constitution . . . [and] the possibility that a proposed amendment could have ‘broad ramifications’ for the state does not render it infirm under chapter 101.161(1)”) (emphasis in original); see *Grose v. Firestone*, 422 So.2d 303, 306 (Fla. 1982) (explaining such arguments “may be raised in an appropriate proceeding in due course when the issue is properly presented”).

Plaintiffs’ speculation about the future effects of Amendments 5 and 6 are wholly inappropriate in a proceeding to determine whether they should be placed on the ballot. See *Advisory Op. to Att’y Gen. English—The Official Language of Florida*, 520 So. 2d 11, 12–13 (Fla. 1988) (finding it “premature to speculate how the amendment might interact with other portions of the constitution as applied to a given factual situation,” even though, “if passed, the amendment could have broad ramifications”); *Advisory Op. to Att’y Gen. re Ltd. Casinos*, 644 So. 2d 71, 74 (Fla. 1994) (rejecting challenges as “premature speculation”). By raising those issues here, Plaintiffs avoid debating these policy considerations in the forum of public opinion.

They seek to prematurely litigate what should be decided by the people when they are presented with the ballot. *Advisory Op. to Att'y Gen. ex rel. Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, 815 So.2d 597, 600 (Fla. 2002) (Pariente, J., concurring) (“[T]he merits or wisdom of the proposal is irrelevant to whether the proposed amendment may be placed on the ballot.”).

The Florida Supreme Court has strongly expressed its reluctance to revisit the validity of a citizen initiative after issuing an advisory opinion, advising that it will hear a renewed challenge only in the very limited circumstances in which “a vital issue was not addressed in the earlier opinion.” *Florida League of Cities*, 607 So. 2d at 399. This is certainly not one of those “truly extraordinary cases” in which “[r]enewed litigation” is warranted. *Id.* Rather, Plaintiffs seek to *re-litigate* issues that *were relevant* when decided and to *pre-litigate* issues that are *irrelevant* to the ballot review process, serving only to thwart the people’s constitutional right to propose and vote on amendments to their constitution. As such, this Court should dismiss Plaintiffs’ claims.

Allowing Plaintiffs’ suit to proceed in defiance of the constitutionally limited system of pre-election review would work an inequitable and undue hardship on the Defendant, proponents of the Amendments, and the people of Florida. After the Amendments’ sponsor obtained ten percent of the required voter signatures for placement on the ballot, the Secretary of State submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court in the manner prescribed by article IV, section 10, and article V, section 3, of the Florida Constitution. This proceeding provided all parties ample opportunity to raise any concerns regarding the Amendments’ validity. Nonetheless, sixteen months after the

Florida Supreme Court issued its opinion finding the Amendments valid, Plaintiffs mount an attack on the eve of the election season.

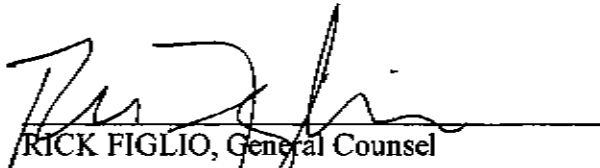
During those intervening months, the sponsor and interested citizens expended time, effort, and financial resources to obtain the remaining signatures—with no reason to anticipate that the Legislature and other parties would attempt a second challenge long after the Amendments were approved for placement on the ballot. Plaintiffs' unreasonable delay now costs the Defendant, the Amendments' sponsor, and the people of Florida additional expense to resolve a legal dispute on issues that were or could have been resolved during the advisory opinion stage. With this cost comes a corresponding reduction in time and resources to engage in the public debate that is central to our participatory democracy.

In sum, the Florida Supreme Court has already decided the only issues now relevant to Amendments 5 and 6: that they do not violate the single-subject rule and that the ballot title and summary adequately inform the voters of what they are being asked to decide. As such, "there is no prohibition upon placing th[e] proposed amendment[s] on the ballot." *In re Physician Fee*, 880 So. 2d at 666. This court lacks jurisdiction to entertain Plaintiffs' last-minute attempt to reassert those issues and throw up additional legal roadblocks to the citizen initiative process. Plaintiffs' unreasonable delay in bringing this challenge, and their disregard for the method of review prescribed by our constitution, pose unacceptable obstacles to the people's right to shape their government's defining document.

Conclusion

For the foregoing reasons, the Governor respectfully urges this court to dismiss the Plaintiffs' complaints.

Respectfully submitted,



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