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

FILED
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CLERK CIRCUIT COURT
LEON COUNTY FLORIDA

CORRINE BROWN and MARIO DIAZ-BALART,

Plaintiffs, and

FLORIDA HOUSE OF REPRESENTATIVES and
THE FLORIDA SENATE,

Intervening Plaintiffs,

vs.

Case No.: 2010 CA 1824

DAWN K. ROBERTS, in her capacity as Interim
Secretary of State of the State of Florida, and
FAIRDISTRICTSFLORIDA.ORG, Inc., a Florida
corporation,

COPY - not verified against original

Defendants, and

BOB GRAHAM,

Intervening Defendant.

_____________________________________/

GRAHAM'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION AND
MOTION TO EXPEDITE DISPOSITION

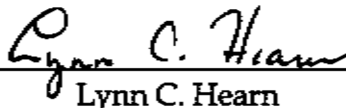
Intervening Defendant BOB GRAHAM, pursuant to Rule 1.140(b)(1) of the Florida Rules of Civil Procedure, moves to dismiss this action due to lack of subject matter jurisdiction, and moves to expedite disposition of this motion. In support, Graham adopts in full "Defendant's Motion to Dismiss Plaintiffs' and Intervening Plaintiffs' Complaints for Lack of Subject Matter Jurisdiction," and "Defendant's Motion

for Expedited Disposition," both filed by Defendant Secretary of State. These motions are attached and incorporated herein by reference.

In addition to the authorities cited by the Secretary of State, Graham respectfully notes the authorities holding that a trial court must resolve a threshold jurisdictional question timely, *see Berens v. Cobb*, 539 So. 2d 24 (Fla. 2d DCA 1989), and that it may not conduct any further proceedings in a case over which it lacks subject matter jurisdiction, *see City of Sanibel v. Maxwell*, 925 So. 2d 486 (Fla. 2d DCA 2006) (granting writ of prohibition directing trial court to dismiss case due to lack of subject matter jurisdiction) and *Walker v. Garrison*, 610 So. 2d 716 (Fla. 4th DCA 1992) (same).

WHEREFORE, Bob Graham respectfully requests that this Court expedite consideration of, and, upon consideration, grant, his Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



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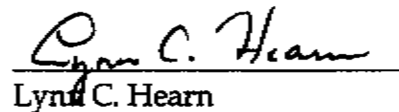

Lynn C. Hearn

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 Interim
Secretary of State of the State of Florida,

Defendant.
______________________________/

**DEFENDANT'S MOTION TO DISMISS
PLAINTIFFS' AND INTERVENING PLAINTIFFS' COMPLAINTS
FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves to dismiss Plaintiffs' and Intervening Plaintiffs' respective complaints for lack of subject matter jurisdiction pursuant to Rule 1.140(b)(1), Florida Rules of Civil Procedure.

I. PRELIMINARY STATEMENT

As the State of Florida's chief elections officer, the Defendant is vitally interested in an orderly elections process, particularly an orderly process for pre-election judicial review of amendments to the Florida Constitution proposed by voter initiatives. *See* § 97.012, Fla. Stat.

To that end, the Florida Constitution and Florida Supreme Court precedent direct that the Supreme Court has exclusive jurisdiction over pre-election ballot summary challenges to voter initiative proposed amendments to the Florida Constitution such as those asserted against

Amendments 5 and 6 in this case.

Confining such review to the Supreme Court prevents the type of piecemeal and last-minute litigation over voter initiatives that this case represents.

Because the Plaintiffs and the Intervening Plaintiffs can only pursue the claims asserted here in the Florida Supreme Court, this case must be dismissed.

II. BACKGROUND

Proposed Amendments 5 and 6

On September 28, 2007, the Florida Department of State, Division of Elections, (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts"). [Plaintiffs' Complaint, ¶ 1; Senate Complaint, ¶ 12]

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Attorney General to request an advisory opinion from the Supreme Court as to whether the Amendments comply with the requirements of article XI, section 3 of the constitution and section 101.161, Florida Statutes (2008) (relating to ballot title and summary). *See Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 178-79 (Fla. 2009) (hereafter, "*Redistricting Standards*").

The Supreme Court consolidated its review of the Amendments and allowed all interested parties the opportunity to file briefs in support or opposition. FairDistricts filed its brief in

support of the Amendments, and the Legislature filed a brief in opposition and appeared at oral argument. *Redistricting Standards*, 2 So.3d at 178, 185-91. The Plaintiffs in this case, Corrine Brown and Mario Diaz-Balart, chose not to appear in the Supreme Court.

On January 29, 2009, the Supreme Court declared, "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Redistricting Standards*, 2 So. 3d at 191.

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010, general election. *Id.*

The Plaintiffs' Claims

The Supreme Court's decision notwithstanding, on May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major ramifications" posed by Amendment 6. [Complaint, ¶ 5]

The Plaintiffs' Complaint alleges eight separate claims, each entitled "Misleading Ballot Summary," and each claim asserts that the ballot summary of proposed Amendment 6 is misleading in some respect and therefore violates Florida law.

The House and Senate Claims

The Plaintiffs are joined in their challenge to Amendment 6 by Intervenors the Florida House of Representatives and the Florida Senate (together, "Intervening Plaintiffs").

In its operative pleading ("House Complaint"), the House: (1) adopts Counts I-VI of the Plaintiffs' Complaint, each of which alleges that the ballot summary of proposed Amendment 6

is misleading; (2) asserts the allegations in Counts I-VI of the Plaintiffs' Complaint against the ballot summary for proposed Amendment 5; and (3) asserts an additional claim against the Amendment 5 ballot summary (also on the basis that the summary is purportedly misleading).[1]

On June 14, 2010, the Senate filed its complaint ("Senate Complaint"), which adopts each of the claims raised by the Plaintiffs and by the House. In addition, the Senate asserts two claims seeking injunctive and declaratory relief on the basis that proposed Amendment 5 and Amendment 6 purportedly violate federal and Florida law.

Now, less than three months before the Supervisors of Elections must finalize the ballots for the general election – and after delaying more than sixteen months following the advisory opinion in *Redistricting Standards* – the Plaintiffs and Intervening Plaintiffs ask this Court to exceed its jurisdiction and set aside the reasoned opinion of the Florida Supreme Court, blocking the Amendments from appearing on the ballot.

III. ARGUMENT

A. The Florida Supreme Court has exclusive jurisdiction to consider pre-election challenges to voter initiative amendments to the Florida Constitution.

In 1984, the Florida Supreme Court decided *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984), in which it affirmed the trial court's grant of an injunction striking a voter initiative amendment from the ballot on grounds that the amendment violated the single subject requirement of article XI, section 3, and that the ballot summary did not comply with section 101.161. *Evans*, 457 So. 2d at 1353-55.

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[1] On June 11, 2010, the Court entered its Order Granting Florida House of Representatives Motion to Intervene. In addition to permitting the House to intervene in this case, the Court accepted the allegations contained in the House's motion to intervene as the House's operative pleading.

Evans was the second opinion issued by the Supreme Court in 1984 in which the Court struck a voter initiative proposed amendment from the ballot due to violations of article XI, section 3[2] or section 101.161.[3] In his concurrence in *Evans*, Justice Overton observed: "the legislature and this Court should devise a process whereby misleading language can be challenged and corrected in sufficient time to allow a vote on the proposal." 457 So. 2d at 1356 (quotation omitted).

In 1986, the Legislature put forward just such a process when it proposed for adoption article IV, section 10 and article V, subsection 3(b)(10) of the constitution. These provisions established the Supreme Court's present mandatory and exclusive jurisdiction over pre-election challenges to voter initiative petitions to amend the Florida Constitution. The accompanying legislative staff summaries explained the purpose of these provisions: "This proposed amendment, together with the enacting language of PCS/HB 72, are designed to provide a method by which an initiative's proposal's compliance with constitutional and statutory requirements could be ascertained expedititously." Staff of Fla.H.R.Comm. on Judiciary, CS/HJR 71 (1986), Staff Analysis 2 (March 6, 1986); Staff of Fla.H.R.Comm. on Judiciary, PCS/HJR 71 (1986), Staff Analysis 2 (Feb. 18, 1986).[4]

In *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the Supreme Court discussed the history and purpose behind article IV, section 10 and article V, subsection 3(b)(10) as follows:

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[2] *Evans*, 457 So. 2d at 1353-54; *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).

[3] *Evans*, 457 So. 2d at 1353-54.

[4] *See Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (citing the staff analysis summaries to CS/HJR 71 and PCS/HJR 71 and noting that "[a]lthough the committee substitutes discussed in these summaries were not themselves adopted, they differ in no relevant way from House Joint Resolution 71, which ultimately was adopted, placed before the voters, and approved. *See* Fla. HJR 71, 1986 Fla. Laws 2281, 2281-83.").

> The constitution expressly authorizes judicial review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const.; *see generally* Art. V, § 3(10), Fla. Const.; Art XI, § 3, Fla. Const. (explaining that the sponsor of an initiative petition must obtain signatures of eight percent of electors statewide in order to place the amendment on the ballot); §§ 15.21 (explaining that judicial review may be sought when the sponsor has obtained one-tenth of the signatures necessary for placement on the ballot), 16.061, Fla. Stat. (1997). This provision was adopted in 1986 in response to the Court's striking of two initiative amendments from the ballot after the sponsors had obtained the requisite number of signatures for placement on the ballot. *See Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). **The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . .**

Armstrong, 773 So. 2d at 14 n.18 (emphasis added).

On at least two occasions, the Supreme Court has stated expressly that its jurisdiction to review voter initiative proposed amendments to the Florida Constitution, pre-election, is both mandatory and exclusive. *See Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 642 So. 2d 724, 725 (Fla. 1994) ("The Attorney General of Florida has petitioned this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)); *Advisory Opinion to Attorney General Re: Stop Early Release of Prisoners*, 661 So. 2d 1204, 1205 (Fla. 1995) ("The Attorney General of Florida has requested this Court to review a proposed amendment to the Florida Constitution, as it is his duty to do. Art. IV, § 10, Fla. Const. § 16.061, Fla.Stat. (1993). In response, we issued an order permitting interested parties to file briefs, and we heard oral arguments on the validity of the proposed amendment. **We have original and exclusive jurisdiction.** Art V, § 3(b)(10), Fla. Const." (emphasis added)).

Notably, in the more than two decades following the voters' adoption of article V, subsection 3(b)(10), there has not been a published opinion in which a Florida court, other than

the Supreme Court, has attempted to exercise jurisdiction over a pre-election suit seeking to invalidate a voter initiative to amend the constitution on the basis that the proposed amendment or ballot summary did not comply with article XI, section 3 or section 101.161.[5]

B. Constitutional amendments from resolutions of the Legislature are subject to different procedures than voter initiatives

A joint resolution of the Florida Legislature is the other principal means by which proposed constitutional amendments are placed on the ballot.[6]

Prior to the voters' approval of article IV, section 10 and article V, subsection 3(b)(10) in 1986, the method by which legislative joint resolutions and voter initiatives were reviewed by the Florida courts was identical; either could be reviewed through a declaratory action filed in

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[5] Plaintiffs' "Notice of Priority Status" cites the First District Court of Appeal's opinion in *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 558-59 (Fla. 1st DCA 2006) ("*Playing Field*"), for the proposition that the trial court's "refusal to expedite [a] challenge to a proposed constitutional amendment was in error." [Notice of Priority Status, ¶ 4] Defendant does not dispute that this case should be resolved on an expedited basis. However, to the extent that Plaintiffs rely on *Playing Field* in support of this Court exercising jurisdiction in this case, that opinion is entirely distinguishable. *Playing Field* involved a procedural challenge based on allegations that the initiative sponsor fraudulently obtained signatures on the initiative petition in violation of section 100.371, Florida Statutes. It did not address whether the amendment complied substantively with article XI, section 3 and section 101.161.

[6] There are five methods by which the Florida Constitution may be amended:

(i) Constitutional Convention – Florida voters may call a constitutional convention by collecting a designated amount of signatures and then gaining a majority of the vote to the question "Shall a constitutional convention be held?";

(ii) Constitutional Revision Commission – this commission meets every 20 years to examine the constitution of the state and propose the amendments deemed necessary;

(iii) Taxation and Budget Reform Commission – this commission also meets only every 20th year;

(iv) Legislative Joint Resolution – The Florida Legislature can pass a joint resolution supported by three-fifths of the membership of each house of the legislature; and

(v) Citizen Initiative – the method by which Amendments 5 and 6 were proposed here.

See art. XI, §§ 1-4, 6, Fla. Const.

the circuit courts or a mandamus petition filed in the Supreme Court.[7]

After article IV, section 10 and article V, subsection 3(b)(10) took effect, the Supreme Court has had original and exclusive jurisdiction over the pre-election review of voter initiative proposed amendments to the Constitution, for the reasons discussed above. By contrast, no basis for original and exclusive Supreme Court jurisdiction exists for review of proposed amendments by legislative joint resolution. *Armstrong*, 773 So. 2d at 14 n.18 ("The constitution expressly authorizes [Supreme Court] review of only those amendments proposed by voter initiative. *See* Art. IV, § 10, Fla. Const. . . .").

Therefore, unlike voter initiative proposed amendments, the validity of joint resolution proposed amendments may still be reviewed by circuit courts pursuant to declaratory judgment actions.[8] *See e.g., Armstrong*, 773 So. 2d at 9 (pre-election declaratory judgment action filed in circuit court as to validity of constitutional amendment proposed by legislative resolution).

Thus, any authorities arising from proposed amendments by legislative resolution which may be relied upon here by the Plaintiffs and the Intervening Plaintiffs are entirely inapplicable.

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[7] *See Evans*, 457 So. 2d at 1352 (in which the Supreme Court reviewed a "a declaratory judgment rendered [in the circuit court] in which [that court] found the [citizen initiative] proposed amendment to the Florida Constitution . . . and its ballot summary were constitutionally valid."); *Askew v. Firestone*, 421 So. 2d 151, 152-53 (Fla. 1982) (Florida Supreme Court opinion reviewing declaratory judgment issued by a circuit court regarding validity of joint resolution proposed amendment to the Florida Constitution); *Fine*, 448 So. 2d 985-86 (Florida Supreme Court accepting discretionary mandamus jurisdiction to consider validity of citizen initiative proposed amendment to Florida Constitution).

[8] One reason for the Legislature's decision not to include pre-election review of joint resolution proposed amendments by the Supreme Court in the amendment resulting in article IV, section 10 in 1986 was posited by the *Armstrong* Court: "The purpose of this provision is to allow the Court to rule on the validity of an initiative petition before the sponsor goes to the considerable effort and expense of obtaining the required number of signatures for placement on the ballot. . . . Obviously, no such provision is necessary for amendments originating from other sources." *Armstrong*, 773 So. 2d at 14 n.18.

C. Plaintiffs' reliance upon *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992) is misplaced.

Plaintiffs' Complaint alleges that "[u]nder *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 & n.3 (Fla. 1992), the Florida Supreme Court's review of [Amendment 6] in [*Redistricting Standards*] is no impediment to this challenge." [Plaintiffs' Complaint, ¶ 16]

Smith was decided pursuant to a petition for writ of mandamus originally filed in the Supreme Court. 607 So. 2d at 398 (citing art. 5, § 3(b)(8) ("The supreme court . . . [m]ay issue writs of mandamus and quo warranto to state officers and state agencies."). The Court had previously issued an advisory opinion pursuant to article IV, section 10 and article V, subsection 3(b)(10) as to the validity of the voter initiative amendment at issue in that case and, consequently, the *Smith* Court was faced with the question of:

> whether our earlier advisory proceeding precludes us from considering the present cause. It is true that article IV, section 10 and article V, subsection 3(b)(10) are silent as to whether the advisory proceeding raises a procedural bar or otherwise deprives this Court of jurisdiction over the present case. Thus, an ambiguity exists requiring judicial construction.

607 So. 2d at 398.

In its holding that a second challenge to the proposed amendment was permissible, the *Smith* Court noted that its advisory opinions "would not be binding precedent and would only constitute persuasive authority as to any other adversarial legal challenge that might later be raised." *Id.*[9] The Court stated that its holding that advisory opinions issued pursuant to article IV, section 10 and article V, subsection 3(b)(10) are non-binding was:

> entirely consistent with settled law holding that advisory opinions "are not binding judicial precedents, [although] they are frequently very persuasive and

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[9] The Court relied in part on the legislative staff summaries considered by the Legislature prior to its submission of the proposed amendment resulting in voter approval of article IV, section 10, and article V, subsection 3(b)(10). 607 So. 2d at 399.

usually adhered to" . . . as to issues they actually address, [but] not as to issues . . . that were not addressed at all in a prior advisory opinion.

Id. at 399 n.3 (quoting *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944)).

There is no ambiguity in *Smith* that in "extraordinary cases" an amendment opponent can advance a second challenge in the Supreme Court prior to an election. 607 So. 2d at 399. Yet the issue here is not whether the *Supreme Court* has jurisdiction to revisit issues previously decided. The issue here is whether *this* Court has such jurisdiction. As to that question, *Smith* provides no support for the Plaintiffs' contention that this Court may exercise original jurisdiction in this case. Indeed, in two respects, the *Smith* opinion indicates that jurisdiction lies only with the Supreme Court.

First, *Smith* was decided pursuant to a petition for writ of mandamus filed directly in the Supreme Court – not the circuit court. Thus, the procedure followed in that case is wholly consistent with subsequent statements of the Supreme Court that it has original and exclusive jurisdiction over the pre-election review of proposed initiative amendments pursuant to article V, section 3(b)(10). *Advisory Opinion*, 642 So. 2d at 725; *Advisory Opinion*, 661 So. 2d at 1205. Second, the manner in which the Supreme Court framed the issue before it demonstrates that Court's exclusive jurisdiction. As the Court stated, the issue there was "whether the advisory proceeding raises a procedural bar or otherwise deprives **this Court** of jurisdiction over the present case." 607 So. 2d at 398 (emphasis added).

In short, nothing in *Smith* even hints that the petitioner/opponent of the proposed amendment could have gone to any other court with its pre-election challenge.

Likewise, the Supreme Court's decision in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999), supports Defendant's position here. In *Ray*, a post-election amendment challenge, the Supreme Court revisited *Smith* to make clear that absent *extraordinary circumstances*, its decisions in an

advisory opinion are binding. As stated in *Ray*:

> relitigation of issues expressly addressed in an advisory opinion on a proposed amendment **is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction.** Renewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion. [A]lthough our advisory opinions are not strictly binding precedent in the most technical sense, only under **extraordinary circumstances** will we revisit an issue decided in our earlier advisory opinions.
>
> This case does not present such a circumstance. . . . Therefore, we conclude that our earlier [advisory opinion] decision . . . **is binding** on the single-subject issue and we find no reason to reconsider the issue and recede from that decision.

Ray, 742 So. 2d at 1285 (emphasis added; internal quotation omitted).

Thus, to the extent Plaintiffs or Intervening Plaintiffs wish to challenge Amendments 5 and 6 before the election, they, like the petitioner in *Smith*, must do so in the Florida Supreme Court and must show that *extraordinary circumstances* warrant that Court's exercise of mandamus jurisdiction.

D. This Court has no jurisdiction to consider a pre-election challenge to the validity of the Amendments with an expanded scope of review.

The Senate Complaint alleges as a basis for this Court's jurisdiction that:

> this Court has jurisdiction to enjoin the proposed constitutional amendments from being placed on the ballot as their contradictions with federal law will render them futile and incapable of being made operative under any circumstances. *See Gray v. Winthrop*, 115 Fla. 721 (1934).

[Senate Complaint, ¶ 8] Remarkably, this is the very argument Justice Overton made in his dissent – rejected by the majority – in *Advisory Opinion to Attorney General Re: Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 229-30 (Fla. 1991) (Overton, J., concurring in part and dissenting in part) (hereafter "*Limited Terms*"). In *Limited Terms*, Justice Overton argued that pursuant to *Gray v. Winthrop*, 156 So. 270 (Fla. 1934), *Gray v. Moss*, 156

So. 262 (Fla. 1934), and *Weber v. Smathers*, 338 So. 2d 819, 821 (Fla. 1976), the Supreme Court must strike an initiative proposed amendment to the constitution from the ballot if:

> "by its terms [it] specifically and necessarily violates a command or limitation of the Federal Constitution . . . in order to avoid the expense of submission, when the amendment, if adopted, would palpably violate the paramount law and would inevitably be futile and nugatory and incapable of being made operative under any conditions or circumstances."

Limited Terms, 592 So. 2d at 229 (J. Overton, dissenting) (quoting *Winthrop*, 156 So. at 272). That argument was rejected by the majority, which held that "we are limited in this proceeding to addressing whether the proposed amendment and ballot title and summary comply with article XI, section 3, Florida Constitution and section 101.161, Florida Statutes (1989)." 592 So. 2d at 227 & n.2 (citing *Grose v. Firestone*, 422 So. 2d 303, 306 (Fla.1982) (question of whether proposed amendment violated due process not justiciable in challenge to ballot summary)).

Likewise, in *Advisory Opinion to the Attorney General Re: Florida's Amendment to Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002) (hereafter, "*Class Size*"), the Supreme Court reaffirmed its holding in *Limited Terms*, and once again rejected the argument made by Justice Overton in his dissent in *Limited Terms* – and by the Senate here. As stated in *Class Size*:

> In evaluating the propriety of the initiative petition, the Court does not review the merits of the proposed constitutional amendment, and does not decide whether the Legislature should more appropriately address the subject matter of the proposed amendment. Moreover, **other constitutional challenges are not justiciable in this type of proceeding**. [*Limited Political*], 592 So. 2d 225, 227 (Fla. 1991).

816 So. 2d 580, 582 (emphasis added, internal citation omitted in part). By "this type of proceeding," the Court meant a **pre-election proceeding**, over which, for the reasons previously discussed, the Supreme Court has original and exclusive jurisdiction.

In *Advisory Opinion to the Attorney General Re: Term Limits Pledge*, 718 So. 2d 798, 804-05 (Fla. 1998) (hereafter, "*Term Limits*"), Justice Overton once again argued, this time in a

concurrence joined by no other Justice, that:

> it is a fraud on the public to indicate that this initiative provision could be properly placed on the ballot if the ballot summary was not misleading. I find this entire provision to be unconstitutional on its face under *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). I still adhere to the view that I expressed in [*Limited Terms*] that . . . in considering whether or not the proposed amendment to [the Florida] constitution meets constitutional requirements of validity under the Constitution of the United States. . . .

718 So. 2d at 804 (Overton, J., concurring in the result only) (citing in part Art. III, § 10, Fla. Const.; *Winthrop*, 156 So. 270; *Moss*, 156 So. 262). Once again, the majority of the Court rejected the argument. 718 So. 2d at 801 & n.1.

The Defendant does not dispute that if the voters approve the Amendments, the Senate may assert – post-election – the arguments it attempts to make in this Court.[10] But the pre-election scope of review of initiative proposed amendments is "limited to two legal issues: (1) whether the proposed amendment violates the single-subject requirement of article XI, section 3 of the Florida Constitution, and (2) whether the ballot title and summary of the proposed amendment are misleading, in violation of section 101.161(1), Florida Statutes." *Term Limits*, 718 So. 2d at 801.[11]

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[10] *Ray* is an example of this procedure. There, the amendment opponents filed a post-election circuit court case to prevent enforcement of a voter-approved amendment to the Florida Constitution on the ground that the amendment was invalid under federal law. *Ray*, 742 So. 2d at 1277, 1278, 1280. This is precisely the claim the Florida Senate makes in this case.

[11] The Plaintiffs and Intervening Plaintiffs stated at the hearing on June 9 that their claims require a trial of factual issues. As discussed above, the appropriate scope of pre-election review is limited to the issues under Article XI, section 3, of the constitution and section 101.161, Florida Statutes, *i.e.*, whether the language of an amendment conforms to the single subject rule and whether the ballot title and summary conform to the requirements of the statute. If there are factual issues the Attorney General believes are necessary to enable the Supreme Court to render an advisory opinion, he must specifically enumerate those. *See* § 16.061, Fla. Stat. There were no factual issues so enumerated by the Attorney General as to Amendments 5 and 6. *See Redistricting Standards*.
(Continued ...)

The rationale for this limitation is simple and compelling; as stated in *Advisory Opinion to the Attorney General Re: Tax Limitation*, 644 So. 2d 486 (Fla. 1994) (hereafter, "*Tax Limitation*"):

> This Court's role in these matters is strictly limited to the legal issues presented by the constitution and relevant statutes. **This Court does not have the authority or responsibility to rule on the merits or the wisdom of these proposed initiative amendments, and we have not done so. Infringing on the people's right to vote** on an amendment is a power this Court should use only where the record shows the constitutional single-subject requirement has been violated or the record establishes that the ballot language would clearly mislead the public concerning material elements of the proposed amendment and its effect on the present constitution.

Id. at 489 (emphasis added).

Even as to the two narrow issues which the Supreme Court does consider in a pre-election advisory opinion, "'[t]he Court must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people.'" *Advisory Opinion to Attorney General Re: 1.35% Property Tax Cap*, 2 So. 3d 968, 971 (Fla. 2009) (quoting *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982)). "[W]here voter initiatives are concerned, the Court has no authority to inject itself in the process, unless the laws governing the process [i.e., article XI, section 3 and section 101.161] have been clearly and conclusively violated." *Id.* (internal quotation and citation omitted).

As aptly put by the Third District Court of Appeal:

> The law is well-settled that a court of equity as a general rule will not restrain the holding of an election because a free election in a democracy is a political matter to be determined by the electorate and not the courts. Limited exceptions to this rule have been recognized but only on the narrowest of grounds. One such exception is where the election is being held in violation of an applicable

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Any other issues for which evidence may be necessary for Plaintiffs to support their claims are assertable only in a post-election proceeding as discussed above. Consequently, a trial is neither necessary nor proper in this case.

> legislative enactment. Another is where the ballot question on a referendum is misleading and deprives the voter of an opportunity to know and to be on notice as to the proposition on which he is to cast his vote.

Metropolitan Dade County v. Shiver, 365 So. 2d 210, 212 (Fla. 3d DCA 1978), *affirmed*, 394 So. 2d 981 (Fla. 1981) (internal citation omitted).

In sum, the Supreme Court has applied its limited authority to review initiative proposed amendments to infringe as little as possible on the people's right to vote. Allowing an amendment opponent to simply sidestep the Supreme Court and seek broader review in a pre-election challenge in a Florida circuit court would render that limited scope of review meaningless.

In this case, the Plaintiffs and Intervening Plaintiffs plainly seek to do just that.

IV. CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction to decide this case. If the Plaintiffs and the Intervening Plaintiffs wish to challenge Amendments 5 and 6 prior to the November 2010 general election, they must seek review through the Supreme Court's exclusive jurisdiction.

Accordingly, the Defendant respectfully asks this Court to dismiss the Plaintiffs' and Intervening Plaintiffs' claims in this case for lack of subject matter jurisdiction.

Dated this 22nd day of June, 2010.

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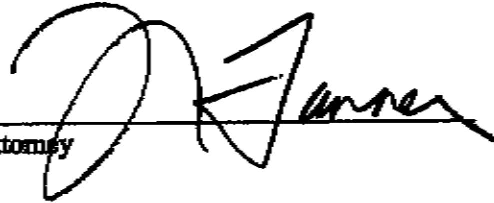

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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

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 Interim
Secretary of State of the State of Florida,

Defendant.

______________________________________/

DEFENDANT'S MOTION FOR EXPEDITED DISPOSITION

Defendant Dawn K. Roberts, in her capacity as Florida Interim Secretary of State ("Defendant"), moves the Court to expedite disposition of the issues raised by (i) Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (the "Motion to Dismiss") and (ii) Defendant's Motion for Stay of Discovery (the "Motion for Stay"), filed on even date.

I. PRELIMINARY STATEMENT

When subject matter jurisdiction is in doubt, the Court must promptly address and resolve the question – *sua sponte* if necessary – before allowing the case to proceed.

And while jurisdiction remains in doubt, discovery should be stayed in order to conserve the time and resources of the Court and the litigants. This is especially so here where three of the litigants are public bodies expending public resources in this case.

II. BACKGROUND

On September 28, 2007 the Florida Department of State, Division of Elections (the "Department") approved a voter initiative petition to amend the Florida Constitution in regard to the criteria for state legislative reapportionment ("Amendment 5"). The Department contemporaneously approved a second initiative petition to amend the Constitution in regard to the criteria for United States Congressional redistricting ("Amendment 6"). Both Amendment 5 and Amendment 6 (together, the "Amendments") were sponsored by FairDistrictsFlorida.org ("FairDistricts").

After FairDistricts obtained ten percent of the required voter signatures for the petitions, the Department submitted the Amendments to the Florida Attorney General to request an advisory opinion from the Florida Supreme Court as to whether the Amendments comply with the requirements of Article XI, section 3 of the Florida Constitution and section 101.161, Florida Statutes (relating to ballot title and summary).

The Supreme Court consolidated its review of the Amendments and on January 29, 2009 issued its opinion holding "that the proposed amendments meet the legal requirements of article XI, section 3 of the Florida Constitution, and the ballot titles and summaries comply with section 101.161(1), Florida Statutes (2008)." *Advisory Opinion to Attorney General re Standards For Establishing Legislative District and Congressional Boundaries*, 2 So. 3d 175, 191 (Fla. 2009).

Accordingly, the Supreme Court approved the Amendments for placement on the ballot for the November 2, 2010 general election. *Id.*

On May 24, 2010, Plaintiffs Corrine Brown and Mario Diaz-Balart ("Plaintiffs") filed the present case to challenge the ballot summary for Amendment 6, alleging that the summary "violates the strict standard for ballot clarity [by] misrepresent[ing] the legal effect and major

ramifications" posed by Amendment 6. [Complaint, ¶ 5] Plaintiffs were joined in their challenge to Amendment 6 by Intervenors The Florida House of Representatives on May 26, 2010, and by The Florida Senate on May 27, 2010 (together, the "Intervening Plaintiffs"). The Intervening Plaintiffs also challenge Amendment 5 on various grounds.

At the time they filed their Complaint, the Plaintiffs filed a Notice of Priority Status requesting an expedited disposition schedule for this case pursuant to Rules 2.215(g) and 2.545(c)(1), Florida Rules of Judicial Administration (the "Priority Notice"). The Plaintiffs asserted that various deadlines attendant to ballot preparation for the 2010 general election necessitate expedited consideration of their claims. [Priority Notice, ¶¶ 2-5]

Following a hearing on June 9, 2010, the Court entered a Scheduling Order for this case which directs the parties to exchange witness lists, exhibit lists, and expert disclosures on an expedited basis (all to be completed by July 12) and directs that discovery must be completed by July 21, 2010. [Scheduling Order, ¶¶ 1-5] The Scheduling Order sets the case for non-jury trial beginning on July 26. [*Id.* ¶ 6]

In conjunction with this Motion, Defendant has filed the Motion to Dismiss and the Motion for Stay. The Motion to Dismiss demonstrates that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs in this case. The Motion for Stay seeks a stay of all discovery pending the Court's resolution of the Motion to Dismiss.

This Motion asks the Court, pursuant to its inherent authority to manage cases before it, to expedite its consideration and disposition of the issues raised in Defendant's Motion to Dismiss and Motion for Stay to ensure a speedy resolution of the vital, threshold questions addressed therein.

III. ARGUMENT

The Court is authorized to expedite its resolution of the Motions

The Florida Rules of Civil Procedure and the Florida Rules of Judicial Administration equip trial courts with the authority to insure the just and expeditious disposition of cases. *See* Fla. R. Civ. P. 1.010 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action."); Fla. R. Jud. Admin. 2.215(g) ("Particular attention shall be given to . . . challenges involving elections and proposed constitutional amendments.").

As Plaintiffs acknowledged in their Priority Notice, cases such as this are particularly appropriate for expedited disposition. [Priority Notice, ¶ 5]

The Court should expedite resolution of the Motion to Dismiss

The Motion to Dismiss asserts that this Court lacks subject matter jurisdiction over the claims raised by Plaintiffs and Intervening Plaintiffs because the Florida Supreme Court has the exclusive jurisdiction to determine whether a proposed amendment to the Florida Constitution may appear on the ballot.

Challenges to the Court's subject matter jurisdiction must be resolved as promptly as possible.

It is well-settled in Florida law that "[i]f [a] court is without jurisdiction, it is powerless to act in the case." *Roberts v. Seaboard Sur. Co.*, 29 So. 2d 743, 748 (Fla. 1947) (internal citation omitted). Thus, "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997). "The limits of a court's jurisdiction are of 'primary concern,' requiring the court to

address the issue 'sua sponte when any doubt exists.'" *Id.* (quoting *Mapoles v. Wilson*, 122 So. 2d 249, 251 (Fla. 1st DCA 1960)).

The Scheduling Order requires dispositive motion briefing to be completed by July 21, 2010 [Scheduling Order, ¶ 3] but it does not restrict the Court's earlier consideration of the jurisdictional challenge raised in the Motion to Dismiss. In keeping with the expedited relief requested here, the Scheduling Order allows dispositive motions to be heard "before trial at a time to be determined." [Scheduling Order, ¶ 6]

Notably, expediting disposition of the Motion to Dismiss will eliminate the expense associated with discovery and trial – concerns which are especially acute in this case where three of the litigants are public bodies, litigating with scarce public funds.

The Court should expedite resolution of the Motion for Stay

Defendant's Motion for Stay argues that a stay of discovery is proper because the Court lacks subject matter jurisdiction in this case.

The Court is authorized to order a stay because the discovery rules invest trial courts with "broad discretion . . . to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 535 (Fla. 1987) (quoting Fla. R. Civ. P. 1.280(c)). Public policy can "support[] the denial of discovery, after a proper balancing of the competing interests to be served by granting discovery or by denying it." *Sugarmill Woods Civic Ass'n, Inc. v. S. States Util.*, 687 So. 2d 1346, 1351 (Fla. 1st DCA 1997) (citations omitted).

As discussed in the Motion for Stay, the Defendant should not be subjected to the burden of discovery in this case when *bona fide* questions as to the court's subject matter jurisdiction are present.

IV. CONCLUSION

For these reasons, the Defendant respectfully asks the Court to hear the Motion to Dismiss and the Motion for Stay at the earliest available date on the Court's calendar and thereafter to rule on the motions as promptly as possible.

Dated this day of June, 2010.

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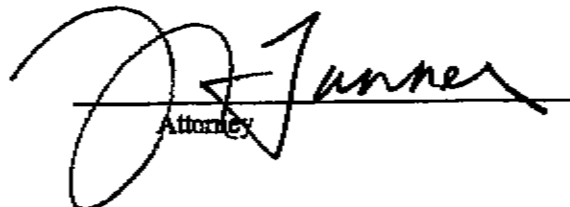

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