

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

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,

Defendants, and

BOB GRAHAM,

Intervening Defendant.

**SUPPLEMENT TO MOTIONS TO DISMISS
BY DEFENDANTS GRAHAM AND FAIRDISTRICTSFLORIDA.ORG, INC.**

Defendant FairDistrictsFlorida.org, Inc. and Intervening Defendant Bob Graham, pursuant to Rule 1.140(b), file this supplement to their previously filed motions to dismiss this action. FairDistrictsFlorida.org, Inc. and Graham set forth why the claims of Plaintiffs and each of the Intervening Plaintiffs must be dismissed.

FairDistrictsFlorida.org, Inc. also asserts an additional ground as to why it must be dismissed from the case.

Common Claims by Plaintiffs and Intervening Plaintiffs

The claims brought by Plaintiffs and Intervening Plaintiff the Florida House of Representatives all challenge the accuracy of the ballot title and summary of Amendment 5 and/or Amendment 6. (Amended Complaint for Declaratory and Injunctive Relief, filed June 29, 2010; Florida House of Representatives' Amended Motion to Intervene, filed June 25, 2010). Specifically, the "wherefore" clause of each count in Plaintiffs' amended complaint seeks a declaration that ballot summary for Amendment 6 violates section 101.161, Florida Statutes. The House, in its Amended Motion to Intervene, adopts in full Counts I through VI of the Plaintiffs' complaint, and seeks to apply these claims to the ballot summary for Amendment 5. (Amended Motion to Intervene ¶¶ 16-17.) The House also asserts an additional ground for challenging the ballot summaries of Amendments 5 and 6 (failure to disclose alleged purpose and intent of moving redistricting process from Legislature to Florida Supreme Court), and an additional ground for challenging the ballot summary of Amendment 5 only (failure to disclose alleged effect on Florida Supreme Court's mandatory review of redistricting plans). (*Id.* ¶¶ 18, 19-32). The Florida Senate expressly adopts and incorporates the claims of the Plaintiffs and the Florida House of Representatives. (Intervenor's Complaint of the Florida Senate, filed June 14, 2010, at ¶ 1). The Senate asserts two additional claims, addressed separately below.

The Florida Supreme Court has ruled that the ballot summaries for Amendments 5 and 6 comply with section 101.161, Florida Statutes. *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009). Therefore, Plaintiffs' and the Florida House's attempts to relitigate this issue, if they are to be adjudicated at all, can only be adjudicated by the Florida Supreme Court. This is because, since 1986, the Florida Supreme Court has had mandatory and exclusive jurisdiction over all challenges to the validity of an initiative petition. See Art. V, § 10, Fla. Const. ("The attorney general shall . . . request the opinion of the justices of the supreme court *as to the validity of any initiative petition* circulated pursuant to Section 3 of Article XI. The justices shall . . . permit interested persons to be heard on the questions presented and shall render their written opinion no later than April 1 of the year in which the initiative is to be submitted to the voters . . .") (emphasis added); Art. V, § (b)(10) ("JURISDICTION.—The supreme court . . . [s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law."); § 16.061(1), Fla. Stat. ("the Attorney General shall . . . petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161. The petition may enumerate any specific factual issues that the Attorney General believes would require a judicial determination.")

The case of *Fla. League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1982), holds that in “truly extraordinary cases,” the Florida Supreme Court may allow the issue of the clarity of a ballot summary to be relitigated via mandamus petition to that Court. *Id.* at 399. But no reading of this case suggests the Court intended to relinquish its exclusive jurisdiction over such a claim to any other court. *Id.* at 398 (“Initially, we must address the question of whether our earlier advisory proceeding precludes us from considering the present cause.”) (emphasis added); *id.* at 399 (cautioning that 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”) (emphasis added). The Court was simply answering the question posed to it, *i.e.*, whether its previously issued advisory opinion approving the proposed amendment’s ballot summary pursuant to article IV, section 10 of the Florida Constitution, served as an absolute bar to its consideration of the accuracy of the ballot summary a second time, this time in the form of a petition for writ of mandamus. The fact that the Court answered this question in the negative can only stand for this proposition; it cannot be interpreted to allow litigants to circumvent the Florida Supreme Court’s exclusive jurisdiction over such claims.

Most, if not all, of Plaintiffs’ and Intervening Plaintiffs’ challenges to the ballot summaries were considered and rejected by the Florida Supreme Court in *Advisory Opinion to the Attorney Gen. re Stds. for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009). To the extent Plaintiffs and Intervening Plaintiffs assert they should be permitted to challenge Amendments 5 and 6 on grounds that are not expressly

addressed in that decision, the Florida Supreme Court has said otherwise. In *Advisory Opinion to the Attorney Gen. re Referenda Required for Adoption and Amendment of Local Govt. Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court applied the doctrines of law of the case and res judicata to bar claims that were or could have been raised in the consideration of a prior iteration of the ballot summary, stating:

. . . [B]ecause our opinions addressing citizen initiatives are intended to enable proponents to remedy any flaws in the ballot language, the fact that we found only the first sentence of the ballot summary defective indicates that we implicitly rejected other challenges to the ballot summary. To hold otherwise would allow serial attacks on a proposed amendment, thwarting a proponent's efforts indefinitely. . . . All alleged deficiencies with the terms in the ballot title and summary should have been raised in the first case in which we considered this proposed amendment. Allowing only piecemeal attacks on a proposed amendment would not only be fundamentally unfair to the proponent of an amendment, it would be a misuse of the process for approval of citizen initiatives.

Id. at 505.

Accordingly, the common claims of Plaintiffs, the Florida House, and Florida Senate must be dismissed because this court lacks subject matter jurisdiction over such claims.

Additional Claims by the Florida Senate

The claims brought by Intervening Plaintiff the Florida Senate do not challenge the ballot summaries of Amendments 5 and 6 but rather allege that these amendments cannot be implemented in a manner consistent with the Voting Rights Act and the Florida Constitution. (Intervenor's Complaint of the Florida Senate, filed June 14,

2010).¹ These claims must also be dismissed because the Florida Supreme Court has repeatedly held that challenges to the substance and effect of a proposed amendment are not justiciable in a pre-election proceeding relating to the validity of a proposed constitutional amendment, whether proposed by initiative petition or by the legislature. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 801 n.1 (1998) (declining to pass on constitutionality of proposed amendment because Court's jurisdiction to issue advisory opinions regarding proposed amendments is limited to the single subject requirement and accuracy of ballot title and summary); *Advisory Opinion to the Attorney Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991) (finding opponents' "various constitutional challenges" to proposed constitutional amendment "not justiciable in the instant proceeding") (citing Art. XI, § 3, Fla. Const., Art. IV, § 10, Fla. Const.; § 16.061(1), Fla. Stat.); *Grose v. Firestone*, 422 So. 2d 303, 306 (1982) (refusing to engage in pre-election consideration of whether constitutional amendment proposed by the legislature was unconstitutional because such argument "is not a justiciable issue in this case and may be raised in an appropriate proceeding in due course when the issue is properly presented.")

These cases recognize that challenges to the substance and operation of a proposed amendment are not yet ripe—and therefore are not justiciable—until the amendment has been approved by the voters *and* appropriate facts are developed and presented to the court in an appropriate proceeding to evaluate how the amendment will operate on a real set of existing facts. *Dade County v. Dade County League of*

¹ The Senate has not filed an amended complaint adding FairDistrictsFlorida.org, Inc. as a party.

Municipalities, 104 So. 2d 512, 515 (Fla. 1958) (courts will not interfere with placement of proposed amendment on the ballot if, upon approval, the proposal can have a valid field of operation “even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law”); *Gray v. Winthrop*, 156 So. 270, 272 (Fla. 1934) (holding submission of proposed amendment to electorate should not be enjoined if amendment is not wholly void, “even though, if adopted, it may in appropriate procedure by proper parties, allegations of facts, and proof or admissions, be shown that the amendment violates paramount federal law”); *Gray v. Moss*, 156 So. 262, 266 (Fla. 1934) (rejecting effort to enjoin Secretary of State from placing proposed constitutional amendment on ballot and noting if adopted “the amendment may by due procedure be shown to be invalid if and to the extent that it operates to violate any controlling provision of the . . . Federal Constitution”); *Grose*, 422 So. 2d at 306 (constitutionality of proposed amendment may be raised in an appropriate proceeding in due course when the issues is properly presented). In light of these authorities, the Senate’s claims regarding the substance and operation of Amendments 5 and 6 are not justiciable in *any* court unless and until the amendments are approved by the requisite percentage of Florida voters and a set of operative facts is developed against which to evaluate the new provisions. At that time, an interested party may bring an appropriate action to challenge the effect of the amendments as applied to a real set of facts.

The Senate asserts a right to challenge proposed amendments before the election based upon alleged conflict with federal law, citing *Gray v. Winthrop*, 156 So. 270 (Fla.

1934). As the above discussion demonstrates, the Florida Supreme Court has squarely held such claims are not justiciable before the election. *Advisory Opinion to the Attorney Gen.-Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 227 (Fla. 1991); see also *id.* at 229-30 (Overton, J., dissenting, stating that the majority's construction means that a claim of unconstitutionality must wait until after the election to be addressed); *Grose*, 422 So. 2d at 306 (argument that substance of legislatively-proposed constitutional amendment was unconstitutional was not justiciable in proceeding seeking to enjoin submission of amendment to the electorate but may be raised in appropriate proceeding in due course when the issue is properly presented).

Even if *Gray v. Winthrop* were applicable in the present proceeding, which it is not, the principles espoused in that case and its progeny would not save the Senate's claims from dismissal. In *Gray v. Winthrop*, the Florida Supreme Court held that a court could enjoin the submission of a proposed amendment to the electorate when the amendment, on its face, violated the Federal Constitution such that no portion of the amendment could legally be effective. 156 So. at 272. However, that high standard was not met in *Gray v. Winthrop*: "The language of the amendment does not express or imply an intent that [its terms] shall operate to violate any provision of the paramount Federal Constitution, and it must be assumed, in the absence of express terms to the contrary, that the . . . amendment was intended to be operative in accord with such dominant federal law." *Id.* (reversing denial of motion to dismiss); see also *Gray v. Moss*, 156 So. 262, 264 (Fla. 1934) (reversing denial of motion to dismiss in action for injunction to prevent proposed amendment from being placed on the ballot, because amendment

did not specifically violate a provision of the Federal Constitution and was not wholly void and inoperative; therefore court was not “authorized to interfere with the processes prescribed by the Constitution for proposing and adopting amendments to the Constitution”).

The Senate makes no claim that Amendments 5 and 6 expressly violate the Federal Constitution. Moreover, since the inception of the case Plaintiffs and Intervening Plaintiffs have asserted their claims are not facial claims but rather will require significant factual development.² Accordingly, to the extent the Senate seeks to apply the principles of *Gray v. Winthrop* to its claims in the present case, those principles necessitate dismissal of their claims.

Additional Ground for Dismissal as to FairDistrictsFlorida.org, Inc.

FairDistrictsFlorida.org, Inc., should be dismissed as a defendant because no cause of action is brought against it. Although the Florida House of Representatives orally moved for and was granted leave of court to add FairDistrictsFlorida.org, Inc. as a party defendant, neither Plaintiffs nor either of the Intervening Plaintiffs have brought any cause of action against FairDistrictsFlorida.org, Inc.

Plaintiffs’ Amended Complaint merely added FairDistrictsFlorida.org, Inc. to the style of the action and added a paragraph asserting that FairDistrictsFlorida.Org, Inc. is a Florida corporation and the political committee that sponsored the Congressional

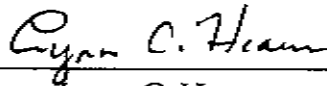
² Graham and FairDistrictsFlorida.org, Inc. dispute that the type of factual development Plaintiffs and Intervening Plaintiffs seek in this case is relevant, and have moved to stay discovery pending resolution of the motions to dismiss.

Amendment. (Amended Complaint ¶ 13). But none of the eight counts in Plaintiffs' Amended Complaint seeks relief from FairDistrictsFlorida.Org, Inc. Likewise, the Florida House of Representatives' Amended Motion to Intervene adds FairDistrictsFlorida.Org, Inc. to the style of the case but adds no substantive claims against it and seeks no relief from it.

Accordingly, this action should be dismissed as to FairDistrictsFlorida.org, Inc. for failure to state a cause of action.

WHEREFORE, Bob Graham and FairDistrictsFlorida.org, Inc. respectfully requests that this Court enter an order dismissing this action in its entirety, and grant such further relief as the Court deems appropriate.

Respectfully submitted,



Lynn C. Hearn

On Behalf of Counsel for FairDistrictsFlorida.org, Inc. and Bob Graham

MARK HERRON
Florida Bar No. 0199737
Email: mherron@lawfla.com
ROBERT J. TELFER III
Florida Bar No. 0128694
Email: rtelfer@lawfla.com
Messer, Caparello & Self, P.A.
Post Office Box 15579
Tallahassee, FL 32317-5579
Telephone: (850) 222-0720
Facsimile: (850) 224-4359

RONALD G. MEYER
Florida Bar No. 0148248
Email: rmeyer@meyerbrookslaw.com
JENNIFER S. BLOHM
Florida Bar No. 0106290
Email: jblohm@meyerbrookslaw.com
LYNN C. HEARN
Florida Bar No. 0123633
Email: lhearn@meyerbrookslaw.com
Meyer, Brooks, Demma and Blohm, PA
Post Office Box 1547
Tallahassee, FL 32302
Telephone: (850) 878-5212
Facsimile: (850) 656-6750

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been provided to the following by United States Postal Service and by electronic mail on this 6th day of July, 2010 to:

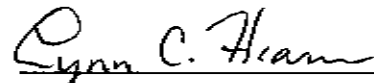
Stephen M. Cody
16610 SW 82 Court
Palmetto Bay, FL 33157
Telephone: 305-753-2250
Fax: 305-468-6421
Email: stcody@stephencody.com
Counsel for Plaintiffs

George N. Meros, Jr.
Email: gmeros@gray-robinson.com
Allen C. Winsor
Email: awinsor@gray-robinson.com
Andy Bardos
Email: abardos@gray-robinson.com
Gray Robinson, P.A.
Post Office Box 11189
Tallahassee, FL 32302
Telephone: 850-577-9090
Fax: 850-577-3311
Counsel for Intervening Plaintiff Florida House of Representatives

Miguel De Grandy
Miguel De Grandy, P.A.
800 S Douglas Road, Suite 850
Coral Gables, FL 33134
Telephone: 305-444-7737
Fax: 305-374-8743
Email: mad@degrandylaw.com
Counsel for Intervening Plaintiff Florida House of Representatives

James A. Scott
Email: jas@trippscott.com
Edward J. Pozzuoli
Email: ejp@trippscott.com
Stephanie Alexander
Email: sda@trippscott.com
Brady J. Cobb
Email: bjc@trippscott.com
Tripp Scott, P.A.
110 Southeast Sixth Street, 15th Floor
Ft. Lauderdale, FL 33301
and
200 West College Avenue, Suite 216
Tallahassee, FL 32301
Counsel for Intervening Plaintiff Florida Senate

Michael G. Tanner
Tanner Bishop
1 Independent Drive, Suite 1700
Jacksonville, FL 32202
Telephone: 904-598-0034
Fax: 904-598-0395
Email: mtanner@tannerbishoplw.com
Counsel for Defendant



Lynn C. Hearn