

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

CASE NO: 2010 CA 1824

CORRINE BROWN and MARIO
DIAZ-BALART,

Plaintiffs,

vs.

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

Defendant.

INTERVENOR'S COMPLAINT OF THE FLORIDA SENATE

COMES NOW, Intervenor, the FLORIDA SENATE, through its President Jeff Atwater (the "Florida Senate"), and by and through its undersigned counsel and hereby files this, its Intervenor's Complaint against the Defendant DAWN K. ROBERTS (hereinafter referred to as the "Defendant"), in her capacity as Interim Secretary of State of the State of Florida, and in support thereof states the following:

1. This Complaint is filed in addition to the claims alleged by Plaintiffs' in their initial Complaint. On June 9, 2010, this Court granted the Florida Senate and the Florida House of Representative's Motions to Intervene into the case at bar as Party Plaintiff's. The Florida Senate expressly adopts and incorporates the claims raised by Plaintiffs and the Florida House of Representatives in their respective Complaints.

2. This lawsuit, filed by United States Congressman Mario Diaz-Balart and United States Senator Corrine Brown, challenges the validity of proposed constitutional amendments to Florida's constitutional apportionment processes that seek to impose a new set of contradictory and unworkable standards thereon. Pursuant to this Court's Order granting leave to the Florida

Senate to intervene as a Party Plaintiff, the claims raised herein will apply to Amendments 5 and 6.

PARTIES, JURISDICTION AND VENUE

3. The Florida Senate is a legislative body created by Article III of the Constitution of the State of Florida vested, along with the Florida House of Representatives, with the legislative power of the State

4. Pursuant to Article III, Section 16 of the Constitution of the State of Florida, the Florida Senate (along with the House of Representatives) is vested with the duty to apportion the State and Congressional voting districts in accordance with the United States Constitution, the Constitution of the State of Florida and all applicable state and federal law in the second year following each decennial census (2010). Specifically, Article III, Section 16(a) of the Florida Constitution mandates that the “legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state...” The Florida Legislature is also vested with the duty to reapportion the congressional districts apportioned to the State of Florida.

5. Defendant, in her capacity as Interim Secretary of the State of Florida, is the chief elections officer of the State of Florida. In that capacity, Defendant is charged with the duty under Florida law to certify the items, including proposed constitutional amendments 5 and 6, which are scheduled to be included on the next statewide general election ballot. A copy of the proposed constitutional amendments at issue in this litigation is attached hereto as Exhibit A.

6. Venue is proper in this Court because the Defendant is headquartered in Leon County, Florida.

7. This Court has authority to grant declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes.

8. The Court also has jurisdiction over this cause, because the proposed constitutional amendments at issue will be in express conflict with paramount federal law, the Federal Voting Rights Act of 1965 (42 U.S.C. § 1971, *et seq.*). Thus, 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).

GENERAL ALLEGATIONS

I. The Redistricting Process

9. The Constitution of the State of Florida establishes a carefully constructed, time-sensitive process for the decennial reapportionment of state legislative districts by the Legislature. Art. III, § 16, Fla. Const.

10. The redistricting process for the 2012 cycle has already begun. Committees of the Florida Legislature have met on numerous occasions to plan for the reapportionment process and to discuss the proposed constitutional amendments at issue and their impact upon the apportionment process. In early 2011, the United States Census Bureau will release state-by-state data, and the Florida Legislature will hold dozens of public hearings across the state to listen to the voters and gather essential information.

11. In contrast to state legislative redistricting, the Constitution of the State of Florida does not regulate congressional redistricting, and congressional plans are not subject to automatic review by the Florida Supreme Court. Pursuant to its authority to regulate elections

for Congress, *see* U.S. Const, Art. I, § 4, cl. 1, the Florida Legislature has, in recent decades, redrawn Florida's congressional districts simultaneously with its decennial reapportionment of state legislative districts.

II. The Challenged Amendments

12. The Florida Department of State, Division of Elections, approved Amendments 5 and 6 for circulation on September 28, 2007. These proposed constitutional amendments have since been certified for placement on the 2010 general election ballot in November, 2010.

13. The proposed constitutional amendments purport to create new, fact-intensive criteria applicable to redistricting. One applies to state legislative redistricting (the "State Legislative Petition"), while the other imposes virtually identical requirements upon congressional redistricting.

14. The criteria mandated by the proposed constitutional amendments at issue in this litigation are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rules by which their effects can be divined and their purposes accomplished. Moreover, they lack judicially discoverable or manageable standards that would enable the courts to construe and enforce their requirements coherently, objectively, predictably, and systematically. Furthermore, the proposed Amendments contain an unconstitutional and unworkable "intent" standard that will impermissibly delve into the intent of the Legislature as a whole while also chilling the public hearings that are vital to the redistricting process. Lastly, the proposed constitutional amendments also patently violate paramount federal law relative to the voting rights of minorities and will therefore ultimately be futile and inoperable.

**COUNT I – REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF DUE TO
THE AMENDMENTS PATENT CONFLICT WITH PARAMOUNT FEDERAL LAW**

15. The allegations contained in Paragraphs 1 through 14 above are incorporated as though restated herein.

16. This is an action for declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes. Additionally, pursuant to the Supreme Court of Florida holding in the case of *Gray v. Winthrop*, an administrative officer may be enjoined from placing a proposed constitutional amendment on the ballot when the amendment, if adopted, would patently violate paramount federal law, and would inevitably be futile and incapable of being made operative under any circumstances. 115 Fla. 721 (Fla. 1934).

17. State statutes and constitutions are subject to applicable prohibitions and limitations of the United States Constitution, the supreme law of the land, which all officers and all electors are required to take an oath to support. State statutes or state constitutions are also controlled by, and subject to federal organic law and federal statutes by virtue of the supremacy clause of the United States Constitution. *U.S. v. 817 N.E. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304, 1311 n.14 (11th Cir. 1999) (explaining that federal forfeiture statutes trump the homestead protections of the Florida constitution); *see also, Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F. Supp. 282, 289 (S.D. Tex. 1986) (“assuming that the [federal statute] is truly in conflict with the Texas Constitution, the Supremacy Clause of the United States Constitution requires that the provisions of the federal statute prevail.”).

18. The language and application of the proposed constitutional amendments at issue will patently conflict with paramount federal law, namely the Voting Rights Act of 1965 (42 U.S.C. § 1971).

19. Section 2 of the Voting Rights Act protects minorities from electoral laws or procedures that cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Moreover, a reapportionment plan is violative of section 5 of the Voting Rights Act if the plan would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003). Five Florida counties are currently covered jurisdictions under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973. Loss of minority districts from a statewide plan is sufficient to show a violation of section 5 of the Voting Rights Act. *Georgia v. Ashcroft*, 539 U.S. at 479.

20. To comply with the non-vote dilution provision of Section 2 and the non-retrogression standard of Section 5, federal courts have expressly authorized and affirmed a legislature's use of incumbency and political party affiliation data in the redistricting process. As recently as 2002 in Florida, a three judge federal panel expressly held that certain challenged districts from the 2002 Florida Reapportionment plan were in compliance with the Voting Rights Act by relying upon political party and incumbency data in the same manner as the Florida Legislature did during the redistricting process. *Martinez v. Bush*, 234 F.Supp.2d 1275 (S.D. Fla. 2002).

21. In upholding two questioned Florida Congressional Minority Districts, Districts 3 and 23 (Corrine Brown and Alcee Hastings), the *Martinez* Court expressly upheld these districts as affording minorities sufficient opportunities to participate in political process based upon political party affiliation data and the incumbent status of the elected official, just as the Legislature did in crafting the 2002 plan. *Id.* at 1302-03. Since Amendment 5 applies to state legislative districts, the vote dilution and retrogressive effects that will be caused by the

Amendments prohibition on considering political party and incumbency data (alleged supra) will also be applicable to State House and State Senate minority seats as well, such as those held by Senator Chris Smith (Senate District 29) and Senator Gary Siplin (Senate District 19), among others.

22. The proposed constitutional amendments at issue, however, expressly prohibit the Florida Legislature from having an intent to favor or disfavor a political party or an incumbent. Under this mandate, the Florida Legislature would be legally prohibited from utilizing political party or incumbency data in the redistricting process which it has been expressly authorized to use by the Voting Rights Act, vis-a-vis the *Martinez* Court, to ensure that the crafted apportionment plan is in compliance with the Voting Rights Act.

23. This prohibition, on its face, patently contravenes both the *Martinez* Court's express approval of the Florida Legislature's use of such data and the *Martinez* Court's own utilization of such data in finding that challenged minority districts were in compliance with the Voting Rights Act. If the Florida Legislature is prohibited from utilizing political party or incumbency data in the redistricting process to ensure that retrogression does not occur, minority seats will be lost as the likelihood of a district's performance for a minority candidate has been determined based upon data such as political party affiliation and incumbency. See *Martinez v. Bush, supra*.

24. The proposed constitutional amendments will interfere with and obstruct the opportunity of minority voters to participate in the political process and to elect candidates of their choice. The proposed constitutional amendments will also cause the loss of minority seats as political party and incumbency data will be precluded from consideration in the redistricting process. In particular, by prohibiting the use of incumbency as a factor in reapportionment,

minority voters will be denied the benefits of the achievements and participation of their elected officials in plain violation of federal law. When a plan crafted under the proposed constitutional amendments causes the loss of minority seats, the criteria mandated by the proposed constitutional amendments and the resulting apportionment plan itself will be inexorably in violation of the non-vote dilution and non-retrogression mandates of the Voting Rights Act.

25. On January 29, 2009, the Florida Supreme Court performed its narrowly-tailored review of the proposed constitutional amendments at issue and rendered an advisory opinion that their summaries are clear and unambiguous and that the proposed amendments are limited to a single subject. *Adv. Op. to Att'y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175 (Fla. 2009).

26. Subsequently, on March 9, 2009 the United States Supreme Court rendered its opinion in the case of *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). Therein, the Court revisited the protections afforded to the maintenance and creation of minority districts pursuant to section 2 of the Voting Rights Act. This case was decided after the proposed constitutional amendments at issue were certified to the general election ballot.

27. Due to the proposed constitutional amendments' express violation and contradiction of paramount federal law, as described above, the proposed constitutional amendments will be futile and incapable of being made operative under any circumstance; as a result, the Defendant must be enjoined from placing proposed Amendments 5 and 6 on the ballot in order to avoid inevitable litigation and undue expenses to the State.

28. The Florida Senate has a clear legal right to injunctive relief and lacks an adequate remedy at law.

29. It is in the public interest for this Court to grant injunctive relief to prevent irreparable harm to the Florida Senate and the voters of Florida.

COUNT II-DECLARATORY RELIEF

30. This is a claim declaratory and injunctive relief pursuant to Sections 26.012(3) and 86.011, Florida Statutes. The allegations contained in Paragraphs 1 through 14 above are incorporated as though restated herein.

31. The criteria mandated by the proposed constitutional amendments are vague, conflicting, and unworkable. They set forth no adequate standards or sufficient rule by which its effect can be divined and its purposes accomplished.

32. For example, pursuant to subsection (1) of the proposed constitutional amendments, "No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or incumbent." (See Exhibit A). Hence, the proposed constitutional amendments are unworkable because they provide no parameters or guidance as to how the "intent to favor or disfavor" a political party or incumbent will be ascertained.

33. The public hearing process currently used in Florida that allows the electorate to espouse their views relative to their respective districts will be chilled as any statements made to legislators in favor of a party or incumbent will be utilized to support a claim that a district was drawn with mal-intent. Furthermore, Legislators will be unable to amend proposed districts based upon comments received from the voters of Florida at public hearings as said statements will be used to support a claim that a district was drawn with an impermissible "intent to favor or disfavor."

34. Most importantly, any searching judicial scrutiny into the intent of specific Legislators and their decisions would violate the separation of powers scheme specifically set out in the Constitution of the State of Florida.

35. Moreover, the Amendments are also unworkable due to their mandate that districts “shall be compact.” (See Exhibit A).

36. The proposed constitutional amendments do not provide the Florida Senate with: a definition of what a “compact” district is; what a “compact” district looks like, or with any parameters whatsoever that would provide guidance to the Florida Senate as to what would constitute a “compact” district.

37. These facial and operational defects will substantially impede the Florida Senate’s ability to effectively carry out its constitutionally mandated reapportionment duties since it will perpetually be operating in a state of legal and operational uncertainty with respect to its perceived intent as well as attempting to comply with an inherently subjective compactness requirement.

38. Moreover, as noted above, any searching judicial scrutiny into the intent of specific Legislators and their decisions would violate the separation of powers scheme specifically set out in the Constitution of the State of Florida.

39. The parties hereto have a bona fide, actual, present practical need for declaration by this Court.

40. The declaration sought herein concerns a present, ascertained or ascertainable state of facts, or a present controversy as to a state of facts.

41. Constitutional rights and obligations of the Florida Senate are dependent upon the law applicable to the facts of this case.

42. The adverse interests are all before this Court.

43. The Florida Senate has an actual, present and adverse interest in the subject matter of this Complaint.

44. The relief sought herein is not merely the giving of legal advice or the answer to questions posed for curiosity but is an actual controversy necessitating a decision.

45. The Florida Senate has a clear legal right to injunctive relief and lacks an adequate remedy at law.

46. It is in the public interest for this Court to grant injunctive relief to prevent irreparable harm to the Florida Senate and to the voters of Florida.

WHEREFORE, the Plaintiff-Intervenor, Florida Senate, respectfully requests this Court to:

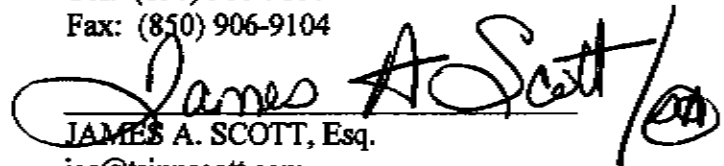
- a. Hold that the proposed Amendments 5 and 6 violate paramount federal law, and will thus be futile and incapable of being made operative under any circumstances in violation of Florida law;
- b. Hold that proposed Amendments 5 and 6 to the Florida Constitution are also vague, conflicting, violative of separation of powers, and are wholly incapable of being made operative
- c. Enjoin the Defendant from placing proposed Amendments 5 and 6 on the 2010 general election ballot; and
- d. Grant Plaintiff-Intervenor such other relief as the Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was furnished by U.S. mail to Stephen M. Cody, Esq., Attorney for Plaintiffs, 16610 S.W. 82 Court, Palmetto Bay, FL 33157, George Meros, Esq., Attorney for Intervenor, Gray Robinson, P.A., 301 South

Bronough Street, Suite 600, P.O. Box 11189 (32302-3189), Tallahassee, Florida 32301 and
Michael J. Tanner, Esq., Attorney for Defendant, Tanner Bishop, The Modis Building, One
Independent Drive, Suite 1700, Jacksonville, Florida 32202, this 14th day of June, 2010.

TRIPP SCOTT, P.A.
Counsel for Intervenor, the Florida Senate
110 Southeast Sixth Street
15th Floor
Fort Lauderdale, Florida 33301
Tel: (954) 525-7500
Fax: (954) 761-8475
and
200 West College Avenue, Suite 216
Tallahassee, FL 32301
Tel: (850) 906-9100
Fax: (850) 906-9104

A handwritten signature in cursive script that reads "James A. Scott" followed by a circled "e" or similar mark.

JAMES A. SCOTT, Esq.

jas@trippscott.com

Florida Bar No. 109120

EDWARD J. POZZUOLI, Esq.

ejp@trippscott.com

Florida Bar No. 717363

STEPHANIE ALEXANDER, Esq.

sda@trippscott.com

Florida Bar No. 0081078

BRADY J. COBB, Esq.

bjc@trippscott.com

Florida Bar No. 0031018

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s. 775.083. [Section 104.185, Florida Statutes]

NAME:	
(Please print name as it appears on Voter I.D. Card)	
RESIDENTIAL STREET ADDRESS:	
CITY:	ZIP:
COUNTY:	
Date of birth: / / (or) Voter registration number:	

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new section 20 to Article III

BALLOT TITLE: STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING

BALLOT SUMMARY: Congressional districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new section 20 to Article III

Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES

In establishing Congressional district boundaries:

- (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
- (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
- (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X
SIGNATURE OF REGISTERED VOTER

DATE SIGNED

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P.O. Box 330868, Miami, FL 33233

RETURN SIGNED PETITIONS TO THIS ADDRESS

Paid petition circulator: Name:

Address:

RESERVED FOR BAR CODE

D

EXHIBIT

A

SERIAL NUMBER: 07-15

CONSTITUTIONAL AMENDMENT PETITION FORM

Under Florida Law, it is a first degree misdemeanor to knowingly sign more than once a petition or petitions for a candidate, a minor political party, or an issue. Such offense is punishable as provided in s. 775.082 or s.775.083. [Section 104.185, Florida Statutes]

NAME: _____ (Please print name as it appears on Voter I.D. Card)	
RESIDENTIAL STREET ADDRESS: _____ _____	
CITY: _____	ZIP: _____
COUNTY: _____	
Date of birth: / / (or) Voter registration number: _____	

I am a registered voter of Florida and hereby petition the Secretary of State to place the following amendment to the Florida Constitution on the ballot in the general election:

ARTICLE AND SECTION BEING CREATED OR AMENDED: Add a new Section 21 to Article III

BALLOT TITLE: STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING

BALLOT SUMMARY: Legislative districts or districting plans may not be drawn to favor or disfavor an incumbent or political party. Districts shall not be drawn to deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. Districts must be contiguous. Unless otherwise required, districts must be compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries.

FULL TEXT: Add a new Section 21 to Article III

Section 21. STANDARDS FOR ESTABLISHING LEGISLATIVE DISTRICT BOUNDARIES

In establishing Legislative district boundaries:

- (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
- (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
- (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

X _____
SIGNATURE OF REGISTERED VOTER

DATE SIGNED

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RETURN SIGNED PETITIONS TO THIS ADDRESS

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DATE APPROVED: 9/28/07

SERIAL NUMBER: 07-16