

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

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

Plaintiffs,

v.

Case No. 2010-CA-1803

DEPARTMENT OF STATE, an agency of the
State of Florida, and DAWN K. ROBERTS, in
her official capacity as the Secretary of State,

Defendants, and

FLORIDA HOUSE OF REPRESENTATIVES
and FLORIDA SENATE,

Intervening Defendants.

**FLORIDA HOUSE OF REPRESENTATIVES' MOTION
FOR SUMMARY JUDGMENT AND RESPONSE
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Florida Rule of Civil Procedure 1.510(b), Intervening Defendant, the Florida House of Representatives, moves for summary judgment and requests that the Court deny Plaintiffs' Motion for Summary Judgment, dated June 11, 2009.

Introduction

Plaintiffs' sole claim is that the ballot summary for Amendment 7 is misleading. But the summary is substantially identical to the actual language of the proposed amendment, and, not surprisingly, the Florida Supreme Court has routinely upheld ballot summaries that closely track the language of a briefly worded amendment.

Plaintiffs base their attack on a fundamental mischaracterization of Amendment 7. Plaintiffs argue that Amendment 7 “nullifies” or “eliminates” all redistricting standards in the Florida Constitution, clearing a path for the unfettered exercise of legislative discretion. Not one word suggests that Amendment 7 tears up, root and branch, all existing or future redistricting standards. In fact, the exact opposite is true. Amendment 7 expressly commands the Legislature to implement all redistricting standards—and to balance them in a rational way.

Background

Since 1968, the Florida Constitution has imposed two fundamental requirements on the creation of state legislative districts. The first relates to the number of districts. Senate districts must number between 30 and 40, and Representative districts must number between 80 and 120. Art. III, § 16(a), Fla. Const. The second requires that districts consist of contiguous territory. *Id.* In other words, all territory within each district must be in actual, physical contact. *In re Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 279 (Fla. 1992).

As required by the Constitution, the Florida Supreme Court conducts automatic reviews of state legislative redistricting plans to verify their compliance with the contiguity requirement, and with the Federal Constitution’s “one person, one vote” requirement of population equality. Art. III, § 16(c), Fla. Const.; *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 824 (Fla. 2002). Because these requirements are clear, absolute, and objective, the Court’s evaluation consists of a simple, facial review of the redistricting map and data. *Id.* at 824-25.

In January 2010, the Florida Department of State certified two proposed constitutional amendments for placement on the 2010 general election ballot. These proposed amendments, sponsored and promoted through the initiative process by a political committee, and designated

Amendment 5 (state legislative districts) and Amendment 6 (congressional districts), would add new, complex, and fact-intensive redistricting requirements to the Florida Constitution.

Amendments 5 and 6 would require all districts (once certain minimum protections for minority voters were satisfied) to be “compact” and, wherever “feasible,” to follow political and geographical boundaries—regardless of their effect on minority communities that do not benefit from the minimum protections of Amendments 5 and 6. The same rigid requirements threaten to divide communities of interest, such as coastal and agricultural communities, whose preservation has long been recognized as a legitimate objective, *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The Legislature proposed Amendment 7 to enable voters to mitigate the unintended consequences of such rigid mandates for racial minorities and communities of common interest. At its outset, Amendment 7 commands the Legislature to “balance and implement” all standards in the State Constitution. It empowers the Legislature, in the balancing process, to advance the rights of minorities and preserve communities of interest, and provides that these interests must be balanced alongside—not subordinated to—the other constitutional standards. This balancing of race-neutral redistricting principles (such as communities of common interest) is essential to the advancement of minorities because districts motivated predominantly by race violate Equal Protection. *Id.* Finally, Amendment 7 directs courts to uphold redistricting plans if they comply with federal law and rationally balance and implement all standards in the Florida Constitution.

Memorandum of Law

The Legislature is vested with constitutional authority to propose amendments to the Florida Constitution upon approval of three-fifths of each chamber. Art. XI, § 1, Fla. Const. Any such proposal is then submitted to the people for approval. Art. XI, § 5(a), Fla. Const.

I. Standard of Review.

A proposed constitutional amendment must be accompanied by a title and summary. § 101.161(1), Fla. Stat. (2009). The title and summary, which alone appear on the ballot, must be clear and unambiguous. *Id.* Ballot language is clear and unambiguous if it fairly describes the chief purpose of the amendment and does not mislead. *Adv. Opinion to the Att’y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1236 (Fla. 2006). The ballot summary must “accurately describe the scope of the text of the amendment.” *Adv. Opinion to the Att’y Gen. re the Med. Liability Claimant’s Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004).

The Court’s role in review of amendments proposed by the Legislature is especially limited. “The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done.” *Smathers v. Smith*, 338 So. 2d 825, 826-27 (Fla. 1976) (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). “This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment” *Id.* at 827.

II. Because the Summary Is Substantially Identical to the Amendment Text, It Clearly and Unambiguously Describes the Proposed Amendment.

As a matter of law (and plain common sense), a ballot summary that is identical in all material respects to the amendment language is clear and unambiguous. Plaintiffs’ effort to find deception in a summary that faithfully echoes the language of the proposed amendment ignores common sense. Worse, it disregards recent, binding Florida Supreme Court precedent.

The ballot summary attacked as misleading is a nearly verbatim restatement of the amendment language. In fact, the only discrepancies between the text and summary actually

enhance the clarity of the summary. These editorial changes—the *only* changes—are depicted in the following strikethrough comparison of the amendment text and summary:¹

In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in ~~this constitution~~the State Constitution. The state shall take into consideration the ability of racial and language minorities to participate in the political process and elect candidates of their choice, and communities of common interest other than political parties may be respected and promoted, both without subordination to any other provision of ~~this article~~Article III of the State Constitution. Districts and plans are valid if the balancing and implementation of standards is rationally related to the standards in ~~this constitution~~the State Constitution and is consistent with federal law.

In such circumstances, the Florida Supreme Court has, with little difficulty, approved proposed ballot language. In *Advisory Opinion to the Attorney General re the Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. 2004), the Court upheld a measure to limit attorney compensation in medical malpractice cases. In finding the title and summary clear and unambiguous, the Court identified no “material or misleading discrepancies between the summary and the amendment.” *Id.* at 679. “In fact, the summary . . . [came] very close to reiterating the briefly worded amendment.” *Id.* Thus, the Court concluded that “the wording of the title and summary was sufficient to communicate the chief purpose of the measure.” *Id.*

In *ACLU of Florida, Inc. v. Hood*, 881 So. 2d 664 (Fla. 1st DCA 2004), the plaintiffs challenged a legislatively proposed amendment authorizing the Legislature to require parental notification prior to the termination of a minor’s pregnancy. While the text of the amendment authorized the Legislature to require parental notification “[n]otwithstanding” the minor’s right of privacy under Article I, Section 23 of the Florida Constitution, the summary did not make the same disclosure. In a unanimous decision, the Florida Supreme Court ordered that the language

¹ Underscored words appear in the summary, but not the amendment text. Stricken words appear in the text, but not the summary. All other words are identical in both.

of the amendment—including the reference to the constitutional right of privacy—appear on the ballot verbatim. *ACLU of Fla., Inc. v. Hood*, Case No. SC04-1671 (Fla. Sep. 2, 2004).²

In *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229 (Fla. 2006), the Court reviewed a proposal to define marriage. The differences between the summary and amendment text were minimal. In upholding the amendment, the Court explained that the “ballot title and summary do not impermissibly employ terminology divergent from that contained in the text of the actual proposed amendment,” and that “the language submitted for placement on the ballot contains language that is essentially identical to that found in the text of the actual amendment.” *Id.* at 1237.

In *Advisory Opinion to Attorney General re Funding of Embryonic Stem Cell Research*, 959 So. 2d 195 (Fla. 2007), the Court approved a proposed amendment to fund embryonic stem-cell research. The Court explained that, while the summary omitted some details of the proposal, its “language . . . closely tracks that which is used in the amendment itself.” *Id.* at 201. And, in *Advisory Opinion to the Attorney General Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 488, 491 (Fla. 2007), the Court approved a summary that “closely follow[ed] the language of the full initiative,” and that portion of a second summary that “follow[ed] the proposed constitutional amendment very closely.”

The amendment text and ballot summary of Amendment 7 are substantially identical. As these multiple Florida Supreme Court precedents recognize, it is hardly possible to convey

² Because the election was fast approaching, the Court acted quickly in issuing its order. It stated it would later publish an opinion. *ACLU of Fla., Inc.*, Case No. SC04-1671 (Fla. Sep. 2, 2004). Later, the Court determined that, with “the election . . . having been held on November 2, 2004, [the Court] has now determined that no opinion shall be issued.” *Id.* (Fla. Dec. 22, 2004). The same case demonstrates that, in the case of a legislatively proposed amendment, the proper remedy for defective ballot language is to correct it—not to strike the proposal from the ballot.

the substance of a proposal more clearly and unambiguously than by a verbatim recitation. Voters presented with the actual words of the proposed amendment will not be misled.

III. Amendment 7 Does Not Eliminate the Contiguity Requirement.

Plaintiffs argue that Amendment 7 nullifies the existing requirement that districts consist of contiguous territory.³ Plaintiffs point to the provision that enables the Legislature to promote minority rights and communities of common interest “without subordination” to other standards. According to Plaintiffs, the phrase “without subordination” elevates these standards above—and permits the Legislature to ignore—other standards. Plaintiffs are wrong.

A. *No Fair Reading Supports Plaintiffs’ Interpretation of Amendment 7.*

Amendment 7 does not repeal any standards, explicitly or implicitly. On the contrary, it directs the Legislature to “balance and implement” all standards in the Florida Constitution. This is a clear command to the Legislature to reconcile and implement all standards. Because the contiguity requirement will remain in the Constitution, the Legislature must implement it.

When read in its proper context, the phrase “without subordination” is clear. *Cf. Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008) (“A constitutional provision should be ‘construed as a whole in order to ascertain the general purpose and meaning of each part’” (quoting *Dep’t of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996))). The standards in Amendment 7

³ The Supreme Court has required ballot summaries to inform voters of the proposal’s substantial effect “on existing sections of the constitution.” *Adv. Opinion to the Att’y Gen. re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994). Thus, in *Askew v. Firestone*, 421 So. 2d 151 (Fla. 1982), the Court invalidated a proposed amendment to *conditionally* bar legislators from lobbying within two years after vacating office. Because the summary did not indicate that the proposal would supersede an *unconditional*, two-year ban already contained in the Constitution, it created the false impression that the proposed amendment enacted a new prohibition, while in fact it relaxed an existing prohibition. And in *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), the Court disapproved a proposal to conform the prohibition against “cruel or unusual punishment” to the federal prohibition against “cruel and unusual punishment,” because the summary did not inform voters that the amendment would weaken the Florida Constitution’s existing protection.

must be weighed and balanced *alongside*—not subordinated to—other standards. To support any other result, Plaintiffs must wholly ignore the first and third sentences of Amendment 7.

It is telling that the Legislature chose the phrase “without subordination,” rather than the familiar word “notwithstanding.” The word “notwithstanding” would clearly have denoted primacy, or superiority. But the Legislature provided only that the standards in Amendment 7 are not subordinate—not *inferior*—to other redistricting standards. Had the Legislature intended to supersede existing standards, it would have employed more suitable language.⁴

The balancing of equal and coordinate standards would not permit the Legislature to disregard contiguity. To balance, harmonize, and implement *all* standards in a rational way, the Legislature must strictly observe—not ignore—such absolute, objective standards as contiguity.

Contiguity is an objective concept. A district is either contiguous or not contiguous. It either consists of one territory or multiple, unconnected territories. Were the Legislature to disregard such black-and-white standards, its implementation would not be upheld as rational.

The existing constitutional limit on the number of state legislative districts is also an absolute. Art. III, § 16(a), Fla. Const. On Plaintiffs’ theory, the Legislature might create any number of districts—say, four hundred Senate districts—if it determined that smaller districts would promote communities of common interest. But if it did so, the Legislature would fail to “implement” all standards. This example clearly illustrates the fallacy of Plaintiffs’ argument.

Other standards are not absolute, but relative, and leave room for compromise. A compactness requirement does not require perfect circles or squares, but only some acceptable degree of compactness. A district that loses some compactness to promote communities of

⁴ Because “the Legislature is presumed to know the meaning of the words it chooses,” *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 14 (Fla. 2004), its choice of words must be presumed deliberate and meaningful.

interest—or deviates from a geographical boundary to enhance the ability of minorities to elect their preferred candidates—might reflect a sensible compromise or rational harmonization of standards. This is what Amendment 7 demands. But a district cannot be *somewhat* contiguous. Contiguity is absolute, and strict compliance is essential. A different reading would contravene Amendment 7's express command to balance and implement all standards in the Constitution.

If Amendment 7 nullifies contiguity, so do the proposals supported by Plaintiffs. Both Amendments 5 and 6 contain a contiguity requirement and place various standards on an equal footing with contiguity. For example, Amendments 5 and 6 do not subordinate to contiguity the requirement that districts not diminish the ability of minorities to elect representatives of their choice. Under Plaintiffs' interpretation, the equal status of these requirements in Amendments 5 and 6 would allow the Legislature to create non-contiguous districts in order to ensure that the ability of minorities to elect representatives of their choice remains undiminished.

B. Legislative History Opposes Plaintiffs' Position.

Amendment 7 had nothing to do with contiguity. Plaintiffs cannot cite a single passage in the legislative Staff Analysis⁵—or even a lone utterance in legislative debate—that indicates the slightest intent to repeal the contiguity requirement. Rather, the Staff Analysis demonstrates that Amendment 7 was prompted by the potential new standards in Amendments 5 and 6.

The Staff Analysis describes the Legislature's chief concern that under Amendments 5 and 6 "aesthetic issues such as compactness and maintaining political boundaries would likely supersede the interest of maintaining communities of interest." *See* Staff Analysis at 19. For example, the compactness requirement—unless balanced with communities of interest—might

⁵ The Staff Analysis prepared by the House Select Policy Council and Strategic Economic Planning is attached to Plaintiffs' Motion for Summary Judgment as Exhibit 3.

preclude the preservation of Congressional District 25, which now encompasses the Everglades, one of the “most significant environmental communities of interest in the world.” *Id.*

Amendment 7 was designed to place the Legislature’s discretion to promote the rights of minorities and communities of interest on “an equal footing with other state redistricting standards.” *Id.* The Legislature ensured that the standards in Amendment 7 will not be second-class standards, demoted beneath the new, expressly hierarchical standards in Amendments 5 and 6. The lengthy Staff Analysis contains no indication that Amendment 7 was intended to bulldoze existing, tried-and-true requirements such as contiguity out of the Constitution.

C. Canons of Construction Oppose Plaintiffs’ Interpretation.

In addition to the legislative history, well-established rules of construction discredit Plaintiffs’ interpretation. “In construing the Constitution every section should be considered so that the Constitution will be given effect as a harmonious whole. A construction which would leave without effect any part of the Constitution should be rejected.” *Askew v. Game & Fresh Water Fish Comm’n*, 336 So. 2d 556, 560 (Fla. 1976); accord *Chiles v. Phelps*, 714 So. 2d 453, 459 (Fla. 1998) (“We are precluded from construing one constitutional provision in a manner which would render another superfluous, meaningless, or inoperative.”).

Plaintiffs’ extreme and implausible interpretation would exterminate the existing requirement of contiguity. This approach ignores accepted canons of interpretation. “Where a constitutional provision will bear two constructions, one of which is consistent and the other which is inconsistent with another section of the constitution, the former must be adopted so that both provisions may stand and have effect.” *Broward County v. City of Fort Lauderdale*, 480 So. 2d 631, 633 (Fla. 1985) (quoting *Burnsed v. Seaboard Coastline R.R.*, 290 So. 2d 13, 16 (Fla.

1974)). “A construction that nullifies a specific clause will not be given to a constitution unless absolutely required by the context.” *Gray v. Bryant*, 125 So. 2d 846, 858 (Fla. 1960).

The Florida Supreme Court recently explained that a new constitutional provision will prevail over prior provisions of the Constitution only if it “specifically repeals them” or “cannot be harmonized with them.” *Adv. Opinion to Att’y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 190 (Fla. 2009) (plurality opinion) (quoting *Jackson v. City of Jacksonville*, 225 So. 2d 497, 500-01 (Fla. 1969)). An implied repeal is “not favored, and every reasonable effort will be made to give effect to both provisions.” *Id.*; accord *Wilson v. Crews*, 34 So. 2d 114, 118 (Fla. 1948) (“Implied repeals . . . of organic provisions occur only when the provisions as adopted are positively and irreconcilably repugnant to each other, and then only to the extent of the repugnancy.” (quoting *State v. Butler*, 69 So. 771, 779 (Fla. 1915))).

Amendment 7 does not expressly repeal—and can easily be harmonized with—the contiguity provision. Amendment 7 requires all standards to be balanced and implemented. An objectively determinable mandate such as contiguity must be respected—not ignored—in that balancing process. Plaintiffs’ interpretation does violence to the Constitution, and is unnecessary to boot. *Cf. Brown v. Griffin*, 229 So. 2d 225, 226 (Fla. 1969) (“But if the statute is reasonably susceptible to a construction which renders it valid, that construction should be adopted.”).

D. Amendment 7 Identifies the Specific Article of the Constitution It Affects.

Even if Amendment 7 eliminates the contiguity requirement (which it does not), its summary would not be misleading. The summary must “*identify the articles or sections of the constitution substantially affected.*” *Adv. Opinion to Att’y Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009) (quoting *Fine v. Firestone*, 448 So. 2d 984, 989

(Fla. 1984)) (emphasis added). The function of a summary is to “put a voter on notice” that an existing provision will be substantially affected, *id.*—not to describe that effect in detail.

Here, the ballot summary identifies the only affected article of the Constitution. The summary squarely discloses that the new standards will not be subordinate to other provisions in Article III. This is sufficient to afford a voter “fair notice of that which he must decide.” *In re Adv. Opinion to Att’y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient*, 880 So. 2d 659, 664 (Fla. 2004) (quoting *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)). Voters must “do their homework and educate themselves about the details of a proposal,” *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621 (Fla. 1992)—even “before [they] enter[] the voting booth,” *In re Adv. Opinion to Att’y Gen. re Phys. Shall Charge the Same Fee for Same Health Care Serv. to Every Patient*, 880 So. 2d at 665 (quoting *Adv. Opinion to Att’y Gen. re Right to Treat. & Rehab. for Non-Viol. Drug Offenses*, 818 So. 2d 491, 498 (Fla. 2002)).

IV. The Ballot Title Is Not Misleading.

Persisting in their misinterpretation of Amendment 7, Plaintiffs argue that the word “standards” in the ballot title is misleading. According to Plaintiffs, Amendment 7 creates no standards and in fact eliminates all standards. This wild interpretation cannot be sustained.

Under any rational understanding, Amendment 7 creates standards. Amendment 7 authorizes the Legislature to take into consideration the ability of racial and language minorities to participate in the political process and elect representatives of their choice. It also authorizes the Legislature to respect and promote communities of common interest.

Plaintiffs deride these standards as mere “suggestions,” but *discretionary* standards are “standards” nonetheless. A “standard” is any “criterion for measuring acceptability.” Black’s

Law Dictionary (8th ed. 2004). Clearly, if adopted, the provisions of Amendment 7 will serve as criteria for measuring the acceptability of state legislative districts.

Amendment 7 does not eliminate standards. Quite the reverse. Its fundamental command is to “balance and implement” all constitutional standards in a rational way. In this process, the Legislature must harmonize and effectuate all standards. Plaintiffs’ suggestion that Amendment 7 obliterates existing standards is directly opposite to its plain words.

“Finally, the ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters.” *Adv. Opinion to the Att’y Gen. re: Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002). In *Advisory Opinion to Attorney General re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996), the Attorney General argued that the title’s reference to “constitutionally imposed” taxes might mean either (i) taxes imposed by the Constitution itself; or (ii) taxes constitutionally imposed by the Legislature. The Court rejected the argument, concluding that the title was clear when “read with common sense and in context with the summary.” *Id.* The same is true here. As in most cases, the brief ballot title derives clarity from the summary of the amendment.

V. The Absence of Definitions in the Ballot Summary Is Not Misleading.

Plaintiffs argue that the failure to define a “legal phrase” that appears in the ballot summary is fatal. There is no such absolute rule. As in all cases, the dispositive question is whether the summary will mislead the public. In this case, the public will easily comprehend the common-sense terminology to which Plaintiffs object.

A. *The Phrase “Communities of Common Interest” Is Not Misleading.*

“Communities of common interest” is a common-sense term. It is not legal jargon, but plain English. It means what it says. Consulting a dictionary—or common usage—voters

will easily understand, from the literal meaning of these familiar words, that the proposal would permit the Legislature to tailor districts that suit communities with shared interests.

The Florida Supreme Court has not required ballot summaries to define all words or phrases with legal significance. In *In re Adv. Opinion to the Att'y Gen. re Med. Liability Claimant's Comp. Amendment*, 880 So. 2d 675, 679 (Fla. 2004), the Court did not insist on a definition of the legal phrase "medical liability" in the ballot summary of a proposed amendment to limit attorney's fees in medical malpractice litigation. The Court concluded that "the precise meaning of his term is better left to subsequent litigation, should the amendment pass." *Id.*

Still more recently, in *Advisory Opinion to Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1237-38 (Fla. 2006), the Court rejected the argument that the summary of a proposed amendment designed to define marriage and prohibit any other legal union treated as marriage or its "substantial equivalent" was required to define "substantial equivalent." The Court held that "substantial equivalent" is "not within the field of undefined legal phrases" that might mislead the voters. *Id.* at 1237. The phrase is "is frequently used and understood by the common voter, and . . . does not require special training in the legal profession to comprehend its meaning." *Id.* The Court concluded that the "plain meaning of these words, according to dictionary definition," was sufficiently clear and unambiguous. *Id.*

The two cases in which the Supreme Court disapproved summaries for their failure to provide definitions involved inscrutable legal terminology. In *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304, 1309 (Fla. 1997), the Court struck a proposal that would have permitted future initiatives regarding compensation for restrictions on

property use (other than common law nuisances) to embrace multiple subjects. The Court found that the phrase “common law nuisance”—a phrase known *only* to the law—required definition.

Similarly, in *Advisory Opinion to Attorney General ex rel. Amendments to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888 (Fla. 2000), the Court reviewed a proposed amendment to prohibit public discrimination on several bases, including gender. The ballot summary explained that the proposed amendment exempted from the prohibition “bona fide qualifications based on sex.” *Id.* at 890. The Court explained that, without definition, this impenetrable phrase would leave voters guessing.

By contrast, the phrase “communities of common interest” is best defined by the plain meaning of the individual words that compose it. Though used in the law, it has not developed an all-encompassing technical definition that is preferable to its literal interpretation. *See* Joshua Drew, *Snapshots From the Jurisprudential Wilderness*, 5 Va. J. Soc. Pol’y & L. 373, 408 n.207 (2008); Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 Va. L. Rev. 461, 465-67 (1997); *cf. Matter of Legislative Districting of State*, 475 A.2d 428, 442 n.21 (Md. 1982) (unhelpfully defining “communities of interest” to mean “identifiable concentrations of population which share one or more common interests”). Indeed, it would be futile to attempt to list or categorize all communities of interest in Florida—now or in the future.⁶

⁶ The summaries of the proposed amendments that Plaintiffs support contain many undefined phrases similar to “communities of common interest.” The summaries do not define “compact.” The meaning of “compact” can “vary significantly,” and courts generally rely on at least three different statistical measures to evaluate compactness. *See* Staff Analysis at 11-12. At other times, courts have defined compactness as a function of cultural homogeneity rather than geographical proximity. *Id.* at 12. The summaries also do not define the “opportunity of racial or language minorities to participate in the political process” and the “ability to elect representatives of their choice,” though these legal phrases have technical meanings, *see Georgia v. Ashcroft*, 539 U.S. 461, 480-84 (2003). And the Supreme Court rejected the argument that the ballot summaries must define the legal phrase “language minorities.” *Adv. Opinion to Att’y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 189 (Fla. 2009).

“Communities of common interest” is both easily understandable and perhaps a redundant effort to inform the electorate. “Community” is defined as a “group of people having common interests,” *see* American Heritage Dictionary (4th ed. 2009), or a “group of people with a common characteristic or interest living together within a larger society,” *see* Merriam-Webster Dictionary. Amendment 7 may be overly explanatory, but the voter is clearly informed.

“The voter must be presumed to have a certain amount of common sense and knowledge.” *Adv. Opinion to Att’y Gen. re Protect People From the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002) (quoting *Adv. Opinion to the Att’y Gen. re Tax Limitation*, 673 So. 2d 864, 868 (Fla. 1996)); *accord In re Adv. Opinion to Att’y Gen. ex rel. Local Trs.*, 819 So. 2d 725, 732 (Fla. 2002). Countless public hearings in former redistricting cycles clearly prove that voters have a perfect awareness of the interests relevant to them, and of the communities affected by those interests. A common-sense definition is the best definition.

B. The Phrase “Rationally Related” Is Not Misleading.

Like “communities of common interest,” the phrase “rationally related” means what the well-known dictionary definitions of the words import—nothing more, nothing less. Nothing in Amendment 7 suggests that any other definition than the usual dictionary definition of the words was intended. And, while Plaintiffs speculate that this phrase “appears to” refer to rational-basis review under the Equal Protection Clause, nothing in Amendment 7 makes the same connection.

The meaning of this phrase is unambiguous: the Legislature’s plan must be upheld if it rationally balances and implements state constitutional standards. The Staff Analysis confirms this common-sense understanding. It explains that, under Amendment 7, “districts and plans are valid if the standards in the state constitution were balanced and implemented rationally,” Staff Analysis at 1, and that Amendment 7 “requires that districts and plans be drawn in a manner that

balanced and implements the standards in the Florida Constitution in a rational manner,” *id.* at 18-19. There is no mystery in these words. Voters will easily discern their ordinary meaning.

The words “rational,” “rationally” and “relate” are words that people use every day. They bear no analogy to the phrase “common law nuisance,” which has no meaning outside the law, *see Adv. Opinion to the Att’y Gen. re People’s Prop. Rights Amendments Providing Comp. for Restricting Real Prop. Use May Cover Multiple Subjects*, 699 So. 2d 1304, or to the phrase “bona fide qualifications based on sex,” which is indecipherable jargon, *see Adv. Opinion to Att’y Gen. ex rel. Amendments to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888. Even in the law, these words are not tethered to a single, technical meaning. The Legislature commonly uses them in different contexts. *See, e.g.*, § 171.093(4)(c), Fla. Stat. (2009) (“During the 4-year period, . . . district service and capital expenditures within the annexed area shall continue to be rationally related to the annexed area’s service needs.”); *id.* § 468.621(2)(d) (“Such fine must be rationally related to the gravity of the violation.”).

According to Plaintiffs, the ballot summary must disclose that the proposed amendment “differs from the current constitutional standard.” (Plaintiffs’ Motion for Summary Judgment at 15.) The Constitution, however, does *not* currently contain a standard of judicial review. Thus, the standard of judicial review in Amendment 7 does not substantially affect existing provisions of the Constitution. In *Advisory Opinion to Attorney General—Limited Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991), the Court approved a proposal to impose term limits on certain elective offices. Opponents argued that the summary was defective because it did not disclose that the terms of office were then unlimited. The Court disagreed: “This is not a situation in which the ballot summary conceals a conflict with an existing provision. There is no existing constitutional provision imposing a different limitation on the terms of office.” *Id.*

Here, there is no existing constitutional provision that prescribes a different standard of judicial review. In this respect, Amendment 7 does not change constitutional law, but writes on a clean constitutional slate. *Id.* (concluding that term-limits proposal “writes on a clean slate”).

Plaintiffs contend that the summary must describe the standard of judicial review as the “lowest level of constitutional review.” This derogatory characterization is based on Plaintiffs’ erroneous comparison of the new standard to rational-basis review under Equal Protection. But Amendment 7 does not import an existing level of scrutiny from an unrelated jurisprudence. It directs the Court to ask whether the Legislature has rationally balanced and implemented all state constitutional standards. Finally, the ballot summary is not required to compare and contrast constitutional standards. It is enough if the summary clearly sets forth the standard—as it does.

VI. The Ballot Title and Summary Need Not Explain the Proposed Amendment’s Effect on Other Proposed Amendments.

Plaintiffs complain that, while the summary restates the text, it must also explain the possible effects of the proposed amendment on *other* proposed amendments—amendments the people might never adopt. The Florida Supreme Court recently dismissed the same argument.

In *Advisory Opinion to Attorney General re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006), the Court approved for ballot placement a proposed amendment sponsored by Florida Hometown Democracy, Inc., requiring voter approval of all amendments to comprehensive land-use plans.

Before voters could adopt the amendment, the Court approved a “competing proposed amendment” designed—as the preamble of the amendment text expressly stated—to “pre-empt or supersede” the earlier proposal. *Adv. Opinion to Att’y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118, 119, 121 (Fla. 2008). Florida Hometown Democracy, Inc., argued that the “proposal is intended to pre-empt or

supersede the Florida Hometown Democracy proposed initiative” and that the “summary does not advise that the proposal would ‘pre-empt or supersede’ other proposals.” Answer Brief of Interested Person Florida Hometown Democracy, Inc., at 21, *Adv. Opinion to Att’y Gen. re Fla. Growth Mgmt. Initiative Giving Citizens Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118 (Fla. 2008) (available at 2008 WL 5373017). But the Court was unconcerned with the new proposal’s effect upon—and even preemption of—the earlier, still pending proposal.

Two Justices dissented. They argued that the proposal’s title and summary were misleading because they were “*completely silent* with regard to the fact that one of the chief purposes of this amendment is to vitiate or overrule the effects of’ the earlier proposal. *Id.* at 130 (Lewis, J., dissenting) (emphasis in original). The dissenters were unable to “agree with the majority that a ballot summary that . . . is silent with regard to the fact that the proposed amendment has the potential to destroy rights that would be created by a separate constitutional amendment does not ‘hide the ball’ and is not misleading.” *Id.* at 131 (Lewis, J., dissenting).

The majority was unpersuaded. In approving the “competing” amendment for ballot placement, three Justices⁷ noted that the proposed amendment would not substantially affect unidentified provisions of the Florida Constitution. *Id.* at 120-21. The Justices took no specific notice of the dissent, but tellingly noted that the proposed amendment “will not conflict with or restrict any *existing* rights to subject local growth management plans to local referenda.” *Id.* at

⁷ Justices Wells, Canady, and Polston joined in the plurality opinion, while Justice Anstead concurred in the result. One of three dissenters (Justice Quince) did not join in the argument made by Justices Lewis and Pariente that the ballot summary was defective for its failure to disclose the proposed amendment’s effect on a second proposed amendment.

123 (emphasis added).⁸ The silence of the ballot summary with respect to *potential* rights—rights that might or might not come into existence—did not invalidate the proposed amendment.

In light of *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes*, Plaintiff's position that the summary must describe the proposed amendment's effect on other proposed amendments rings hollow. The Supreme Court confronted this question, and only two Justices concurred in the position urged by Plaintiffs. There, the text of the proposal even declared its purpose to supersede another proposed amendment, while its ballot summary remained silent.

No Florida court, however, has ever invalidated one proposed amendment because its ballot summary did not explain its effect on, or interaction with, another proposed amendment. Ballot summaries must explain proposed changes to *existing* constitutional law, but not *potential* constitutional law. A mere proposal to amend the Constitution has not attained the dignity of an existing constitutional provision formally adopted by the people. Furthermore, the electorate can easily compare and contrast the summaries of various proposals simultaneously presented on one ballot,⁹ but the voting booth permits no ready access to the Constitution itself. *Cf. Fla. Dep't of*

⁸ Even without this clear indication that the Court rejected the dissent's position, that position would be deemed rejected. An argument addressed in dissent, though not explicitly rejected, is rejected implicitly. See *Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 11 (Fla. 5th DCA 2009).

⁹ Unlike the proposals discussed in *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes*, Amendments 5, 6, and 7 will appear on the same ballot, allowing easy comparison. Further, voters are not absolutely dependent on ballot language alone. Proposed amendments must be published twice in a general-circulation newspaper in each county prior to the election, Art. XI, § 5(d), Fla. Const., and a copy of the amendment itself must be conspicuously posted or made available to voters on election day at every voting location, § 101.171, Fla. Stat. (2009). The Supreme Court has recognized that the availability of the amendment to the voters at voting locations affords valuable, additional notice. *In re Adv. Opinion to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Serv. to Every Patient*, 880 So. 2d 659, 665 (Fla. 2004); *Ray v. Mortham*, 742 So. 2d 1276, 1283 (Fla. 1999).

State v. Slough, 992 So. 2d 142, 149 (Fla. 2008) (noting that accuracy is important because the “title and summary will be the only information that is available to voters” in the voting booth).¹⁰

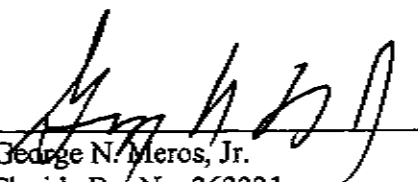
In a footnote, Plaintiffs suggest that *Advisory Opinion to Attorney General re Florida Growth Management Initiative Giving Citizens Right to Decide Local Growth Management Plan Changes* has no relevance where an amendment proposed by the Legislature affects a petition initiative. All amendments, however, are subject to the very same accuracy requirement. Art. XI, § 5, Fla. Const.; § 101.161(1), Fla. Stat. (2009); *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000) (“This accuracy requirement . . . applies to all proposed constitutional amendments . . .”).

Conclusion

Policy disagreements are central to Plaintiffs’ quarrel with Amendment 7. Plaintiffs oppose legislative discretion to protect communities of common interest, and seek a robust—if not preponderant—role for the courts in redistricting. Plaintiffs’ recourse, however, must be to the forum of public opinion—not the courts. It is “important to stress that the wisdom or merits of the proposed amendment are not issues before the Court.” *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008). Because the summary discloses the legal impact of Amendment 7, this Court should enter summary judgment in favor of Defendants and deny Plaintiffs’ Motion to Dismiss.

¹⁰ Plaintiffs’ claim is illogical and would invite gamesmanship. Because proposed amendments have not acquired an established meaning, any attempt to determine the potential effect of one proposal on another is highly speculative. See *Adv. Opinion to the Att’y Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d at 1238 (concluding that the interpretation of a proposed amendment is “better left to subsequent litigation”). Further, on Plaintiffs’ hypothesis, multiple proposals that affect one another—even unintentionally—would all be liable to mutual invalidation. Amendments 5 and 6 would themselves be invalid for failure of their summaries to explain their interaction with Amendment 7. And the amendment process could even degenerate into constitutional gamesmanship, as competitors attempt to invalidate proposed amendments by proposing *other* amendments that would be affected by the earlier proposals. Wisely, the Florida Supreme Court closed the door on the argument urged by Plaintiffs.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been furnished by United States

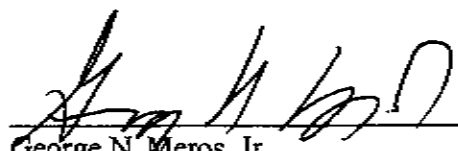
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