

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

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES;
ADORA OBI NWEZE;
THE LEAGUE OF WOMEN
VOTERS OF FLORIDA, INC.;
DEIRDRE MACNAB;
ROBERT MILLIGAN;
NATHANIEL P. REED;
DEMOCRACIA AHORA;
and JORGE MURSULI;

Plaintiffs,

vs.

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.

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSES TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

Plaintiffs, pursuant to Rule 1.510 of the Florida Rules of Civil Procedure and this Court's Scheduling Order, dated June 10, 2010, submit this reply to the responses by Defendants Department of State and Dawn K. Roberts, Secretary of State, and

Intervening Defendants the Florida House of Representatives and Florida Senate (collectively, "Defendants") to Plaintiffs' Motion for Summary Judgment and Incorporated Memorandum of Law, and response to the Defendants' motions for summary judgment. Plaintiffs respectfully submit that the filings demonstrate there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law.

ARGUMENT

I. A BALLOT SUMMARY IS NOT EXEMPT FROM THE ACCURACY REQUIREMENT SIMPLY BECAUSE IT QUOTES THE AMENDMENT TEXT.

Instead of immediately responding to Plaintiffs' substantive allegations of defects in Amendment 7's ballot title and summary, Defendants lead their responses to Plaintiffs' motion for summary judgment with several pages of argument asserting the court need not even evaluate the accuracy of the ballot summary because the summary is materially identical to the amendment text. Defendants proclaim, without citation, that a ballot summary identical in all material respects to the amendment language is clear and unambiguous "as a matter of law." (House Response at 4; *see also* Senate Response at 5-6). Not only is this an incorrect statement of law, it demonstrates Defendants' lack of understanding of the purpose of the accuracy requirement and the legislature's obligation to provide voters sufficient information to make their vote to change the organic law of this state a meaningful one.

The extent to which a summary accurately portrays an amendment is certainly an appropriate consideration in measuring compliance with Article XI, Section 5 of the

Florida Constitution and section 101.161, Florida Statutes. Thus, it is unsurprising that the Florida Supreme Court has examined and commented upon the similarity between a summary and the underlying text in finding that a summary meets the constitutional and statutory requirements. (See cases cited in House Response at 5-6; Senate Response at 5-6).

But Defendants' arguments fail to recognize that the ultimate question is always whether the summary fairly informs the voter of the chief purpose of the amendment and is not misleading, see, e.g., *Advisory Opinion to the Attorney Gen. re Extending Existing Sales Tax to Non-Taxed Servs. Where Exclusion Fails to Serve Pub. Purpose*, 953 So. 2d 471, 482 (Fla. 2007). Thus, the court's finding of similarity between the summary language and text is not an end in and of itself but rather a component of the overall evaluation of whether the summary meets these goals. *Id.* at 488 ("We do not believe that this argument makes the summary misleading . . ."); *Advisory Opinion to the Attorney Gen. re The Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675, 679 (Fla. 2004) ("we find the wording of the title and summary sufficient to communicate the chief purpose of the measure"); *Advisory Opinion to the Attorney Gen. re Fla. Marriage Protection Amendment*, 926 So. 2d 1229, 1240 (Fla. 2006) ("we hold that the ballot summary and title in the instant proposal are not impermissibly misleading").

It is therefore entirely possible for a ballot summary to be substantively identical to the amendment text and yet still fail to inform voters of the amendment's chief purpose or be misleading. *Wadhams v. Bd. of County Comm'rs*, 567 So. 2d 414, 416 (Fla. 1990) (invalidating amendment to county charter where full text of amendment was

placed on ballot); *Evans v. Bell*, 651 So. 2d 162, 166 (Fla. 1st DCA 1995) (same). This is precisely the scenario in the present case.

It would make a mockery of the accuracy requirement to hold that it is automatically satisfied by a ballot summary that simply parrots the amendment text verbatim. Such a rule would allow an amendment that is by all accounts indecipherable to be placed on the ballot simply because the summary matches the amendment text, word for word, in its indecipherability. Those who ask the voters of this state to vote to amend their constitution have a higher duty than this. *E.g.*, *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982) (“the proposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation”) (internal quotations and citation omitted).

II. AMENDMENT 7'S BALLOT TITLE AND SUMMARY ARE CLEARLY AND CONCLUSIVELY DEFECTIVE BECAUSE THEY FAIL TO INFORM VOTERS OF THE CHIEF PURPOSE AND EFFECT OF THE AMENDMENT.

A. Misleading Ballot Title

Amendment 7's ballot title, “Standards for the Legislature to Follow in Legislative and Congressional Redistricting,” erroneously leads voters to believe the amendment will create articulable standards against which redistricting plans can be measured. It does not.

The discretionary consideration of the interests of racial and language minorities and communities of common interest do not remotely satisfy the Defendants' own definition of a standard, *i.e.*, "criterion for measuring acceptability." (House Response at 12) (citing Black's Law Dictionary (8th ed. 2004)). Once the legislature has "taken into consideration" the interests of racial and language minorities to participate in the political process and elect candidates of their choice, it may choose to take these interests into account when drawing districts, or it may choose not to; both results, although directly opposite, are permissible under the amendment. Also discretionary is the legislature's consideration of communities of common interest; it may choose to "respect and promote" such communities in drawing districts, or it may choose not to; both results, though directly opposite, are permissible under the amendment. Because these factors have no bearing upon the validity or invalidity of a redistricting plan, they cannot possibly constitute "[criteria] for measuring acceptability."

Nor does Amendment 7 provide a standard by stating that "[d]istricts and plans are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution and is consistent with federal law." This phrase is not even internally consistent; although "implementation" of standards suggests that each standard is to be adhered to, "balancing" of standards suggests that something less than full compliance with one standard may be acceptable if the deficiency is offset by compliance with another. Furthermore, the requirement that the balancing and implementation be only "rationally related" to the standards contained in the State Constitution can hardly be considered a "standard." This statement means

that only an “irrational” plan will not be deemed valid, but sheds no light whatsoever on the criteria for measuring acceptability of a redistricting plan.

B. Contiguity

The ballot summary fails to disclose that a chief purpose and effect of the amendment is to permit the defeat of the existing constitutional requirement that districts be contiguous by discretionary considerations relating to racial and language minorities and communities of common interest. Although Defendants urge the court to interpret the phrase “without subordination to” to mean “alongside” (House Response at 7-8) or “equal” (Senate Response at 9),¹ this phrase simply does not support such an interpretation. As Defendants acknowledge, “subordinate” means inferior, or of a lower class or rank. (House Response at 8; Senate Response at 9). Thus, the discretionary considerations of racial and language minorities and communities of common interest may not be assigned a *lower* ranking or value than “any other provision of Article III of the State Constitution.” But *not lower* does not mean *equal*. Indeed, *not lower* may mean *higher*. Thus, Amendment 7 would permit the legislature to justify a non-contiguous district by, for example, finding it is necessary to do so in order to respect and promote a certain community of common interest.

Amendment 7’s instruction that districts and plans are valid if the “balancing and implementation of standards is rationally related to the standards contained in the

¹ This position is inconsistent with the House’s earlier interpretation of Amendment 7’s relationship to the mandatory standards in Amendments 5 and 6. The House staff analysis for Amendment 7 asserts that consideration of the interests in Amendment 7 would be “of at least equal dignity” with the standards contained in Subsection (1) of Amendments 5 and 6. *House of Representatives Staff Analysis for HJR 7231 at 17-19 (April 20, 2010) (emphasis added)*. “At least equal” is not the same as “equal.”

State Constitution” would not bar such a non-contiguous district drawn for the purpose of respecting and promoting a community of common interest. A balancing test, by its very nature, does not require compliance with every factor. *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (stating that no one factor of four-part balancing test is necessary or sufficient to find the deprivation of criminal defendant’s right to a speedy trial); *State v. Jones*, 483 So. 2d 433, 438 (Fla. 1986) (stating not all factors in four-part balancing test must favor the state in order to validate a sobriety checkpoint). Thus the legislature could defend the validity of a non-contiguous district by asserting it “balanced” the interests of communities of common interest against the contiguity requirement and determined the interest in respecting and promoting such communities was sufficiently great to warrant less than full compliance with the contiguity requirement. This is a significant change from current law which must be, and is not, disclosed clearly and unambiguously in the ballot summary.

The House and Senate’s assertion that they must continue to comply with the contiguity requirement in drawing districts because it is an “absolute” or “objective” factor (House Response at 8-9; Senate Response at 9) is a made-up distinction that has no support in the text of the Florida Constitution, the proposed amendment, or case law. Amendment 7 does not state that a redistricting plan must satisfy the contiguity requirement but can “balance” other constitutional standards that “are not absolute, but relative, and leave room for compromise.” (House Response at 8). The extraordinary grant of discretion in Amendment 7 cuts both ways; while it permits the legislature to draw districts and plans by “balancing” constitutional standards, it also permits

displacement of any existing or future standard that purports to be mandatory. This includes the contiguity requirement.

Finally, the fact that the legislative analysis of HJR 7231 does not reflect an intention to repeal the contiguity requirement is of little import. "In evaluating an amendment's chief purpose, a court must look not to subjective criteria espoused by the amendment's sponsor but to objective criteria inherent in the amendment itself." *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000). Thus, the language of the amendment speaks for itself. Furthermore, during the 2010 legislative session the Senate proposed and heavily debated an alternative joint resolution which was similar to HJR 7231 but was different in that, among other things, it would have expressly required legislative and congressional districts to be contiguous. See CS for CS for SJR 2288, available at The Florida Senate, Session Bills, http://www.flsenate.gov/Session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=2288&Chamber=Senate&Year=2010&Title=%2D%3EBill%2520Info%3AS%25202288%2D%3ESession%25202010 (last visited June 30, 2010). The Legislature cannot be heard to assert that Amendment 7 somehow implicitly preserves the contiguity requirement notwithstanding its passage of a proposed amendment that made no reference to such requirement and its rejection of a proposed amendment that would have expressly preserved it.

C. Communities of Common Interest

Defendants assert Amendment 7's ballot summary need not define the term "communities of common interest" because it is not an "impenetrable" legal term but

rather can be defined according to common sense and reference to dictionaries. The problem with this approach is that a voter's "common sense" understanding of the term may not comport with its actual application by the courts. It is inappropriate to allow voters to rely upon their own conceptions to define legal terms that have a history of construction and application by the courts. *Advisory Opinion to the Attorney Gen. re Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ.*, 778 So. 2d 888, 889 (Fla. 2000) (voters should not be left to guess at the meaning of a legal term).

Defendants essentially argue that they should not be required to define the term because it is not susceptible to a clear, set definition. (Senate Response at 15) ("it has not developed an all-encompassing technical definition" and "it would be futile to attempt to list or categorize all communities of interest in Florida"). This argument directly supports Plaintiffs' argument that, contrary to its title, Amendment 7 does not provide any meaningful standards by which a plan or district can be measured. Yet because respect and promotion of "communities of interest" can be used as an excuse to trump every other redistricting standard in the constitution, both present and future, it is especially important that voters be informed of the meaning of this potentially dispositive term.

D. Balance & Implement / Rationally Related

Contrary to Defendants' assertions, the Florida Constitution does specify a standard for judicial review: it requires redistricting to be conducted "*in accordance with the constitution of the state.*" Art. III, § 16, Fla. Const. (emphasis added). There is no

ambiguity in this requirement: the legislature's redistricting plans must *comply* with the constitutional standards applicable to redistricting. Accordingly, in its facial review, the Supreme Court examines whether a redistricting plan "violates" the Florida Constitution. See *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002).

Amendment 7 provides that the state is to "balance and implement" the state constitutional standards. Although it is not clear what this means, it is at least clear that it means something less than drawing plans "in accordance with," or in *compliance* with, state constitutional standards. Meanwhile Amendment 7 also instructs the state to "apply" federal requirements. This demonstrates that "balance and implement" is not intended to mean the same as "apply"; there must be some reason the legislature chose different language for state standards than federal ones. See *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 14 (Fla. 2004) (the Legislature is presumed to know the meaning of the words it chooses). The word "balance" implies a case-by-case weighing of considerations, which is the opposite of a strict compliance requirement or *per se* rule. *Forsberg v. Housing Auth. of Miami Beach*, 455 So. 2d 373, 374 (Fla. 1984) (stating the existence of a right to disclosural privacy is determined by case-by-case balancing test rather than *per se* rule).

Similarly, it is not clear what it means that under Amendment 7 districts and plans "are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution." But "rationally related" must mean something less than the current requirement that plans be drawn "in accordance

with" the constitution. Amendment 7 also provides that districts and plans are valid if they are "consistent" with federal law. "Rationally related" must mean something less than "consistent"; the legislature cannot be presumed to have chosen different words without intending different meanings. And whether or not the "rationally related" language is intended to borrow from the well-established lowest level of constitutional review, a test which permits all but irrational plans is a substantial change in Florida law which must be revealed to the voters in clear and unambiguous terms.

E. Effect on Amendments 5 & 6

Defendants do not dispute that Amendment 7's chief purpose is to dilute the effects of Amendments 5 and 6, if they are approved by the voters. Indeed, the House acknowledges "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." (House Response at 3); *see also House of Representatives Staff Analysis for HJR 7231 at 17-19 (April 20, 2010)* (noting that Amendments 5 and 6 would limit the legislature's discretion in drawing districts and that the interests in Amendment 7 would be "of at least equal dignity with the standards contained in Subsection (1) of [Amendments 5 and 6] and would be superior to the standards contained in Subsection (2)" of these amendments).²

²This interpretation of Amendment 7's relationship to the standards in Amendments 5 and 6 stands in stark contrast to the Defendants' contention that Amendment 7 does not dilute or in any way affect the Legislature's obligation to comply with the existing contiguity requirement. Nothing in the text of Amendment 7 justifies these conflicting interpretations.

Defendants' sole defense of the lack of disclosure of the effects on Amendments 5 and 6 is that they are not obligated to make such disclosure, citing *Advisory Opinion to Attorney Gen. re Florida Growth Mgmt. Initiative Giving Citizens the Right to Decide Local Growth Mgmt. Plan Changes*, 2 So. 3d 118 (2008) (approving citizens' initiative sponsored by "Floridians for Smarter Growth" relating to local growth management plan changes) (*Growth Mgmt. Initiative*). But this advisory opinion is inapplicable to the present case.

In *Growth Mgmt. Initiative*, the Court was considering a citizens' initiative that had achieved ten percent of the required signatures in one-fourth of the required congressional districts so as to trigger Supreme Court review. *Id.* at 118 (citing art. IV, § 10 and art. V, § 3(b)(10), Fla. Const.); § 15.21, Fla. Stat. This initiative would have preempted another citizens' initiative, sponsored by "Florida Hometown Democracy," if both initiatives successfully achieved ballot position and were approved by the voters. *Growth Mgmt. Initiative*, 2 So. 3d 118, 119 (Fla. 2009) (quoting text of Floridians for Smarter Growth's Amendment as intended to "pre-empt or supersede recent proposals to subject all comprehensive land use plans and amendments to votes").

At the time of the Court's opinion in *Growth Mgmt. Initiative*, Florida Hometown Democracy's amendment had been approved by the Supreme Court for placement on the ballot,³ but had not yet acquired the number of petitions necessary to be placed on the ballot. See § 15.21, Fla. Stat. (Florida Supreme Court review is triggered when an initiative petition achieves ten percent of the requisite petitions in at least one-fourth of the congressional districts required by the constitution); Art. XI, § 3, Fla. Const. (ballot

³ See *Advisory Opinion to Atty. Gen. re Referenda Required for Adoption and Amendment of Local Govt. Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. 2006).

placement is achieved by filing petitions from one-half of the congressional districts of the state totaling eight percent of the number of votes cast in the state in the last presidential election). In fact, the Florida Hometown Democracy amendment did not achieve ballot placement until June 22, 2009, several months after the advisory opinion in *Growth Mgmt. Initiative*.⁴ The “alternative” proposed amendment approved by the Court in *Growth Mgmt. Initiative* still has not achieved ballot position.⁵ It is understandable that a majority of the Court did not find the Floridians for Smarter Growth amendment needed to disclose its potential effect upon the Hometown Democracy amendment in order to satisfy the accuracy requirement, because it was uncertain when—if ever—the two citizen initiatives ultimately would be placed on the ballot.

But there is no such uncertainty in this case. Amendments 5 and 6 achieved ballot placement on January 22, 2010. These amendments were certain to appear on the 2010 general election ballot, and the legislature intentionally drafted Amendment 7 to interfere with their effectiveness. As a timely filed legislatively-proposed amendment, Amendment 7 was also certain to appear on the 2010 general election ballot. Art. XI, § 5, Fla. Const. Under these specific circumstances, in order to satisfy the accuracy requirement, Amendment 7's ballot summary must inform voters that a chief purpose and effect of the amendment is to eviscerate the mandatory standards contained in

⁴ See Fla. Dept. of State, Div. of Elections, 2010 Proposed Constitutional Amendments, <http://election.dos.state.fl.us/initiatives/initiativelist.asp?year=2010&initstatus=ALL&MadeBallot=Y&lecType=GEN> (last visited June 30, 2010).

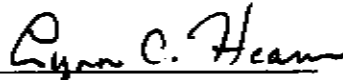
⁵ See Fla. Dept. of State, Div. of Elections, Initiatives/Amendments/Revisions, <http://election.dos.state.fl.us/initiatives/initiativelist.asp> (last visited June 30, 2010).

Amendments 5 and 6. Its failure to do so renders Amendment 7 clearly and conclusively defective. *Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), *rev. denied*, 523 So. 2d 577 (Fla. 1988) (“the apparent studied omission of [reference to an inconsistent item on the ballot] and the consequent and just as obvious failure to dispel the confusion which must inevitably arise from this set of circumstances renders the language as framed fatally defective”).

CONCLUSION

Because the ballot title and summary of Amendment 7 clearly and conclusively fail to adequately inform the voter of the chief purposes and effects of the amendment, and are affirmatively misleading, placement of Amendment 7 on the ballot would violate Article XI, Section 5, Florida Constitution, and Section 101.161(1), Florida Statutes. Plaintiffs respectfully request that this Court enter final judgment declaring Amendment 7 invalid and prohibiting Defendants from placing it on the ballot, and grant such further relief as the Court deems appropriate.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by first class mail and electronic mail on this 30th day of June, 2010, to:

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