

# IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1149

**ADVISORY OPINION TO THE  
ATTORNEY GENERAL RE:  
STANDARDS FOR  
ESTABLISHING  
CONGRESSIONAL DISTRICT  
BOUNDARIES**

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**ANSWER BRIEF**

**OF THE FLORIDA LEGISLATURE**

**IN OPPOSITION TO THE PETITION**

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## SUMMARY OF THE ARGUMENT

Nothing the sponsors have said undermines the fact that the proposed amendment easily falls within the reach of In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994). A close analysis of the proposal demonstrates that it is more like that in Laws Related to Discrimination than any of the cases cited by the sponsors — and just as flawed.

The amendment proposes a “broad generality” as a chief purpose, then enumerates eight standards for redistricting, five of which provide anti-discrimination protections to distinct classes in the same way as the amendment in Laws Related to Discrimination. Voters must accept or reject the entire package, although they may agree with one classification but strongly disagree with another.

Moreover, the proposal in fact has two chief purposes grouped within a single “broad generality”: anti-discrimination and geographic integrity, objectives that aim at two different targets, forcing voters to make yet another choice among disparate issues.

It is impossible to create a redistricting plan that does not favor or disfavor parties or incumbents. Even the sponsors admit this is true. Sponsors' answer brief, p. 20: "The sponsor of this amendment recognizes that any district — no matter how neutral the drafter — will favor or disfavor someone." The sponsors go on to say they "[know] that it is impossible to remove political favoritism from the redistricting process . . ." The practical effect of the amendment shifts to the courts the burden of redistricting, a purely legislative duty under the U.S. Constitution.

The amendment substantially affects several existing constitutional provisions, as well as the Legislature's role under the U.S. Constitution (subject to Congress' authority and the U.S. Constitution) to regulate elections to the House of Representatives. Consequently, the proposed amendment plainly and materially affects existing constitutional provisions without giving voters notice of its substantial changes to the state's constitutional fabric.

The sponsors make a false grammatical argument that the phrase "drawn to favor" is the functional equivalent of the actual language of the amendment, "drawn *with the intent* to favor . . ." According to the sponsor, "to" in "drawn to" is "consistent" with the phrase "with intent to."<sup>1</sup> The crux of their position is that "to" modifies "drawn." This is grammatically absurd. In fact, the "to" is part of the

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<sup>1</sup> Sponsor's answer brief p. 19.

infinitives “to favor” and “to disfavor.” Since the verb “be drawn” in the summary lacks the critical modifier present in the text — “with the intent” — it necessary means “be drawn” with the *effect* to favor or to disfavor incumbents or parties. Consequently the summary is vague and misleading on its face.

The sponsors’ contention that there is no significant difference between the summary’s use of the words “city and county boundaries” and the amendment text’s reliance on “political boundaries” is without foundation. The two terms are not synonymous. “Political boundaries” includes city and county boundaries, but those of other political subdivisions as well. Moreover, the term “political boundaries” as used in this context is vague and misleading, a point even the sponsors admit.

The sponsors also treat the words “and” and “or” as though they mean the same thing, when they do not. Because the summary uses the word “and” to connect to unrelated elements, it implies that both conditions must be satisfied to make for an acceptable plan. The text’s use of “or,” however, means that only one of two conditions must be satisfied to render an acceptable plan.

The sponsors offer no argument that the term “language minorities” is a legal term of art that requires definition, and is vague and misleading.

The sponsors mischaracterize our argument about the amendment's effect on the courts. The point is not that the courts will be required to interpret the Constitution in any post-redistricting lawsuit. Rather, it is that the amendment effectively shifts the power and duty to conduct redistricting onto the courts.

The summary gives two misleading negative implications: 1) that there are no constitutional provisions addressing unequal treatment, and 2) that the Legislature is presently discriminating against classes of voters. Summaries that create such negative implications are routinely stricken.

The summary fails to advise voters that the amendment substantially curtails the Legislature's authority under Article 1, s. 4, U.S. Constitution, to regulate elections to Congress, subject only to Congress' power to regulate such elections.

## **ARGUMENT**

### **I. The proposed amendment violates the one subject rule.**

#### **A. Logrolling.**

Nothing the sponsors have said undermines the fact that the proposed amendment easily falls within the reach of In re Advisory Opinion to the Attorney General — Restricts Laws Related to Discrimination, 632 So.2d 1018 (Fla. 1994). A close analysis of the proposal demonstrates that it is more like that in Laws Related to Discrimination than any of the cases cited by the sponsors — and just as flawed.

It is worth remembering that the amendment requires the following:

1. No plan or district shall be drawn with the intent to favor or disfavor a political party.
2. No plan or district shall be drawn with the intent to favor or disfavor an incumbent.
3. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
4. No plan or district shall be drawn with the intent or result of denying or abridging the equal opportunity of language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.
5. Districts shall consist of contiguous territory.

The second paragraph would establish these independent, freestanding standards, which are to be met unless doing so conflicts with a requirement in paragraph 1 or with federal law:

6. Districts shall be as nearly equal in population as is practicable.
7. Districts shall be compact.
8. Districts shall, where feasible, utilize political and geographic boundaries.

Thus, the amendment establishes eight independent requirements for any apportionment plan.

But if one looks at these requirements more closely, we see that they address two discrete, but broad, subjects: anti-discrimination (1, 2, 3, 4, 6) and geographic integrity (5, 7, 8).<sup>2</sup>

The anti-discrimination requirements provide protection for five different classes:

- Political parties.
- Non-incumbents.
- Racial minorities.
- Language minorities.

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<sup>2</sup> Although the Legislature suggested in its initial brief that one might see five broad general purposes, if one is generous perhaps as few as two are apparent.

- All voters, who apparently are to be entitled to the most stringent interpretations of the “one person/one vote” requirement of the equal protection clause. (However, the one/person, one/vote standard is already strictly applied in congressional redistricting.<sup>3</sup>)

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<sup>3</sup> Karcher v. Daggett, 462 U.S. 725, 730 (1983):

Article I, § 2 establishes a “high standard of justice and common sense” for the apportionment of congressional districts: “equal representation for equal numbers of people.” Wesberry v. Sanders, 376 U.S. 1, 18, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore the “equal representation” standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality “as nearly as is practicable.” See id., 376 U.S., at 7-8, 18, 84 S.Ct., at 530, 535. As we explained further in Kirkpatrick v. Preisler, *supra*:

“[T]he ‘as nearly as practicable’ standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533, 577 [84 S.Ct. 1362, 1390, 12 L.Ed.2d 506] (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.” 394 U.S., at 530-531, 89 S.Ct., at 1228-1229.

Article I, § 2, therefore, “permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.” Id., 394 U.S., at 531, 89 S.Ct., at 1229. Accord, White v. Weiser, 412 U.S., at 790, 93 S.Ct., at 2352.

The proposal at issue in Laws Related to Discrimination prohibited all governmental entities from enacting “any law regarding discrimination against persons which creates, establishes or recognizes any right, privilege or protection for any person based upon any characteristic, trait, status, or condition other than race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status.” Id. at 1019. The Court rejected the proponents’ contention that the measure addressed the single subject of discrimination. In fact, the Court concluded that the label “discrimination” was merely an unacceptable “broad generality” which could not be relied on to sail past the one subject bar. Id. at 1020. The Court rejected the amendment for several reasons, but for our purposes, it is significant that the Court found that the amendment was an exercise in logrolling because “it enumerates ten classifications of people that would be entitled to protection from discrimination if the amendment were passed.” Id. The enumeration of these classifications required “voters to choose which classifications they feel most strongly about, and then [required] them to cast an all or nothing vote on the classifications listed in the amendment.” Id.

The amendment before us today forces voters to make the same sort of choice. It proposes a “broad generality” as a chief purpose, then enumerates eight standards for redistricting, five of which provide anti-discrimination protections to

distinct classes in the same way as the amendment in Laws Related to Discrimination. Voters must accept or reject the entire package, although they may agree with one classification but strongly disagree with another.

Moreover, the proposal in fact has two chief purposes grouped within a single “broad generality”: anti-discrimination and geographic integrity, objectives that aim at two different targets, forcing voters to make yet another choice among disparate issues. See e.g., Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 893 (Fla. 2000).

The sponsors’ cases are distinguishable. In all but two cases, the question whether standards for implementation of the proposed amendment constituted logrolling was not an issue raised by any of the parties or discussed by the Court. And even the two cases that come close have different facts.

In Advisory Opinion to the Atty. Gen. re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186 (Fla. 2006), the proposal aimed at regulating the use of money received under a settlement with tobacco companies. It established a program intended to discourage young people from smoking. The amendment required four components of this education and prevention education program: an anti-smoking advertising

campaign, an “evidence-based curricula” to educate young people about smoking hazards, programs involving community-based partnerships, and the enforcement of anti-smoking laws. Id. at 1189. The Court concluded that these program elements did not constitute logrolling. The Court found that the components were related to the single unifying purpose of the amendment and did not combine unrelated provisions, some of which are popular and some not. Id. at 1191. These four program components were not controversial; they provided general rather than specific directives; they did not deprive the Legislature or the executive branch of discretion on how to carry out the program; and they provided no protection for any group or classification. In short, the components are what any reasonable anti-smoking program would contain to fulfill its objectives and thus are reasonably related to the amendment’s chief purpose. That is, they all aim in a single direction and have a single, unified goal.

In Advisory Opinion to the Attorney General re Limited Casinos, 644 So.2d 71 (Fla. 1994), the proposed amendment sought to allow privately-run casino gambling in nine counties. Id. at 73. The amendment dictated the size, number and type of casino permitted in each county as well. Id. The Court concluded that, despite this level of detail, the amendment addressed a single subject (private casino gambling) and “does not combine subjects which are dissimilar so as to

require voters to accept one proposition they might not support in order to vote for one they favor.” The court went on to say the details addressing number, size, location and type of facility “only serve to provide the scope and implementation of the initiative proposal. These features properly constitute matters directly and logically connected to the subject of the amendment.” Id.

Taking all these cases together, the Court clearly views anti-discrimination amendments aimed at providing protections to different classes to contain separate, independent subjects — one subject for each class. This makes sense, since they aim at different targets and require “voters to choose which classifications they feel most strongly about, and then [required] them to cast an all or nothing vote on the classifications listed in the amendment.” Laws Related to Discrimination, 632 So.2d at 1019.

Ending discrimination or having voting standards thus is a broad generality that will not by itself constitute the chief objective of an amendment for one subject purposes. The Court has taught us in its one subject cases that the task is to look at the goal of each individual standard. Where all the standards serve the same purpose, they pass constitutional muster. But where each serves a separate purpose, has an independent target or are so controversial that voters may disagree with some standards but not others, they do not. Thus, where ending discrimination

against a defined class is the goal and each standard protects a distinct class, then each standard has a separate independent purpose.

That is the case here. Therefore, the current proposal violates the single subject requirement, as applied by this Court in Laws Related to Discrimination.

**B. Shifting the burden of redistricting to the courts.**

The sponsors raise a straw man argument that no one can reasonably disagree with: that the courts have an obligation to interpret the Constitution and the proposal does not require more than that. But this is not the point.

The point is that the practical effect of the amendment shifts to the courts the burden of redistricting, a purely legislative duty under the U.S. Constitution. The amendment also will substantially burden the courts because it will open every redistricting plan to challenge and judicial rewriting.

As we pointed out in detail in our initial brief, it is impossible to create a redistricting plan that does not favor or disfavor parties or incumbents. Even the sponsors admit this is true. Sponsors' answer brief, p. 20: "The sponsor of this amendment recognizes that any district — no matter how neutral the drafter — will

favor or disfavor someone.” The sponsors go on to say they “[know] that it is impossible to remove political favoritism from the redistricting process . . .”<sup>4</sup>

Acts that have a discriminatory effect legally give rise to an inference that they were intentional. See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Patterson v. McLean Credit Corp. 491 U.S. 164, 186-187 (1989) (discriminatory acts raise presumption of discriminatory intent).

Consequently *every* congressional redistricting plan can, and undoubtedly will, be challenged, vastly increasing judicial involvement in what the Founders intended to be a *purely legislative process* and in many, if not most cases, resulting in judicial redrafting of apportionment plans. It is acceptable under the U.S. Constitution that the courts must occasionally impose redistricting plans, but it will offend the Constitution if they are must routinely do so. League of United Latin American Citizens v. Perry, 548 U.S. 399, 415 (2006).

### **C. Affecting other constitutional provisions.**

The Legislature’s initial brief discussed at length how the proposed amendment disrupts established constitutional provisions, among them Article 1, s. 2; and Article 3, ss. 2, 3, 4 and 7, Fla.Const. — and Article 1, s. 4, U.S. Const.

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<sup>4</sup> This being so, the courts open themselves up to accusations of political favoritism if they become regular players in redistricting.

The sponsors' response is an insubstantial argument that because the Florida Constitution does not mention congressional redistricting, no harm to any other constitutional provisions can possibly occur.

This is a logical absurdity. The question is not whether a particular provision existed before. In fact, when amending the Constitution the point often is to add *new* provisions. The point is whether the amendment substantially affects an existing provision. As pointed out in the Legislature's initial brief, this amendment certainly substantially affects several existing constitutional provisions, as well as the Legislature's role under the U.S. Constitution (subject to Congress' authority and the U.S. Constitution) to regulate elections to the House of Representatives.

Consequently, the proposed amendment plainly and materially affects existing constitutional provisions without giving voters notice of its substantial changes to the state's constitutional fabric.

## **II. The ballot title and summary are defective.**

The need for a fully informative, objective ballot summary is critical to the amendment processes. Without such a summary, voters cannot, and will not, make informed choices:

The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters deciding

whether to approve a proposed amendment to our constitution never see the actual text of the proposed amendment. They vote based only on the ballot title and the summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the sine qua non of the citizen-driven process of amending our constitution.

Advisory Opinion of the Attorney General re Additional Homestead Tax

Exemption, 880 So.2d 646, 653-654 (Fla. 2004).

**A. “Drawn to favor” vs. “drawn with the intent to favor.”**

The sponsors make a faux grammatical argument that the phrase “drawn to favor” is the functional equivalent of the actual language of the amendment, “drawn *with the intent* to favor . . .” According to the sponsor, “to” in “drawn to” is “consistent” with the phrase “with intent to.”<sup>5</sup>

The crux of their position is that “to” modifies “drawn.” This is grammatically absurd. In fact, the “to” is part of the infinitives “to favor” and “to disfavor.” The pertinent sentence in the summary unpacks this way:

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<sup>5</sup> Sponsor’s answer brief p. 19.

- Congressional districts and district plans [the subjects]<sup>6</sup>
- may [modal auxiliary verb of permission]<sup>7</sup>
- not [negative adverb]
- be drawn [past participle of “to draw”]<sup>8</sup>
- *to* favor [infinitive verb]<sup>9</sup>
- or [conjunction]
- *to* disfavor [infinitive verb]<sup>10</sup>
- an incumbent or political party [objects].<sup>11</sup>

It should now be obvious that the critical verb is “be drawn,” not “drawn to.”

However, the summary lacks the adverbial phrase<sup>12</sup> “with the intent,” which in the amendment itself modifies “be drawn.” The absence of this adverbial phrase significantly alters the meaning of the summary. Since “be drawn” in the summary

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<sup>6</sup> Harbrace College Handbook (12 ed.) (Harcourt Brace 1994), p. 5.

<sup>7</sup> Id., p. 77.

<sup>8</sup> Id., pp. 77-78, 83-84. Here “be” is a modal auxiliary verb modifying the past participle “draw” to render the passive voice.

<sup>9</sup> Id., p. 90.

<sup>10</sup> Id.

<sup>11</sup> Id. p. 6.

<sup>12</sup> Id., p. 20.

is not limited by “with the intent,” it necessary means that districts cannot be drawn with the *effect* of favoring or disfavoring a party or incumbent.

Even if one shrinks from reading the summary this way, “be drawn” is at best ambiguous, since it can have more than two meanings. Since it reasonably can have more than two meanings, it is vague. Such vagueness misleads the voter.

**B. Political boundaries.**

The sponsors contend that the proposed amendment will merely require districts to be “community based.” Since, they claim, this is the gist of the amendment, voters are not misled by the very different term used in the summary: “city and county boundaries” versus “political boundaries” in the actual amendment.

Here, the sponsors invite the Court to journey with them into the land of wishful thinking. In fact, they do not even understand their own amendment. As we already pointed out in our initial brief, “political boundaries” is not synonymous with the term “city or county boundaries.” The first term embraces polities of a far different sort than the second, so that the use of “city/county boundaries” in the summary constitutes a materially misleading deviation from the language of the amendment. But even more significant, the sponsors admit that the term “political boundaries” is ambiguous and confusing: “The term ‘political boundaries’ in the

summary would likely be confusing to voters . . .”<sup>13</sup> Given the sponsors’ concession that the term is ambiguous and confusing, their belief that the amendment requires “community based” districts lacks any foundation. Nothing in the term “political boundaries” necessarily requires an effort to draw “community based” districts. Thus, the gist supposedly given by the summary is an illusion.

Just as important, the concession points out that even the sponsors understand that “political boundaries” and “city/county boundaries” are materially different terms that cannot be substituted for each other. In fact, the sponsors apparently do not have any idea what the term “political boundaries” really means.

To sum up, although the summary makes the promise that districts will adhere to city and county boundaries, the amendment imposes no such restriction.

The difference is material, and the summary works a classic bait-and-switch.

### **C. And/or.**

The sponsors make another false grammatical argument that a critical “or” in the amendment actually means “and,” as stated in the summary. But “or” in everyday English does not mean “and.” It means something altogether different. By using “and” instead of “or” in the summary, an important meaning is changed and voters are misled.

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<sup>13</sup> Sponsors’ answer brief, p. 22.

The critical sentence of the summary is: “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.” But in the amendment itself the italicized “and” is an “or.”

The sponsors argue that the “not” in the amendment, which converts the verb to a negative command, means that there is no choice between the two final elements of the sentence: participating in the political process, electing representatives of their choice.

Unfortunately, the grammar police will not agree with this view. “And” and “or” do not mean the same thing, regardless of whether there is a “not” lurking about. “And” means “together with or along with; in addition to; as well as. Used to connect words, phrases or clauses having the same grammatical function in a construction.”<sup>14</sup> On the other hand, “or” is “used to indicate an alternative, usually only before the last term in a series: hot or cold; this, that, or the other.”<sup>15</sup> Consequently, “this and that” means both together; “this or that” means one but not the other.

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<sup>14</sup> The American Heritage Dictionary of the English Language (4th ed.) (Houghton Mifflin Co. 2000), p. 66.

<sup>15</sup> Id., p. 1236.

The Court in Armstrong v. Harris, 773 So.2d 7 (Fla. 2000), understood this simple grammatical difference very well, which is why the case came out the way it did — for whether a passage contains an “and” instead of an “or” will substantially change its meaning.

Here, the plain, ordinary sense of the summary is that both conditions must be satisfied: district lines must be drawn so that racial and language minorities have equal opportunities to participate in the political process *in addition to* being able to elect their choice of representative. That is to say, unless both conditions are met, a plan fails.

But the amendment requires only the satisfaction of one condition to make for a successful plan.

Therefore, replacing the “or” with an “and” substantially changes the description of the amendment and on its face misleads voters.

As the sponsors point out, “Where the difference in summary terminology would lead a reader to a different understanding of the substance of the amendment, there may be grounds for invalidation.”<sup>16</sup>

There are more than enough such grounds on this point, and on others.

#### **D. Language minorities.**

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<sup>16</sup> Sponsors’ answer brief, p. 23.

The sponsors offer no meaningful rebuttal to our contention that the term “language minorities” in the summary is a technical term of art that should be defined for the voter, but is not, and is vague and misleading on its face.

**E. Failure to describe the impact on the courts.**

The sponsors mischaracterize our argument about the amendment’s effect on the courts. The point is not that the courts will be required to interpret the Constitution in any post-redistricting lawsuit. Rather, it is that the amendment effectively shifts the power and duty to conduct redistricting onto the courts. The sponsors have no rebuttal for that point.

In fact, Laws Related to Discrimination, 632 So.2d at 1023 , Justice Kogan concurring, should control the outcome: “Our case law has established that serious undisclosed collateral effects of an initiative can be reason enough to remove it from the ballot. Florida League of Cities v. Smith, 607 So.3d 397, 399 (Fla. 1992).”

**F. Failure to identify affected existing laws and constitutional provisions.**

This point is controlled by Advisory Opinion to the Attorney General, re Amendment to Bar Government from Treating People Differently Based on Race in Public Education, 778 So.2d 888, 898 (Fla. 2000). There, the Court invalidated a proposed amendment because its summary gave two misleading negative implications:

1. That no constitutional provision addressing differential treatment existed.
2. That “the government is presently practicing discrimination.”

The proposal before use raises both negative implications.

First, the state and federal equal protection clauses apply to any redistricting plan. The proposal implies that they do not. Moreover, as applicable to the states through the U.S. Constitution’s Supremacy Clause, the federal Voting Rights Act regulates redistricting relating to racial and “language minorities.”<sup>17</sup> But the proposed amendment implies that no similar limitations on legislative discretion exist — when they unmistakably do. This is the same sort of negative implication that justified striking the amendment in Race in Public Education.

Second, the summary clearly creates a negative implication that the Legislature is discriminating against racial and language minorities when it is not.

**G. Failing to advise voters of limitations on the Legislature’s discretion.**

The proposed amendment substantially diminishes the Legislature’s authority granted by Article 1, s. 4, U.S. Constitution. That federal constitutional provision grants the Legislature plenary authority, subject only to congressional restrictions, to arrange for elections to the House of Representatives. The voters must be

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<sup>17</sup> Legislature’s initial brief, p. 35.

advised that a vote for this amendment substantially curtails the Legislature's fundamental authority under the founding document of the country. The failure to advise voters of this fact is misleading.

In fact, in Laws Related to Discrimination, 632 So.2d at 1021, the court invalidated an initiation proposal in part because the "summary also fails to state that the proposed amendment would curtail the authority of government entities."

### **CONCLUSION**

For these reasons, the petition fails the one-subject requirement and contains a defective ballot title and summary. Consequently, the court should order it stricken from the ballot.

RESPECTFULLY SUBMITTED,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served by U.S. mail on, on Attorney General Bill McCollum and Scott Makar, Solicitor General, PL-01, The Capitol, Tallahassee, FL 32399; Barry Richard and Hope Keating, Greenberg Traurig, 101 East College Ave., Tallahassee, FL 32301; and Mark Herron, Messer, Caparello & Self, 2618 Centennial Place, Tallahassee, FL 32308, on August 20, 2008.

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Jason Vail

### **CERTIFICATE OF TYPE SIZE AND STYLE**

The brief is printed in 14 point Times New Roman.

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