IN THE SUPREME COURT OF FLORIDA

Case No. SC10-1375
Lower Tribunal Case Nos. 2010-CA-001803, 1D10-3676

FLORIDA DEPARTMENT OF STATE, an agency of the State of Florida, *et al.*, Appellants,

v.

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

ANSWER BRIEF OF APPELLEES

On Review from the Circuit Court of the Second Judicial Circuit in and for Leon County

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STATEMENT OF THE CASE AND FACTS

The question presented in this case is whether the ballot title and summary of proposed Amendment 7, which relates to legislative and congressional redistricting, gives voters fair notice of its chief purpose and effect.

On the last day of the 2010 legislative session (April 30, 2010), the Florida Legislature passed by two-thirds vote of each house a joint resolution relating to redistricting, identified as HJR 7231. (R1:63 n.2, R1:74-75.) The Department of State designated HJR 7231 as Amendment 7. (R1:63 n.2.)

The ballot summary approved by the legislature for Amendment 7 states:

> STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING. - In establishing congressional and legislative district boundaries or plans, the state shall apply federal requirements and balance and implement the standards in 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 Article III of the State Constitution. Districts 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.

(R1:74-75.) The ballot summary is nearly identical to the full text of the amendment, with the addition of the ballot title and specific references to the Florida Constitution. (*Id.*)

The legislature drafted and passed Amendment 7 in direct response to two citizen initiatives related to redistricting (Amendments 5 and 6) that had been certified for ballot position by the Department of State four months earlier. (Initial Brief at 3); (R1:15-19) (stating that Amendments 5 and 6 would limit legislature's discretion in drawing districts and explaining how Amendment 7 addressed this concern); (R1:161) (explaining that the legislature proposed Amendment 7 to "mitigate the unintended consequences of such rigid mandates for racial minorities and communities of common interest"). Amendments 5 and 6 would add to the Florida Constitution specific, prioritized, mandatory standards for the legislature to follow in both legislative and congressional redistricting. They are intended to establish fairness standards for use in creating legislative district boundaries. (R1:13; R1:71-72.)

Amendment 5 would create Article III, Section 21, to read as follows:

> In establishing Legislative district boundaries:
> (1) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
> (2) Unless compliance with the standards of this subsection conflicts with the standards of subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where, feasible, utilize existing political and geographical boundaries.

> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over another within that subsection.

(R1:71.) Amendment 6 would create Article III, Section 20, to establish identical requirements for the legislature to follow in establishing congressional district boundaries. (R1:72.)

Plaintiffs/Appellees, Florida State Conference of NAACP Branches, the League of Women Voters of Florida, and Democracia Ahora, together with several individual voters, brought the present action in circuit court asserting the ballot title and summary failed to comply with the accuracy requirement in Article XI, section 5 of the Florida Constitution and Section 101.161(1), Florida Statutes. (R1:6-21.) The complaint sought a judgment declaring that Amendment 7 failed to meet the constitutional and statutory requirements for placement on the ballot and enjoining the Department of State and Secretary of State from placing the amendment on the 2010 general election ballot. (*Id.*) The Florida House of Representatives ("House") and Florida Senate ("Senate") sought and were granted leave to intervene in the action. (R1:22-26; R1:38-40; R1:46.) The parties agreed to resolve the case pursuant to cross-motions for summary judgment on an expedited schedule. (R1:99-100.)

Plaintiffs moved for summary judgment on the grounds that the ballot title and summary for Amendment 7 failed to inform voters of the chief purpose and

true effect of the amendment, which Plaintiffs asserted is to free the legislature from any present and future mandatory standards applicable to drawing legislative and congressional district lines and to minimize the degree to which the redistricting plans are required to meet standards contained in the Florida Constitution. (R1:47-98.) Plaintiffs made numerous specific arguments, all of which are addressed herein. (*Id.*) Governor Crist sought and was granted leave of court to file an amicus brief in support of Plaintiffs. (R1:117-119: R2:229-30.)

The House and Senate each filed responses and cross-motions for summary judgment in support of Amendment 7; the Department of State/Secretary of State adopted the responses of the House and Senate. (R1:120-158; R1:159-181; R1:182-84.) The parties filed final replies in support of their respective motions for summary judgment. (R2:185-201; R2:202-204; R2:205-216; R2:217-228.)

After hearing argument on the motions, the trial court found that the ballot summary of Amendment 7 clearly and conclusively failed to inform the voter in plain language of what was to be voted upon. (T:73-79.) The court found that although the ballot summary matched the amendment's text, both were very difficult to understand. (T: 77-78) (stating it took the court three days, reading all of the cases and briefs and hearing all of the arguments, to understand the amendment and its effect on existing laws and provisions in the constitution.) The court found an average voter would not be able to make an informed decision

about the rights the voter would put in jeopardy by approving the amendment. (T:77-78.) In its written order, the court found:

> Amendment 7, if passed, would allow this or any future legislature, if it chose to do so, to gerrymander districts guided by no mandatory requirements or standards and subject to no effective accountability so long as its decisions were rationally related to, and balanced with, the aspirational goals set out in Amendment 7 and the subordinate goal of contiguity.

(R2:272.) Because the ballot title and summary failed to inform voters of the ramifications of the amendment, the court enjoined the Department of State and Secretary of State from placing Amendment 7 on the ballot for the 2010 general election. (*Id.*)

The Defendants filed a joint notice of appeal from the final judgment. (R2:274-281.) The First District certified the case pursuant to article V, section 3(b)(5) of the Florida Constitution, as passing upon a question of great public importance requiring immediate resolution by this Court. This Court accepted jurisdiction by order dated July 19, 2010.

SUMMARY OF THE ARGUMENT

Florida law requires all proposed amendments to the Florida Constitution, no matter their source, to be presented to voters with a clear and unambiguous explanation of the measure's chief purpose. Amendment 7 fails to meet this requirement.

The chief purpose of Amendment 7 is to maximize the Florida Legislature's discretion in drawing legislative and congressional districts by freeing it from all existing and future mandatory standards and minimizing the degree to which its plans may be reviewed for compliance with the standards in the Florida Constitution. The ballot title and summary the legislature approved for submission to the voters for Amendment 7 fails to inform voters of this purpose and effect. Specifically, voters are not informed that the discretionary redistricting criteria identified in the amendment may be implemented at the expense of other existing and future mandatory redistricting standards in the Florida Constitution, including the requirement that districts be contiguous. The failure to disclose this effect to Florida voters renders Amendment 7 fatally deficient.

Amendment 7 is also defective because its title suggests it creates "standards" when it does not. Further, it fails to disclose that it reduces the standard of review of compliance with redistricting standards in the State Constitution to the lowest standard recognized in the law, it fails to define the phrase "communities of common interest," and it fails to inform voters of its intent to nullify the effects of citizen-proposed Amendments 5 and 6, if approved by the voters.

ARGUMENT

I. STANDARD OF REVIEW

The question of whether a proposed constitutional amendment is defective is a pure question of law, subject to de novo review. *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008); *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

II. THE TRIAL COURT CORRECTLY FOUND THAT AMENDMENT 7'S BALLOT TITLE AND SUMMARY FAIL TO STATE IN CLEAR AND UNAMBIGUOUS LANGUAGE THE AMENDMENT'S CHIEF PURPOSE AND EFFECT.

A. The Legal Standard

Florida law imposes an "accuracy requirement" on all proposed constitutional amendments. *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000). This requirement flows from Article XI, section 5 of the Florida Constitution and is codified in Section 101.161(1), Florida Statutes.

Under these provisions and this Court's precedent applying them, a ballot title and summary must provide a clear and unambiguous explanation of the measure's chief purpose. *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982). They must disclose substantial impacts to the Florida Constitution. *Advisory Opinion to the Attorney Gen. re Term Limits Pledge*, 718 So. 2d 798, 803-804 (Fla. 1998). The ballot title and summary cannot be misleading, either expressly or by omission. *Askew*, 421 So. 2d at 155-56. A ballot title and summary cannot "fly

under false colors" or "hide the ball" as to the amendment's true effect. *Armstrong*, 773 So. 2d at 16. Courts will strike proposed amendments from the ballot that are clearly and conclusively defective under these standards. *Askew*, 421 So. 2d at 154.

The Court affords a measure of deference to the legislature in reviewing legislatively-proposed amendments. *Armstrong*, 773 So. 2d at 14 ("our first duty is to uphold [the legislature's] action if there is any reasonable theory under which it can be done") (quoting *Gray v. Golden*, 89 So. 2d 785, 790 (Fla. 1956)). "This deference, however, is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature." *Id.* Thus, the deference to legislative enactments does not exempt legislatively-proposed amendments from application of the same standard applicable to all proposed amendments, *i.e.*, whether the ballot title and summary "state in clear and unambiguous language the chief purpose of the measure." *Askew*, 421 So. 2d at 154-55. Such deference simply means that in order to strike a legislatively-proposed amendment from the ballot, the Court must find without any doubt that the ballot language is deficient. Where "there is doubt as to whether the Legislature has violated . . . strictures on their amendatory powers, [courts] are compelled to sustain [the] legislative action." *Smathers v. Smith*, 338 So. 2d 825 (Fla. 1976).

B. Amendment 7's Chief Purpose and Effect

The chief purpose and effect of Amendment 7 is to eliminate mandatory application of any existing or potential requirements related to redistricting in the Florida Constitution and to reduce the required level of compliance with existing and potential constitutional requirements to the lowest level recognized in the law.

The Florida Constitution currently provides only minimal specifications regarding the legislative districts that the legislature is to redraw every ten years: the legislature "shall apportion the state . . . into . . . consecutively numbered . . . districts of either contiguous, overlapping, or identical territory." Art. III, § 16, Fla. Const. Amendment 7 would permit—but not require—the legislature to reference two additional factors when drawing legislative and congressional districts: one, "the ability of racial and language minorities to participate in the political process and elect candidates of their choice" is to be "*take[n] into consideration*," and two, "communities of common interest other than political parties *may be respected and promoted*." (Emphasis added.) Although "*consideration*" of the specified interests of racial and language minorities is mandatory, action based upon these considerations is not. Therefore, it would be permissible under this provision for the legislature to consider the ability of a certain racial or language minority group to participate in the political process and elect a candidate of its choice but ultimately to decide, for any reason or for no

reason at all, to decline to take these interests into account when drawing the districts. Treatment of "communities of common interest" is even more permissive: such communities "*may be* respected and promoted." (Emphasis added.) Thus under Amendment 7 it would be permissible for the legislature to decide, for any reason or for no reason at all, to decline to consider communities of common interest when establishing legislative and congressional districts.

Notwithstanding the permissive nature of these considerations, Amendment 7 allows them to be followed "without subordination to any other provision of Article III of the State Constitution." Thus, Amendment 7 allows its new criteria to trump the existing constitutional requirement that districts be contiguous. Additionally, even though passage of Amendments 5 and 6 would result in additional mandatory redistricting standards, Amendment 7's "without subordination to" language would effectively nullify these new standards and allow them to be trumped by the permissive interests identified in the amendment. The result is there will be no mandatory standards, and the legislature will have unfettered discretion to draw districts motivated by purely political interests.

Further, whereas the Florida Constitution currently requires redistricting to be conducted "in accordance with the constitution of the state," Article III, Section 16, Florida Constitution, under Amendment 7 the state is to "balance and implement" the state constitutional standards, and its districts and plans are valid if

such balancing and implementation is "rationally related" to the standards in the state constitution. Thus Amendment 7 would render valid all but "irrational" districts and plans, even when the plans violate requirements of the Florida Constitution that are by their own terms mandatory.

C. Amendment 7 does not clearly and unambiguously inform voters that it would convert all existing and future mandatory redistricting standards, including contiguity, into optional criteria to be balanced with other aspirational goals, subject to minimal court scrutiny.

1. Plain Language

The Court has interpreted article III, section 16 of the Florida Constitution to require that each individual district be contiguous within itself, while allowing an individual district to overlap with, or be identical to, another individual district. *Advisory Opinion to the Attorney Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 190-91 (Fla. 2009) (citing *In re Apportionment Law Appearing as Senate Joint Resolution No. 1E*, 414 So. 2d 1040, 1045, 1050 (Fla. 1982)). The Court defines "contiguous" to mean "being in actual contact: touching along a boundary or at a point." *In re Constitutionality of House Joint Resolution 25E*, 863 So. 2d 1176, 1179 (Fla. 2003).

Amendment 7 would require *consideration* of the interests of racial and language minorities and *permit* respect and promotion of communities of common

interest "without subordination to" any other provision of Article III of the constitution. As the trial court found, this language is very difficult to decipher. (T: 77-78.) Upon careful study, however, it is apparent this language would allow the permissive considerations of Amendment 7 to trump the existing mandatory requirement in Article III, Section 16, that districts be contiguous. Thus, Amendment 7 would permit the legislature to justify a non-contiguous district by, for example, finding it is necessary to respect and promote a certain community of common interest which is not geographically contiguous. This could result in districts with detached, polka dot style segments not connected to each other. Thus the existing mandatory standard of contiguity would be "subordinated" to the wholly permissive considerations in Amendment 7.

Defendants dispute this effect, urging the Court to interpret the phrase "without subordination to" to mean "on equal footing." But this is not what the amendment says. As Defendants recognize, "subordinate" means inferior. The discretionary considerations of racial and language minorities and communities of common interest may not be assigned an *inferior* or *lower* value than "any other provision of Article III of the State Constitution." But *not lower* does not necessarily mean *on equal footing*. Indeed, *not lower* could just as well mean *higher*. It is true the legislature could have chosen other words (such as "notwithstanding," "elevate," or "priority") that would have made it clearer that the

permissive considerations of Amendment 7 may trump other redistricting standards. But the legislature also easily could have chosen words to express clearly that the Amendment 7 standards were to be "equal," or "on par with," other standards in Article III relating to redistricting. If that is what the legislature meant, that is what it should have said. Instead, by using the complicated phrase "without subordination to" which is difficult for experienced lawyers and judges to understand, the legislature hid the ball from voters as to the amendment's true meaning and effect.

The provision in the first sentence of Amendment 7 requiring the state to "balance and implement" the state constitutional standards does not to preserve the contiguity requirement. This first sentence 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. *See* Mirriam-Webster Online (defining the verb "balance" to mean to "counterbalance" or "offset.") 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). Additionally, contrary to Defendants' repeated assertions that the amendment requires "all" standards to be implemented, the word "all" appears only in Defendants' brief, not in the amendment summary or text.

Furthermore, the fact that Amendment 7 requires the state to "balance and implement" the state constitutional standards while requiring it to "apply" federal requirements suggests that to "balance and implement" standards means something less than to "apply" them. 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). Thus Amendment 7's "balance and implement" language, read together with the "without subordination language," permits the legislature to draw non-contiguous districts justified by—or "balanced with"—the permissive considerations relating to racial and language minorities or communities of common interest.

Similarly, the provision in the last sentence of Amendment 7 providing that districts and plans "are valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution" also permits the contiguity requirement to be compromised. As with the first two sentences of the amendment, it is far from clear what this sentence means. But the fact that this

provision requires the balancing and implementing of standards to be "rationally related" to the state constitutional standards while requiring such balancing and implementing of standards to be "consistent" with federal law suggests that "rationally related" means something less than "consistent." The legislature cannot be presumed to have chosen different words without intending different meanings. Indeed, in the context of equal protection claims, the "rational relationship" standard is the lowest possible constitutional standard and is appropriately applied only where the challenged legislative action does not affect a fundamental right or a suspect class. *E.g., B.S. v. State*, 862 So. 2d 15, 18 (Fla. 2003).

A test that permits all but irrational plans would certainly permit a plan that sacrifices the contiguity of a district in favor of respect and promotion of a community of common interest—especially in light of Amendment 7's express provision allowing consideration of such interest without subordination to any other redistricting standard. As the trial court correctly concluded, "[p]assage of Amendment 7 would make being contiguous an aspirational goal that could be balanced with other aspirational goals and reviewed for compliance only if the legislative plan were not rationally related, which would be a very weak standard of review. In effect, there would be no review." (T:78).

The Defendants' assertion that the contiguity requirement is an "objective," "clear," "binary" standard which necessarily must be complied with is an

inaccurate, made-up distinction that has no support in case law or the proposed amendment. History shows that the question of whether certain districts satisfy the contiguity requirement is an often-litigated, heavily debated question presenting close questions of interpretation. *In re Apportionment Law Appearing as Senate Joint Resolution 1E*, 414 So. 2d 1040 (Fla. 1982) (rejecting argument that district was not contiguous because its eastern and western ends merely touched and finding challenged district "satisfies, but barely," the contiguity requirement); *In re Constitutionality of Senate Joint Resolution 2G*, 597 So. 2d 276, 280 (Fla. 1992) (holding contiguity requirement is met even if land travel outside of the district is necessary to reach other parts of the district due to the presence of a body of water with no connecting bridge); *In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 828 (Fla. 2002) (district stretching across Lake Okeechobee "stretche[d] to the limits" the contiguity requirement, but was permissible). But even if contiguity could correctly be characterized as an "objective" or "binary" standard, nothing in Amendment 7 gives voters notice that objective and binary standards are not to be included in the "balancing" of state constitutional standards.

The Court need not make an ultimate determination of the proper construction of Amendment 7 to decide this case. The Court need only determine whether the ballot title and summary provide the voter a clear and unambiguous explanation of the measure's chief purpose. *Askew*, 421 So. 2d at 155-56. If the

Court determines without any doubt that the answer to this question is a negative one, it must affirm the decision of the trial court to remove Amendment 7 from the ballot. Although the Court is "wary of interfering with the public's right to vote" on a proposed amendment, it is "equally cautious of approving the validity of a ballot summary that is not clearly understandable." *Advisory Opinion to the Attorney Gen.-Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1994).

2. Rules of Construction

Resort to principles of statutory construction does not render Amendment 7's ballot language any less ambiguous.

The interpretative principle disfavoring implied repeal of a constitutional provision has no application here. As Defendants acknowledge, the trial court did not find that the contiguity requirement was "repealed," but rather that it was relegated to a "subordinate" standard. (R2:271; Initial Brief at 17.) Additionally, the effect of Amendment 7 on the contiguity requirement need not be "implied"—it is contained (albeit surreptitiously) in the phrase "without subordination to any other provision of Article III of the State Constitution." Thus the trial court determined the effect of Amendment 7 upon the existing redistricting standards by construing the specific language in the amendment, not based upon an implication from the absence of reference to existing standards. This fact renders the present

case totally unlike *Advisory Opinion to Attorney Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 190 (Fla. 2009), where the Court rejected the Legislature's argument that Amendment 5 effectively repealed article III, section 16(a) of the Florida Constitution because the amendment "[did] not mention" overlapping or identical districts.

The trial court's construction of the effect of Amendment 7 on present and future mandatory redistricting standards was the only reasonable construction based upon the ballot language the legislature selected for the amendment. But even if the legislature was correct that another reading was "fair," or "debatable," contrary to Defendants' assertion this would not be a basis for reversing the trial court's judgment and submitting the amendment to the voters. The ultimate question before the Court remains whether the ballot language gives voters fair notice of the amendment's chief purpose and effect. *E.g.*, *Armstrong*, 773 So. 2d at 12-13. If the ballot language for Amendment 7 is fairly susceptible of multiple interpretations, then it is ambiguous, and must be stricken from the ballot. *E.g.*, *Smith*, 606 So. 2d at 621 ("At best, the ballot summary is ambiguous about its chief purpose and therefore cannot be included on the general election ballot.").

Defendants seek to import into this proceeding the well-established principle that if there is any interpretation under which a legislative enactment can be deemed valid, the court is obligated to adopt that construction. *E.g.*, *State v.*

Presidential Women's Ctr., 937 So. 2d 114, 116 (Fla. 2006) (narrowly construing terms "reasonable patient" and "risks" in abortion informed consent statute to find statute was not unconstitutionally vague). But this principle must be read together with the standard in proposed amendment cases requiring that notice to the voter of an amendment's purpose and effect be clear and unambiguous. Thus, as the trial court correctly found, the Defendants would prevail if "there is any possible interpretation of the ballot language and title *that allow a finding that they comply with the [statute] and the case authority* [regarding the accuracy requirement] . . . ." (R2:271) (emphasis added). No such interpretation exists in the present case.

3. Legislative History

Although Defendants pepper their brief with carefully selected excerpts of committee meetings and staff analyses, none of them are relevant to the ultimate question in this case: whether Amendment 7's ballot language gives voters clear and unambiguous notice of the Amendment's chief purpose and effect. "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, such as the amendment's main effect." *Armstrong*, 773 So. 2d at 18.

By extensively relying upon legislative history to support their construction of Amendment 7, Defendants effectively concede that the ballot language they

approved for submission to the voters is ambiguous. It is only appropriate to look to legislative history if the words of the legislative enactment itself are ambiguous. *E.g.*, *Fla. Convalescent Ctrs. v. Somberg*, 840 So. 2d 998, 1001 (Fla. 2003).

In any event, some of the legislative history the Defendants fail to cite contradicts the very construction they now assert. Specifically, the staff analysis of Amendment 7 states the following in the section entitled "Effects of the Proposed Joint Resolution":

> Racial and Language Minorities: . . . . This portion of the proposed joint resolution establishes the discretion of the state, in state law, to create and maintain districts that enable the ability of racial and language minorities to participate in the political process and elect candidates of their choice, *without other standards in Article III of the Florida Constitution being read as restrictions upon or prerequisites to the exercise of such discretion*.

(R1:92) (emphasis added). This same analysis also states the joint resolution "prohibits other standards in Article III from being read as a prohibition against the creation of crossover districts." (R1:94.) The analysis further states that "because the standards contained in this amendment are not subordinate to any other provision in Article III, *they would be of at least equal dignity with the standards contained in Subsection (1) of the [Amendments 5 and 6*], and would be superior to the standards contained in Subsection (2) of [Amendments 5 and 6]." (R1:95) (emphasis added).

Each of these statements contradicts the construction of Amendment 7 Defendants urge this Court to adopt, and support the conclusion reached by the trial court based upon an objective review of the amendment language.

D. Similarity between the summary and amendment text does not automatically satisfy the accuracy requirement.

The text of Amendment 7 is difficult for even trained judges and lawyers to comprehend. (T: 77-78.) The average voter would find it nearly impossible to discern the chief purpose and effect by reading the summary or the amendment itself; use of the amendment language as a summary does not excuse its lack of clarity. The purpose of the accuracy requirement and the legislature's obligation to provide voters sufficient information "is to ensure that each voter will cast a ballot based on the *full* truth." *Armstrong*, 773 So 2d at 21. "To function effectively – and to remain viable – a constitutional democracy must require no less." *Id.*.

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 this 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 Initial Brief at 28-30).

But 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. *E.g.*, *id.* at 488 ("We do not believe that this argument makes the summary misleading . . . .").

When, as here, a ballot summary is substantively identical to the text yet still fails to inform voters of the amendment's chief purpose or is misleading, it should be stricken. *Armstrong*, 773 So. 2d at 15 (explaining that even though ballot summary in *Askew* "faithfully tracked the text of the amendment," it was defective for failing to explain that it would supersede an existing constitutional provision); *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).

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,* 421 So. 2d at 155 ("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).

III. AMENDMENT 7 IS DEFECTIVE FOR SEVERAL ADDITIONAL REASONS.

A. The ballot title and summary mislead the public by suggesting that the amendment creates "standards," when it does not.

In an obvious attempt to confuse or mislead voters, Amendment 7's title mimics the titles of Amendments 5 and 6. If Amendment 7 were to be on the ballot, voters would see the following ballot titles:

Amendment 5:	STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE REDISTRICTING
Amendment 6	STANDARDS FOR LEGISLATURE TO FOLLOW IN CONGRESSIONAL REDISTRICTING
Amendment 7	STANDARDS FOR LEGISLATURE TO FOLLOW IN LEGISLATIVE AND CONGRESSIONAL REDISTRICTING

The title of Amendment 7 is obviously designed to make voters think each of these amendments would impose standards for the legislature to follow when

conducting the redistricting process under the Florida Constitution. But this is not the case; although Amendments 5 and 6 propose express, mandatory standards, Amendment 7 makes ambiguous suggestions regarding interests that may be considered and allows these suggestions to trump both current and future redistricting standards. By placing Amendment 7 immediately after Amendments 5 and 6 and making its title indistinguishable from the titles of 5 and 6, Amendment 7 "flies under false colors" in an attempt to entice voters into believing that all three amendments will impose standards for the legislature to follow in redistricting. This is not the case, and voters deserve to know the truth.

Far from creating standards, as the Legislature admits in its Staff Analysis (R1:92, 94, 95), Amendment 7 will give the Legislature discretion to draw districts to suit its interests without adhering to any present or future mandatory requirements. Although the amendment identifies two interests not in the current constitution, it does not require compliance with these interests and therefore sets no "standards." The ability of racial and language minorities to participate in the political process and elect candidates of their choice need only be "take[n] into consideration," and "communities of common interest" (whatever they may be) "may be" (but don't have to be) "respected and promoted." These are not "standards." At best, they are, as the trial court called them, "aspirational goals." (T:78.) By leading the ballot summary with a title that states otherwise,

Amendment 7 misleads voters. *See Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (statement that amendment would "establish" citizens rights in civil actions was misleading where amendment actually capped level of recoverable noneconomic damages); *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991) (ballot language especially defective if it "gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence").

Nor does Amendment 7's attempt to create a new level of review create a redistricting standard. The purported rational relationship test means that only an irrational plan will not be deemed valid, but sheds no light whatsoever on the criteria for measuring acceptability of a district or redistricting plan. There is nothing in the amendment that justifies the title's promise that Amendment 7 will create standards for redistricting. On the contrary, the Legislature's amendment would eliminate mandatory rules for drawing district lines.

B. The ballot summary does not inform voters that Amendment 7 would reduce the level of judicial scrutiny of redistricting plans and districts.

Amendment 7 proposes to implement a new standard for judicial review of legislatively-apportioned districts and plans by declaring such districts and plans "valid if the balancing and implementation of standards is rationally related to the standards contained in the State Constitution." The Florida Supreme Court has not

previously applied a rational relationship test to evaluate a legislative redistricting plan; rather, it looks to whether the plan facially "violates" the Florida Constitution. *See In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 825 (Fla. 2002) (*In re HJR 1987*). Furthermore, the Court's determination of the facial validity of an apportionment plan is without prejudice to subsequent "as applied" challenges based upon specific factual situations. *In re Apportionment Law Appearing as Senate Joint Resolution Number 1305*, 263 So. 2d 797, 808 (Fla. 1972); *In re HJR 1987*, 817 So. 2d at 829-31. The ballot summary fails to inform the voters whether the new "rational relationship" standard of review applies only to the facial review or to the as-applied challenges as well.

The "rational relationship" standard is the lowest constitutional standard applied to equal protection claims and is appropriately applied where the challenged legislative action does not affect a fundamental right or a suspect class. *E.g., B.S. v. State*, 862 So. 2d 15, 18 (Fla. 2003). Although it is not clear how an equal protection standard would be applied to specific constitutional standards, it is clear that the legislature intended to permit only the lowest level of constitutional review of its redistricting plans. As the trial court found, application of a "rationally related" test would mean "a very weak standard of review"; "[i]n effect, there would be no review." (T:78). Because the ballot summary does not inform

voters of this chief purpose and effect, Amendment 7 must be stricken from the ballot.

C. The ballot summary fails to inform voters of the meaning of the phrase "communities of common interest;" thus voters are left to guess at its meaning.

Amendment 7's ballot summary and text both provide that "communities of common interest other than political parties may be respected and promoted . . . without subordination to any other provision of Article III of the State Constitution." The phrase "communities of common interest" does not currently appear in the constitution and there is no definition or explanation of its meaning. This renders the amendment fatally ambiguous.

When a ballot summary uses a legal phrase, voters must be informed of its legal significance. *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) (striking proposed amendments relating to government discrimination because summary did not define "bona fide qualifications based on sex"). Otherwise, voters are left to guess at the term's meaning and will rely upon their own conceptions to do so. *Id.* A summary that does not define important terms is vague and ambiguous and thus violates Section 101.161, Florida Statutes. *Id; see also Advisory Opinion to the Attorney Gen. re People's Prop. Rights Amendments Providing Compensation for Restricting Real Prop. Use May Cover*

Multiple Subjects, 699 So. 2d 1304, 1309 (Fla. 1997) (striking ballot summary that failed to define "common law nuisance" because it did not inform the voter what restrictions were compensable under the amendment).

Without any definition of "communities of common interest," voters are left to guess at what this term means and will do so based upon their own conceptions and experiences. Voters' perceptions of "communities of common interest" will range broadly, from immigrant communities to country club communities to communities of people with common physical characteristics. A common understanding of this term is especially important because Amendment 7 would allow such communities to be "respected and promoted" without subordination to every other redistricting standard in the constitution, both present and future. This means that respect and promotion of a community of common interest could permissibly be the sole justification for the shape of a district that fails to comply with other mandatory criteria. Failure to provide voters with a definition of this potentially dispositive term deprives them of fair notice that the effect of Amendment 7 is to allow the legislature unrestricted discretion to disregard existing and future mandatory redistricting standards.

D. The ballot summary does not inform voters that the purpose and effect of the legislature's amendment 7 is to allow the legislature to draw districts that avoid the restrictions of citizens' initiatives 5 and 6.

The legislature admits that the purpose of Amendment 7 is to give it discretion to avoid the restrictions of the other standards in Art. III, including those that would be added by Amendments 5 and 6. (R1:92, 94, 95.) Voters are not given fair notice of this purpose and effect.

Amendments 5 and 6, if approved by the voters, will add several mandatory standards to the congressional and legislative redistricting process. Under these amendments, legislative and congressional districts may not be drawn "with the intent to favor or disfavor a political party or incumbent" or "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice," and "districts shall consist of contiguous territory." Furthermore, to the extent consistent with these mandatory standards and federal law, districts shall be "as nearly equal in population as is practicable; . . . compact ; and . . . where feasible, utilize existing political and geographical boundaries." (R1:71-72.)

Amendment 7 uses language very similar to Amendments 5 and 6 relating to racial and language minorities, attempting to confuse voters into believing all three amendments will benefit these groups when in fact Amendment 7 would effectively eliminate the protections that would be given to racial and language minorities by Amendments 5 and 6. Amendments 5 and 6 state unequivocally that:

> districts *shall not be drawn* with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.

(R1:71,72) (emphasis added.) This statement is unambiguous; it creates a mandatory standard which must be complied with in order for the legislature's redistricting plan to be valid. Amendment 7, on the other hand, states:

> 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 . . . without subordination to any other provision of Article III of the State Constitution.

(R1:75) (emphasis added.)

The language in Amendment 7 relating to racial and language minorities is seductively similar to that of Amendments 5 and 6, yet its effect is fatal to Amendments 5 and 6. Under Amendment 7 the legislature need only "take into consideration" the ability of racial and language minorities to participate in the political process and elect candidates of their choice. Once considered, the legislature is free to decline to take these interests into account when drawing districts. And because this "consideration" is at least equal to every other standard in the constitution, including those contained in Amendments 5 and 6, the legislature would remain free to draw a redistricting plan with the "intent or result of denying or abridging the equal opportunity of racial or language minorities to

participate in the political process or to diminish their ability to elect representatives of their choice."

Thus even though voters will believe they are furthering the interests of racial and language minorities by voting "yes" for Amendments 5, 6, and 7, the reality is Amendment 7 destroys the very protections voters intended to create with their "yes" vote on Amendments 5 and 6. The ballot summary does not disclose this. Under these specific circumstances, the Legislature's failure to give voters notice of its purpose and effect (to avoid the restrictions of the citizen initiatives) renders the proposal misleading and contrary to section 101.161(1), Florida Statutes.

This result is supported by *Kobrin v. Leahy*, 528 So. 2d 392, 393 (Fla. 3d DCA 1988), *rev. denied*, 523 So. 2d 577 (Fla. 1988). In *Kobrin*, a race to elect members to a county fire and rescue district was scheduled to be on the ballot. *Id.* The county then proposed to place a proposition in the ballot that would eliminate the district entirely, notwithstanding the election of district members to take place in the same election. *Id.* The court struck the proposition because it made no specific reference to the "totally inconsistent, but simultaneously conducted election, nor even to the elimination of the board itself." *Id.* The court concluded that "the apparent studied omission of such a reference 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." *Id.*

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 opinion does not govern the facts of this 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, but had not yet acquired the number of petitions necessary to be *placed* on the ballot. 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*.[1] The "alternative" proposed amendment approved by the Court in *Growth Mgmt. Initiative* still has not achieved ballot position.[2] 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 citizen-sponsored amendments were certain to appear on the 2010 general election ballot, and the legislature

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[1] *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&ElecType=GEN (last visited June 30, 2010).

[2] *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).

intentionally drafted Amendment 7 to interfere with their effectiveness, even borrowing their titles and portions of their text to conceal from voters the devastating effect of Amendment 7 on the effectiveness of Amendments 5 and 6. There can be no more classic case of "hiding the ball". 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 unprecedented circumstances, in order to satisfy the accuracy requirement, Amendment 7's ballot summary must inform voters of its chief purpose and effect of eviscerating the mandatory standards contained in Amendments 5 and 6. Its failure to do so renders Amendment 7 clearly and conclusively defective.

CONCLUSION

The trial court correctly determined that the ballot title and summary of Amendment 7 fail to inform voters in clear and unambiguous language of the amendment's chief purpose and effect. Accordingly, voter approval would be a nullity. The trial court's ruling should be affirmed.

Respectfully submitted,

/s/

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