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Case No. SC19-1341

SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE GOVERNOR RE: IMPLEMENTATION OF AMENDMENT 4, THE VOTING RESTORATION AMENDMENT

REPLY BRIEF OF SECRETARY OF STATE, LAUREL M. LEE

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NOTE ON SUPPLEMENTAL APPENDIX

A supplemental appendix is provided here in lieu of a record. *See* Fla. R. App. P. 9.220. The supplemental appendix contains eight attachments. Citations to the supplemental appendix begin with "Supp. App. __," and include a pin-citation.

ARGUMENT

1. An emphasis on words, not wishes.

The Secretary's position is this: "[T]he words employed" are the clearest expression of intent. *Ervin v. Collins*, 85 So. 2d 852, 855 (Fla. 1956). Words are critically important "when construing constitutional provisions because it is presumed that they have been more carefully and deliberately framed than statutes." *Dep't of Envtl. Prot. v. Millender*, 666 So. 2d 882, 886 (Fla. 1996). This Court further recognizes "that those who drafted the Constitution had a clear conception of the principles they intended to express, that they knew the English language and that they knew how to use it, that they gave careful consideration to the practical application of the Constitution and arranged its provisions in the order that would most accurately express their intention." *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 510 (Fla. 2008) (quoting *Ervin*, 85 So. 2d at 855).

The words that millions of Floridians approved during the November 2018 General Election impose two distinct conditions for re-enfranchising felons outside of the clemency process: (1) commission of a crime other than "murder or a felony sexual offense," and (2) "completion of all terms of sentence including parole or probation." Art. VI, § 4, Fla. Const. The words cannot be rewritten. Conditions imposed cannot be erased. *See Lawnwood*, 990 So. 2d at 510.

Yet others argue that "[t]he Court has an opportunity to follow the Florida electorate's wishes and find that Amendment 4 allows returning citizens to register to vote upon completion of their term of incarceration, probation, and parole." LaVia & LaRoche Br. at 3; *see also* ACLU, *et al.* Br. at 28, 38; Schlakman Br. at 6; Raysor, *et al.* Br. at 42–44. This emphasis on *perceived* wishes, not words, belies a critical flaw that infects any argument for a broader, policy-based interpretation of Article VI, section 4. The goal in this proceeding is to provide an opinion about the plain, ordinary, and fixed meaning of the words used. Only the words on the ballot capture the electorate's intent. Words matter. Guesses about wishes do not.

2. Interpreting text, not playing textual games.

Semantic and syntactical games cannot deprive the words of their plain, ordinary, and fixed meaning either. The Secretary provides several examples.

First, applying the negative-implication or *expressio unius* cannon, the ACLU, NAACP, Brennan Center, and League of Women Voters argue that the phrase "'completion of all terms of sentence' cannot require something extratextual, because the specific expression of parole and probation implies the exclusion of other penalties." ACLU, *et al.* Br. at 35. Note that the constitutional text does not include the words "incarceration" or "confinement"; however, all agree that a felon must at least complete the term of incarceration before being re-enfranchised. Note further that the ACLU's interpretation writes-out the word "including." Rendering

any word surplusage is bad enough, but the word "including" is of particular importance. This Court has said that "it is improper to apply *expressio unius* to a statute in which the Legislature has used the word 'include,'" because "the Legislature uses the word 'including' in a statute as a word of expansion, not of limitation." *White v. Mederi Cartenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 781 (Fla. 2017). Stated differently, the use of the word "including" offers illustrative examples, not an exhaustive list. *Id.*; *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 132, 226 (2012). It is improper to apply the *expressio unius* cannon while ignoring the meaning of the word "including." *Cf.* Scalia & Garner, *supra*, at 107 ("Virtually all the authorities who discuss the negative-implication cannon emphasize that it must be applied with great caution, since its application depends so much on context.").

Second, in a related vein, Schlakman argues that the lack of a comma between the words "sentence" and "including" in the constitutional text signals that "parole" and "probation" provide an exhaustive list of "all terms of sentence." Schlakman Br. at 6. Not so. Whether he says it or not, Schlakman's argument makes a distinction between restrictive and nonrestrictive clauses. Restrictive clauses lack commas and limit or modify the meaning of a sentence element in an essential manner. *See* Strunk & White, *The Elements of Style* 94 (4th ed. 2000). Nonrestrictive clauses contain commas and add information about a sentence

element. *Id.* The argument is that the lack of a comma in the constitutional phrase makes the phrase a restrictive clause, which then limits the meaning of "all terms of sentence" to "parole" and "probation." The problem, as noted above, is that the meaning of the word "including" is left out of such analysis. And Schlakman fails to recognize that "some grammatical principles are weaker than others" when determining statutory meaning. Scalia & Garner, *supra*, at 142. Relying on the distinction between restrictive and nonrestrictive clauses is "a weak basis for deciding statutory meaning," *id.*, and such reliance simply cannot alter the meaning of "include" or the participle "including." *See, e.g.*, *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017) (holding that use of the word "includes" in the U.S. Sentencing Guidelines, even when not preceded by a comma, refers to an illustrative list) (citing Scalia & Garner, *supra*, at 132, 226).

Third, the ACLU, NAACP, Brennan Center, and League of Women Voters argue that "all terms of sentence" refers only to a temporal duration, not financial obligations. ACLU, *et al.* Br. at 35–37. The phrase "end of the current term of office" is cited as support. *Id.* at 36 (citing Art. VI, § 4(c)). We are told that "terms" and "term" cannot have two different meanings. *Id.* at 36–37. The problem is that "terms" and "term" are not the same. One is singular, the other plural; and so, "terms" and "term" have different meanings. The *term* of a lease, for example, refers to its temporal duration. *See* Gov. Br. at 13–14. The *terms* of a lease refer to the

lease's many conditions. *Id*. In the constitutional text at issue here, the plural "all terms of sentence" is properly read to mean all *conditions* of the sentence rather than all *durations* of the sentence; "all" necessarily refers to multiple terms, not the singular meaning of term as advocated by the ACLU. *See, e.g.,* Terms, *Black's Law Dictionary* 1059 (8th ed. 2004) ("Provisions that define an agreement's scope; conditions or stipulations[.]"); *State v. Akins*, 69 So. 3d 261, 264 (Fla. 2011) (referring to a defendant having "made continual payments as required by the *terms* of his probation" (emphasis added)); *Corp. Express Office Prods., Inc. v. Phillips*, 847 So. 2d 406, 408 (Fla. 2003) ("The *terms* of the noncompete agreement precluded the employees from competing against their employers[.]" (emphasis added)).

Thus, when the Florida Constitution imposes "completion of *all* terms of sentence including probation and parole" as a condition of felon re-enfranchisement, the phrase encompasses incarceration, confinement, supervision, parole, probation, fines, fees, costs, restitution, and any other conditions in the criminal sentence. Art. VI, § 4(a), Fla. Const. (emphasis added). "All means all." *Kennedy v. Lynd*, 306 F.2d 222, 230 (5th Cir. 1962).

3. Candor to this Court, the State, and the Public.

Even counsel for Amendment 4's Sponsor agreed that all means all when arguing for the amendment's inclusion on the November 2018 General Election Ballot. Sec'y Int. Br. App. at 13. His exact words were: "[A]ll terms means all

terms within the four corners" of the sentencing document. *Id.* Some argue that this and other statements to the Justices of the Florida Supreme Court carry little weight. *See* ACLU, *et al.* Br. at 47. Others agree and attempt to otherwise minimize the effect of the statements made at oral argument. *E.g.*, Raysor, *et al.* Br. at 46–49.

Notably, however, Amendment 4's Sponsor has not retracted the statements. This silence is deafening when we consider that the Sponsor has filed an *amicus curiae* brief before the federal court—not this Court. Supp. App. at 4–37.[1]

The statements made at oral argument also cannot be dismissed. As discussed in the Secretary's Initial Brief, the Sponsor made the statements—answered questions to be more precise—to satisfy this Court that the ballot summary was not misleading. *See* Sec'y Int. Br. at 13–15. Without the Sponsor's answers and explanations, Amendment 4 and its summary would have been stricken as misleading. *Id.* Because "oral argument is the only time that all of the members of the court and all of the lawyers are together to discuss the case," and work towards

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[1] In its federal *amicus* brief, the Florida Rights Restoration Coalition stated that it "led the campaign to end permanent disenfranchisement in Florida," "submitted the first draft of Amendment 4 to the Florida Division of Elections and collected over 66,000 signatures to secure review" by the Supreme Court of Florida, and collected "signatures from more than 1.1 million voters to qualify Amendment 4 for the November 2018 ballot." Supp. App. at 17. It even "created a political action committee, met with legislators, and ran a public education campaign," and "spent more than $1.4 million to make Amendment 4 a reality." *Id.* at 17–18. The political committee is called Floridians for a Fair Democracy, Inc., and is listed as the official Sponsor of Amendment 4. *See* Sec'y Int. Br. at 4; App. at 45.

a "resolution of the appeal," statements made at oral argument cannot simply be wished away. *Inquiry Concerning Judge Schwartz*, 755 So. 2d 110, 114 (Fla. 2000) (citations omitted). Oral argument is meaningful. Words said at a prior oral argument by an officer of this Court proved meaningful. *See* Sec'y Int. Br. at 13–15 (contrasting with cases where ballot summaries were found to be misleading).[2]

The statements made at oral argument were not isolated either. The Sponsor, the ACLU, and the League of Women Voters meticulously considered Amendment 4's scope and language. *See* Supp. App. at 38–129. An army of lawyers and messaging experts workshopped the legal and public-relations ramifications of different versions of the amendment. *See id.* at 38–53; 90–105; 125–29. After weighing their options, the Sponsor and its allies settled on the scope and language later calcified in Amendment 4. They then repeatedly told Floridians—through press releases, voter guides, and letters to the State—that "all terms of sentence" includes financial obligations imposed as part of the criminal sentence. Sec'y Int. Br. at 6–8 (citing App. at 33–68, 83–86, 122). Polling by the Sponsor, the ACLU, the Brennan

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[2] Criticism of the Sponsor's advocate at oral argument is misplaced. *See, e.g.*, Raysor, *et al.* Br. at 47 ("So too should the Court here decline to accord any weight to the passing statements of a single lawyer—statements that are contradicted by the mountain of evidence offered herein of voters' intent to exclude an LFO requirement."). Jon L. Mills ably advocated for his client and provided answers consistent with his client's publicly stated positions both before and after the vote on November 6, 2018. *Infra*; *see also* Sec'y Int. Br. at 8 (referring to a letter sent to the Secretary in December 2018 reiterating the same points).

Center, and others supported these points. Supp. App. at 38–105. The polling showed that "[a]n exclusion for fines and fees will lower support," *id.* at 42, but "support increases for a version that includes completion of all sentence terms including restitution." *Id.* at 93. "Messaging" telling voters that felons would be re-enfranchised "once they have completed their entire sentence, including probation, parole, and paid all fines" was deemed "very convincing," *id.* at 73, and outweighed "cons" such as the following: "the poor [would be] unable to pay fines and restitution." *Id.* at 103. The Sponsor and its allies held firm to their poll-tested message as late as December 2018. *See* Sec'y Int. Br. at 8 (citing letter).

Thus, it is disingenuous for many of those responsible for telling this Court, the State, and the public that Amendment 4 meant one thing to now say that Article VI, section 4(a) means something else. Words must have fixed meaning. Words said to this Court, the State, and the public should have some meaning too because otherwise the integrity of the citizen initiative process suffers. *Cf. Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008) (looking to intent of an amendment sponsor while interpreting meaning of constitutional text).

4. Jurisdictional distractions.

Finally, this Court has jurisdiction to issue the advisory opinion. This Court said so in August 29, 2019 Order. Arguments to the contrary are rooted in contortions of law and logic, and some are just plain confusing.

We are told that "any opinion by this Court concerning the meaning of Amendment 4 is necessarily a commentary on the constitutionality of SB7066." ACLU, *et al.* Br. at 19. There is no meaningful explanation of how.

We are told that providing an opinion about the meaning of the phrase "completion of all terms of sentence . . . does not impact the exercise of the Governor's powers or duties." ACLU, *et al.* Br. at 20. This ignores that the Secretary serves at the pleasure of the Governor and, as an appointee of the Governor, oversees the registration of eligible Florida voters consistent with Article VI, section 4 of the Florida Constitution.[3] If this Court decides that "completion of all terms of sentence" does *not* include financial obligations, the State would comply with the Florida Constitution. "The supreme executive power . . . vested in [the] [G]overnor" is clearly implicated. Art. IV, § 1(a), Fla. Const.

We are told that an advisory opinion concerning a *state* constitutional provision is impermissible because *federal* lawsuits have been filed challenging not the constitutional provision but related state legislation. *See* ACLU, *et al.* Br. at 20. Yet there is no rule or case that deprives this Court of jurisdiction concerning an opinion about a *state* constitutional provision when someone files a *federal* lawsuit

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[3] The Secretary herself lacks the power to seek an advisory opinion from this Court in the first instance.

challenging a *state* statute. Regardless, the federal court's interpretation of Florida law does not bind Florida courts. *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976).

We are told to wait for "development of state law issues on a full record in the lower Florida courts," but this does not defeat jurisdiction to issue an advisory opinion either. ACLU, *et al.* Br. at 23. If waiting for state litigation to begin and end defeated jurisdiction, this Court might never issue advisory opinions under Article IV, section 1(c) of the Florida Constitution.

We are told to ignore this Court's opinion in *Advisory Opinion to the Governor—1996 (Everglades)*, 706 So. 2d 278 (Fla. 1997) because the ACLU and its friends cannot find another case like it. *See* ACLU, *et al.* Br. at 25–26. But the opinion sought in *Everglades*, as here, was rooted in Article IV, section 1(c) of the Florida Constitution. 706 So. 2d at 279. The Governor in *Everglades* had to be mindful of ongoing federal litigation[4] involving the United States, the South Florida Water Management District, the Department of Environmental Protection, and agricultural interests just as the Governor must now remain mindful of ongoing federal litigation. *Id.* The Governor in *Everglades* had a detailed legislative scheme, the Everglades Forever Act, that he had to consider. *Id.* The Governor in *Everglades* sought an opinion "[a]s the state's chief administrative officer responsible for

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[4] As of the date of this filing, the original Everglades litigation remains pending in the Southern District of Florida. *See United States v. S. Fla. Water Mgmt. Dist.*, Case No. 88-1886-Moreno (S.D. Fla. Filed 1988).

planning and budgeting" so that he could faithfully implement a constitutional amendment approved through the citizen initiative process just as he does so here as the State's Chief Executive. *Id.* at 281. This Court provided an opinion in *Everglades. Id.* at 281–83.

There is no reason to now diverge from *Everglades*. *See id.* This Court has jurisdiction.

CONCLUSION

The Secretary respectfully asks this Court to reiterate that "all terms of sentence" in Article VI, section 4(a) of the Florida Constitution means all, not some, and includes financial obligations imposed as part of the criminal sentence.

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with the Florida Rule of Appellate Procedure 9.210.

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CERTIFICATE OF SERVICE

I certify that on this **3rd** day of October 2019, the foregoing was filed electronically via the Florida Court's E-Filing Portal, which will send a copy of this filing to all counsel of record.

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