Lambda Legal
making the case for equality

September 29, 2008

VIA FIRST-CLASS MAIL, ELECTRONIC MAIL AND FACSIMILE

Marion J. Radson, Esq., City Attorney
Stephanie Marchman, Esq., Assistant City Attorney
Office of the City Attorney
P.O. Box 490
Station 46
Gainesville, FL 32602-0490
marchmansm@cityofgainesville.org
Fax: 352-334-2229

Re: City of Gainesville Proposed Charter Amendment

Dear Attorneys Radson and Marchman:

It is our understanding that your office is reviewing legal issues concerning the petition-proposed amendment to the Charter of the City of Gainesville. We have been speaking with members of the Human Rights Council of North Central Florida and other concerned citizens, and our research into the issues of which we are aware has raised some concerns that we wish to bring to your attention for your review and consideration. We recognize, of course, that you may already have considered these issues, as well as others that we may not have identified, but wanted to raise the following points, in part because you may be in a position to obtain some of the information needed to further evaluate some of these issues.

In this letter we first identify two issues that may affect whether the proposed amendment should be placed on the ballot. Second, we preliminarily identify potential defects in the substance of the proposed amendment. On this second point, Florida's Supreme Court has stated that constitutional challenges may be brought before or after the election upon the proposal. Our attention to the pre-election issues, however, is in no way intended to suggest that there are not also significant substantive Constitutional defects in the proposed amendment. In particular, the public campaign in support of the proposed Charter amendment "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634 (1996) (invalidating, under federal equal protection clause, Colorado Constitutional Amendment that prohibited state and local government from adopting any law, statute, or regulation to protect homosexual, gay, lesbian or bisexual persons). "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer*, 517 U.S. at 634, quoting *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

I. Background

Gainesville's Charter provides that an amendment to it "may be proposed by a petition signed by 10 percent of the registered voters of the city[.]... The [city] commission shall place the proposed amendment to a vote of the electors at the next general election or at a special election called for that purpose." Charter § 5.01(1). However, unlike the charters of some other cities, Gainesville's Charter does not provide a process by which ordinances may be enacted, amended, or repealed by petition.

In January 2008, the Gainesville City Commission amended portions of Chapter 8 of the Gainesville Code of Ordinances to add gender identity as a class that is protected by the ordinance. The City Commission had previously added sexual orientation as a protected class effective July 1, 1998.

Shortly after the January 2008 amendment, a political committee advocating amendment of the Charter, styling itself Citizens for Good Public Policy ("CGPP"), circulated copies of a petition over a 90-day period. CGPP's website refers to its petition as "the petition to repeal the Gender Identity Ordinance," but in fact, the proposed amendment purports to do far more, by stripping the City's ability to enact local legislation to protect its citizens from discrimination.

A different group of citizens, some of whom formed a political committee called Equality is Gainesville's Business, has been engaged in activity and advocacy against that petition effort and in support of the antidiscrimination protections. Their campaign encouraged registered voters to "decline to sign" the petition. These citizens also spoke with voters and provided their arguments against the proposed amendment. As a result of these citizens' efforts, a number of voters elected not to sign – and, therefore, did not support – the petition.

After reviewing the signed petitions, the Alachua County Supervisor of Elections certified 6,343 signatures. The Supervisor's records show that there were 55,808 registered voters on January 29, 2008, the date of the last municipal election. However, that figure is not the number of all registered voters, because it does not include registered voters designated "inactive." Excluding inactive voters from the calculation of the number of required signatures, as directed by Fl. St. Ann. § 98.065(c), is inconsistent with the equality of voting rights that is provided for in the Florida Constitution

We have requested, but have been unable to obtain, the number of "inactive" registered voters as of January 29, 2008. However, based on the information we have obtained, there is a significant possibility that the total number of registered active and inactive voters in

Gainesville on January 29, 2008 was more than 63,430 – and, therefore, that the petition was signed by fewer than 10% of all of Gainesville's registered voters.

On September 17, 2008, a staff member in the Alachua County Election Supervisor's office stated that he was unable to provide historical data, but that on that day there were 6,169 registered voters designated as "inactive." However, the number of "inactive" registered voters on January 29, 2008 is likely to have been significantly larger than the current number, because on March 6, 2007 – less than one year before the most recent municipal election – there were 68,896 active registered voters in Gainesville. That means that between March 6, 2007 and January 29, 2008, 13,088 registered voters were removed from the list of active voters. As you know, however, removal from the active voter list does not mean that the voters are no longer registered. While some voters' names were removed because they became ineligible to vote, a substantial number of voters whose names were removed are still registered but have been designated as "inactive" because they did not return a form.

Based on the foregoing, and for the reasons discussed below, there is basis to believe that the number of signatures certified was less than 10 percent of the registered voters required by the Charter for the proposed amendment to be submitted to a vote of the electors. If that were indeed the case, it would be legally improper to allow the proposed amendment on the ballot.

II. Procedural Issues

A. Inactive Registered Voters Must Be Counted When Calculating the Number of Signatures Needed to Petition for Amendment to the Charter

1. The Florida Constitution Does Not Permit the Legislature to Grant Active Voters Different Electoral Rights from Inactive Voters

The Florida Constitution forbids providing "active" voters more rights than "inactive" voters. Two sections of Florida's Constitution set forth voter eligibility requirements and disqualifications. The first provides that "[e]very citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered." Fla. Const. Article VI Suffrage and Elections, at § 2 (Electors). The second sets forth the disqualifications from voting eligibility, providing, "No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." Fla. Const. Article VI, § 4 (Disqualifications), at subsection (a).

The Florida Supreme Court has explained that the legislature's authority to regulate the election process is not plenary, and that legislative acts that impose "[u]nreasonable or unnecessary restraints on the elective process are prohibited." *Treiman v. Malmquist,* 342 So.2d 972, 975 (Fla.1977), cited with approval in *American Federation of Labor and Congress of Industrial*

Organizations v. Hood, 885 So.2d 373, 375 (Fla. 2004). The Court has also ruled that "[i]t is not competent for the Legislature, by mere legislative Act, to place restrictions on the qualification of electors which will prohibit any of those electors who may be qualified to vote in such elections under the provisions of the Constitution from participating in such election." *State ex rel. Landis v. County Bd. of Public Instruction of Hillsborough County*, 137 Fla. 244, 247, 188 So. 88, 89 (1939). In *Landis*, the Supreme Court held that a statutory provision "limiting the right to vote in such election to those who 'voted in the general election next preceding the date of holding any election pertaining to such Special Tax Schools Districts' contravenes, and is repugnant to, the standard of qualifications established by ... the Constitution and is, therefore, of no force and effect." *Id.*

In *Treiman*, the Supreme Court held that a requirement that a candidate have been registered to vote in the last preceding general election was unreasonable because it "effectively forecloses the candidacy of all of [those] otherwise qualified persons who, because of age, illness, residence or other reason, failed or were unable to register to vote at a time period in the past." 342 So.2d at 976. Although *Treiman* addressed qualifications for elective office, it is entirely consistent with the holding in *Landis*; moreover, in finding the statute's "pre-registration" requirement to hold office to be unreasonable, the court implicitly described some of the reasons it listed to be legitimate and valid reasons for not having registered to vote in the past. For similar reasons, it would violate the Florida Constitution to accord "active" voters more rights than "inactive" voters.

2. Exclusion of "Inactive" Voters to Calculate Petition Signature Requirements Creates Unequal Election Rights

A process that fails to count duly registered voters deemed "inactive" to arrive at the number of petition signatures required unlawfully confers unequal influence to some voters. Under the Charter, an amendment may be proposed "by a petition signed by 10 percent of the registered voters of the city[.]" Charter § 5.01(1).[1] Florida law mandates that election supervisors "conduct a general registration list maintenance program to protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records in the statewide voter registration system." Fl. Stat. Ann. § 98.065(a). A supervisor

[1] There are differences between the Charter provision and the process in the statutes: first, the statute uses the term "electors" and the Charter uses "voters;" also, the statute, unlike the Charter provision, specifies that the number is based on the number of registered electors "as of the last preceding municipal election," while the Charter does not specify when the number is to be calculated. Fl. Stat. Ann. § 166.031(1); Charter § 5.01. Since the City, by ordinance, has stated that unless there is a conflict, the general laws of the state concerning elections shall apply insofar as they do not conflict, Gainesville Ord. § 9-1, we have not evaluated whether these differences are significant.

must use one or more of three statutory procedures to confirm changes of address, including one that requires sending an address confirmation notice requiring a response within 30 days. Fl. Stat. Ann. § 98.065(b) (eff. Jan 1, 2006 to Dec. 31, 2008). Subsection (c) imposes consequences upon voters who do not return the form within 30 days:

> The supervisor must designate as inactive all voters who have been sent an address confirmation notice and who have not returned the postage prepaid, preaddressed return form within 30 days or for which an address confirmation notice has been returned as undeliverable. Names on the inactive list may not be used to calculate the number of signatures needed on any petition.

Although designated as "inactive," the voter who does not respond timely remains registered for two general elections after being placed on the inactive list – and only then, if the voter has not exercised his or her right to vote, is the voter's name removed from the registration system. § 98.065(c). Although the term "inactive" is nowhere in Florida's Constitution or Gainesville's Charter, the statute imposes a significant consequence to that designation: once designated as inactive, the voter is excluded from the calculations of how many signatures are needed on a petition. *Id.*

Although § 98.065(c) directs that inactive voters are not to be counted when calculating the number of signatures that are required, the Division of Elections has advised Election Supervisors to permit inactive voters to sign petitions. In 2004, the Division of Elections issued a formal advisory opinion stating that in many circumstances a petition signed by an inactive voter "should be accepted as valid." Op. Div. Elec. Fla. 04-01 (2004).[2] If, as one would expect, the Alachua Supervisor of Elections followed that opinion, the Supervisor accepted petitions signed by registered voters on the "inactive" list. Such differential treatment – i.e., not counting inactive voters when calculating the number of signatures required but counting inactive voters when calculating the number of signatures gathered – creates an inconsistency that violates the Florida Constitution.

---

[2] A copy of that opinion is provided herewith. It rescinded an earlier opinion that had been relied on by the Florida Supreme Court in *Krivanek v. Take Back Tampa Political Committee*, 625 So.2d 840, 841 (Fla. 1993) (holding that "electors whose names have been temporarily removed from the voter registration books are not qualified to sign initiative petitions under the statutory legislative scheme that establishes voter qualifications"). The statute at issue in *Krivanek* differed from the current one in that it provided for an elector to be "temporarily removed" from the registration books – the current statute, § 98.065, provides that voters on the inactive list continue to be registered.

The requirement that the amendment's supporters gather signatures from at least 10 percent of the registered voters of Gainesville means that where at least 90 percent of the registered voters have not been persuaded to sign the petition, their will to retain the Charter in its current form is to be respected, and the Charter remains unchanged. To allow fewer than 10 percent of the registered voters – whether active or inactive – to force their proposal onto the ballot gives greater weight to the wishes of that minority faction than is given to the other 90+ percent who do not support the proposal. This is contrary to the principle of voting equality basic to our democratic system. *See Reynolds v. Sims,* 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

Section 98.065(c), combined with the Division of Elections opinion, creates an impermissibly inconsistent system. A registered voter on the inactive list who supports a petition can sign it, and thereby help to reach the number of signatures needed. However, a registered voter on the inactive list who does not support the petition has no meaningful opportunity to resist the proposal, even by refusing to sign the petition, because the voter's status as inactive means that his or her refusal to sign will make no difference in the success or failure of the petition whatsoever, and his or her refusal will not make it any more difficult for the petition circulators to reach their goal.

Having granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *See, e.g., Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.")

Allowing registered voters who are on the inactive list to be counted in support of a petition, but not be part of the original set of voters counted to establish the voter pool, is fundamentally and anti-democratically flawed. Consider the following hypothetical illustration. Suppose that Gainesville had 100,000 registered voters, with 80,000 active voters and 20,000 inactive. The Charter requires, before the City and its citizens are to be asked to consider an amendment proposed by a petition, that the proposal have demonstrated that it has support from at least 10 percent of the registered voters. We submit that this should require 10,000 signatures. The statute, however, appears to require only 8,000. But in reality, that is only 8 percent of the total number of registered voters. Further, under the Division of Elections opinion, all 100,000 registered voters – including the 20,000 voters on the inactive list – have the option to sign the petition and have their support counted. But only 80,000 registered voters have the right to have their opposition to the petition counted.

In this example, 1,000 inactive voters support the petition and sign it, but the other 19,000 do not support it and do not sign it. 7,000 active voters also sign, but the other 73,000 do not

support it and do not sign it. With the signatures of only 8,000 registered voters, including 1,000 inactive voters, the petition is supported by only 8 percent of all registered voters, not the 10 percent that the Charter requires. 92,000 registered voters – 92 percent of the total – oppose the petition and do not think it should go forward. If the wishes of all voters – for and against – were treated equally, then that would prevent the petition from being placed on the ballot. However, because of the statute and the Division of Elections opinion, the votes of inactive voters count only if they are cast in favor of the petition. Voters on the inactive list are considered to be part of the electorate only if they support the petition. Therefore, the wishes of 19,000 inactive voters are ignored; their opposition – no matter how strong – is excluded from consideration entirely. They are, in effect, disenfranchised in this process. Only those inactive voters who choose to support the petition have a voice in this process, and may say whether or not the Charter should be amended. Their voice is disproportionately amplified; their votes are improperly given more weight and power than the votes of other citizens.

Whether viewed as an additional eligibility requirement or a disqualification, the disparity imposed on inactive voters by § 98.065(c) is not in the Florida Constitution. Because Fla. St. Ann. § 98.065(c) allows "inactive" registered voters to support the petition, but not oppose it, it diminishes the votes of the active voters who opposed the petition and violates the equality of voting power mandated by the Constitution. The Constitution does not distinguish between active and inactive voters. It lists one set of eligibility requirements, and one set of disqualifications. Fla. Const. Art. VI §2; Fla. Const. Art. VI §4. Neither of those sections identifies frequency of voting, or the need to return a form within 30 days, as a qualification or a disqualification. More importantly, the Florida Constitution does not authorize the creation of a special class of voters whose votes count for some purposes but not for others, and who may exercise their rights only in <u>support</u> of certain actions, but not in <u>opposition</u> to them.

Nor does the Gainesville Charter distinguish between active and inactive voters. Although Gainesville Ord. § 9-1 provides that the general laws of the state concerning elections will apply insofar as they do not conflict, the equal voting rights principles enunciated in the Constitution must also be applied when determining whether or not there is a conflict.

The statute gives extra voting power to active voters, who alone are entitled to have their disapproval of a proposed amendment counted, and also to those inactive voters who support a proposed amendment, since they are the only inactive voters who will have their choice counted. It also gives inordinate weight overall to registered voters (active or inactive) who support and sign the petition, since their signatures, their "votes," are given greater weight than the "votes" of all of the registered voters who did not sign. "The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969).

At least one other state has rejected a legislative attempt to distinguish between active and inactive voters for purposes of counting signatures on petitions and calculating the number of signatures required. The Maryland Supreme Court held the practice of separating "inactive" voters and placing them onto a list that is not counted when calculating the number of signatures required for ballot access to be unconstitutional. *See Maryland Green Party v. Maryland Bd. of Elections*, 377 Md.127, 152, 832 A.2d 214, 229 (2003) (concluding that "any statutory provision or administrative regulation which treats 'inactive' voters differently from 'active' voters is invalid" under state Constitution). In *Maryland Green Party*, the Board of Elections had "invalidated numerous signatures by 'inactive' voters, that is, formerly registered voters whose names had been placed on 'inactive voter registration' lists. The precise number of these invalidations [was] not disclosed by the record." 377 Md. at 140, 832 A.2d at 221. At the time, the Board's regulations provided that anyone on the inactive voter registry would not have their vote counted if they signed a petition, and the definition of "registered voter" in the Election Code "does not include an individual whose name is on a list of inactive voters." *Id.* The court started by analyzing the Maryland Constitution – because, the court held, that constitution "prescribes the *exclusive* and *uniform* qualifications for being on the list of registered voters and being eligible to vote." 377 Md. at 140, 832 A.2d at 222. The court noted that it had previously declared that "being a frequent or active voter is not a valid requirement for voting in Maryland" in *State Administrative Board of Election Laws v. Board of Supervisors of Elections of Baltimore City*, 342 Md. 586, 679 A.2d 96 (1996). *Md. Green Party*, 377 Md. at 144, 832 A.2d at 223.

B. The Proposed Amendment Does Not Comport With the Single-Subject Rule

The Florida Supreme Court has described the single-subject rule – which is express as to constitutional amendments and certain other measures, but also has been applied to some other measures – as reflecting "a consensus on the issues and values that the electorate has declared to be of fundamental importance." *In re Advisory Opinion to the Attorney General – Restricts Laws Related to Discrimination*, 632 So.2d 1018, 1019 (1994) (proposed amendment violated single-subject rule where it would amend Florida Constitution to prevent enactment of discrimination laws that differed from U.S. Constitution). The Court has described the purpose of the single-subject requirement as three-fold: "(1) to prevent hodge podge or "log rolling" legislation, i.e., putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon." *State v. Thompson*, 750 So. 2d 643, 646 (Fla. 1999) (quoting *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184 (Fla. 1957)).

Of critical importance to the proposed amendment to Gainesville's Charter, the Court has stressed that the single-subject rule prevents voters from being placed in a predicament where they are asked to "accept part of an initiative proposal which they oppose in order to obtain a change ... which they support." *Id.* at 1019-20, quoting *Fine v. Firestone*, 448 So.2d 984, 988 (Fla. 1984).

The proposed charter amendment at issue here violates the single-subject requirement for the reasons articulated by the Supreme Court. *See In Re Advisory Opinion to the Attorney General* No. 82674, 632 So.2d 1018 (Fla. 1994). In 1994, the Florida Attorney General petitioned for an advisory opinion on the validity of an initiative petition that would restrict anti-discrimination protection to ten specifically enumerated classifications of people, just as this proposal intends to do. The court held that the petition failed to comply with the "single-subject" requirement of the Florida Constitution, as well as the statute requiring ballot summaries to advise electorate of proposal's true meaning and ramifications.

Although Gainesville's Charter does not set forth an express single-subject requirement for proposed charter amendments, the Florida Supreme Court has noted that it has "on occasion in some of [its] older cases applied a general single-subject requirement to ballot questions in the absence of constitutional or statutory authority." *Charter Review Comm'n of Orange Co. v. Scott*, 647 So. 2d 835, 836-37 (Fla. 1994). Although the court did not impose a single-subject requirement on the amendment in the *Orange County* case, that conclusion was based on the deliberative process by which that particular amendment arrived before the electorate; the court held that "as with our state Constitution Revision Commission process, the Orange County Charter Review Commission process embodies a number of procedural safeguards that reduce the danger of logrolling and diminish the possibility of deception." *Id.*

By marked contrast, the process by which this proposed amendment found its way onto a ballot does not contain any safeguards – let alone adequate ones – to reduce the dangers of logrolling and deception. Therefore, under the Florida Supreme Court's reasoning in *Orange County*, the purposes that are so ably served by imposition of the single-subject rule are required here. The proposal will affect many different categories of persons, and will place the voters in precisely the predicament that the Florida Supreme Court has stated they should not be placed. *See Advisory Opinion*, 632 So.2d at 1019.

III. Constitutional Questions Concerning the Substance of the Proposed Amendment

In addition to the two issues listed above, we believe that there are serious questions about the constitutionality of the proposed amendment. The Florida Supreme Court's decisions have emphasized the very narrow pre-election review of these issues. *Dade County v. Dade County League of Municipalities*, 104 So.2d 512, 515 (Fla. 1958). Therefore, rather than elaborate on them in detail now, we will briefly identify certain of them for further consideration.

Chief among these are concerns, similar to those articulated by the United States Supreme Court in *Romer v. Evans*, about the sufficiency of the proposed amendment under the Equal Protection Clause. 517 U.S. 620, 634 (1996).

In addition, however, we question whether the proposal, which purports to amend ordinances that were duly enacted, may in fact do so where the Charter does not permit ordinances to be enacted, amended, or repealed by petition. *See Holzendorf v. Bell*, 606 So.2d 645, 650 (Fla. App. 1 Dist. 1992) (vesting of legislative authority in city council, coupled with absence of language extending petition and referendum power over ordinances, discloses legislative intention to exclude right to adopt or repeal ordinances by referendum).

We hope that you will give consideration to the foregoing points. Should you wish to discuss any or all of them with us in detail, please do not hesitate to contact me or either of my two colleagues who are primarily working on this matter with me: Staff Attorney Beth Littrell in our Atlanta regional office, tel. (404) 897-1880; and Senior Staff Attorney Thomas W. Ude, Jr. in our New York headquarters office, tel. (212) 809-8585.

Sincerely,

Hayley Gorenberg
Deputy Legal Director