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Dennis G. Kainen v. Katherine Harris

MAY IT PLEASE THE COURT.

MR. WARNER, HOW ABOUT, AS YOU BEGIN, RESPOND TO YOUR OPPONENT'S ARGUMENT, IN RESPECT TO THE FACT THAT THE WAY THAT THE LEGISLATURE HAS DRAFTED THE QUESTION DOESN'T USE THE LANGUAGE THAT IS IN THE CONSTITUTIONAL PROVISION OF MERIT SELECTION AND RETENTION. WHAT IS YOUR --.

WELL, I TAKE THAT QUESTION TO MEAN IS THIS SELF-EXECUTING OR NOT? THE BALLOT QUESTION, ITSELF, IS NOT IN THE CONSTITUTION. A PHRASE IS IN THE CONSTITUTION, REQUIRING A LOCAL OPTION ELECTION, BUT THERE ARE PLENTY OF INSTANCES, IN THE FLORIDA CONSTITUTION, THAT REQUIRE AN ELECTION OF SOME KIND, FOR GOVERNOR, FOR SENATOR, FOR STATE REPRESENTATIVE. ALL OF THOSE MANDATES, IN THE CONSTITUTION, REQUIRE IMPLEMENTING LEGISLATION, IN REGARD TO CONDUCTING THOSE ELECTIONS. THE CONSTITUTIONAL REVISION COMMISSION, NOT ONLY HERE, BUT IN 1976, KNEW HOW TO DRAW A BALLOT QUESTION THAT IT WANTED SPECIFICALLY PLACED ON THE BALLOT. FOR INSTANCE FOR THE MERIT RETENTION ELECTION OF SUPREME COURT JUSTICES, THAT BALLOT QUESTION IS IN THE CONSTITUTION. THE BALLOT QUESTION SHOULD THIS PASS, FOR CIRCUIT AND COUNTY JUDGE'S ELECTIONS, IS IN THE CONSTITUTION. THEY KNEW HOW TO PUT A BALLOT QUESTION IN THE CONSTITUTION. THERE IS NO BALLOT QUESTION HERE. SOMEONE, WHETHER IT IS 67 SUPERVISORS OF ELECTION OR THE SECRETARY OF STATE OR, MORE APPROPRIATELY, THE LEGISLATIVE BODY OF THIS STATE, HAD TO FRAME A QUESTION.

BUT HERE, AS I UNDERSTAND MR. ROGOW'S POSITION ON THE LANGUAGE THAT IS USED IN THE PRESENT STATUTE IS THAT THE CONSTITUTION USES THE PHRASE "MERIT RETENTION", "MERIT SELECTION AND RETENTION", AND THAT LANGUAGE IS NOT USED IN THIS QUESTION THAT IS FRAMED BY THE STATUTE.

I THINK, AS I UNDERSTAND IT, WE HAVE, UNDER REVIEW, HERE, A STATE STATUTE, AND THE STANDARD OF REVIEW IS THE CONSTITUTIONALITY OF THAT STATUTE, PRESUMED TO BE VALID AND NOT STRUCK DOWN, UNLESS BEYOND A REASONABLE DOUBT IT IS UNCONSTITUTIONAL, SO THE LEGISLATURE HAS FRAMED A QUESTION, AS I UNDERSTAND IT, UNDER THIS COURT'S RULINGS. THE QUESTION, IF THAT IS THE QUESTION THE COURT IS GOING TO ENTERTAIN ON THE CONSTITUTIONALITY OF THE STATUTE, THEN THE QUESTION IS DID THE LEGISLATURE HIDE THE BALL? THE LEGISLATURE HAD THE AUTHORITY TO FRAME THE QUESTION. THEN THE QUESTION IS DOES IT FAIRLY INFORM THE VOTERS OF THEIR CHOICES? ONE THING THAT WOULD BE EXTREMELY IMPORTANT, I THINK, TO THE VOTERS IS TO LET THEM KNOW THAT THERE IS GOING TO BE A CHANGE FROM THE PRESENT SYSTEM OF ELECTING JUDGES, BY DIRECT METHOD, TO SOMETHING CALLED MERIT SELECTION AND RETENTION. NOW, THERE IS NO RECORD. THERE IS NO FACTUAL BASIS TO KNOW WHETHER VOTERS UNDERSTAND THAT QUESTION OR NOT. BUT CERTAINLY, EVEN WITHIN THE BAR, PEOPLE DEBATE AS TO WHAT, EXACTLY, WHAT DOES MERIT RETENTION MEAN.

LET ME ASK YOU THIS. DO YOU SEE -- DO YOU READ SELECTION AND NOMINATION AS BEING SYNONYMOUS TERMS?

I THINK IT IS A DISTINCTION, WITHOUT A DIFFERENCE, WITHIN THE CONTEXT OF THIS QUESTION.

NOMINATE NORMALLY MEANS TO NOMINATE A CANDIDATE FOR ELECTION TO POLITICAL OFFICE. SELECTION COULD MEAN ANYTHING. CHOOSING FROM AMONG MANY. IN THE MISS AMERICA PAGEANT, THEY SELECT FIVE FINALISTS. I DON'T SEE ANYTHING THAT IS MISLEADING ABOUT THE USE OF THE WORD IN THAT CONTEXT.

WHAT DO YOU SEE THE COMMISSION AS DOING? NOMINATING OR SELECTING?

THEY SELECT NOMINEES, IN ACCORDANCE WITH THEIR OWN RULES. THAT IS WHAT THE RULES OF THE JNC SAY. THEY SELECT NOMINEES TO BE SUBMITTED TO THE GOVERNOR. IS THERE PROOF THAT THE AVERAGE VOTER, OUT THERE, IS GOING TO BE MISLED AS TO THEIR CHOICES HERE, IN THIS ELECTION, BECAUSE OF THE USE OF THE WORD "SELECT"? WILL THIS ENTIRE STATUTE GO DOWN BECAUSE OF ONE WORD? WHERE IS THE BASIS IN THE WORD TO MAKE THAT KIND OF DECISION?

IT IS POSSIBLE IT COULD, IF THE WORD IS MISLEADING, YES, TO ANSWER YOUR QUESTION.

I AM SORRY.

YOUR QUESTION WAS SHOULD IT GO DOWN BECAUSE OF ONE WORD? IS THAT WHAT YOU ASK? SHOULD THE ENTIRE --

YES.

AND IF THE WORD IS MISLEADING, SUFFICIENTLY, I THINK IT SHOULD.

ON WHAT BASIS WOULD WE FIND THAT? WE HAVE HERE, THE ONLY RECORD YOU HAVE IS -- WHAT YOU WOULD BE TELLING THE CONSTITUTIONAL REVISION COMMISSION IS THAT THEY WERE HIDING THE BALL.

NO.

YOU SHOULD BE TELLING THE LEGISLATURE THAT THEY WERE HIDING THE BALL. CONCERNS WERE RAISED THAT THE AVERAGE VOTER DOESN'T KNOW WHAT MERIT RETENTION IS AND WHAT THEIR CHOICES WOULD BE IN THIS ELECTION. SOMEONE HAD TO DRAFT A BALLOT QUESTION. THE QUESTION IS WHAT BASIS, IN THE RECORD, HERE, IS THAT THE AVERAGE VOTER -- IS IT FALSE?

WAS THERE A REASON FOR NOT USING "NOMINATION", BY THE JUDICIAL NOMINATING COMMISSION, AS OPPOSED TO SELECTION? IS THERE A REASON FOR THAT, OR SHOULD IT BE READ SYNONYMOUSLY, I GUESS? THAT IS THE QUESTION.

WE ARE AT A DISADVANTAGE TO EVER FIND OUT THAT QUESTION, BECAUSE THE PETITIONERS, IN THIS CASE, DIDN'T FILE SUIT ON MAY 3, 2000, WHEN THIS LEGISLATION PASSED. THEY DIDN'T FILE SUIT ON JUNE 23, WHEN THE GOVERNOR SIGNED THIS BILL. THEY DIDN'T FILE SUIT ON JULY 1, WHEN THIS BECAME LAW. THEY WAITED UNTIL AUGUST 14, WHEN THERE WAS NO OPPORTUNITY TO FILE A PROPER DECLARATORY JUDGMENT ACTION IN CIRCUIT COURT, AND DETERMINE WHETHER THERE WAS ANY FACTUAL ISSUES THERE, AS TO WHETHER ONE WORD OR NOT, WOULD MAKE A DIFFERENCE TO THE AVERAGE VOTER, NOT LAWYERS, NOT JUDGES, BUT THE AVERAGE VOTER ON THE STREET, AS TO WHAT IS MERIT RETENTION. WE CAN'T DO THAT. YOU CAN'T DO THAT, BECAUSE THEY CHOSE THIS FORUM AND THIS PLACE TO PRESENT THIS TO THIS COURT IN AN ORIGINAL MANDAMUS ACTION.

BUT ARE YOU SAYING THEY ARE PROHIBITED, NOW, BY LAST YEAR'S? IS THAT YOUR ARGUMENT?

I AM SAYING THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY MANDAMUS JURISDICTION, ON SOMEONE WHO HAS BEEN TARDY TO THIS COURT, PRESENTING FACTUAL ISSUES, WITH NO

ENFORCEABLE RIGHT, PREPARING THIS COURT TO GIVE A CONSTITUTIONAL JUDGMENT ON SOMETHING THAT IS NOT IN A STATUTE. THAT SHOULD NOT BE DONE, IN THIS CASE.

I JUST WANT TO UNDERSTAND YOUR COMMENTS AS, WHETHER OR NOT THEY ARE LATE IS ONE QUESTION, BUT SECONDARILY, WHEN WE ARE LOOKING AT WHETHER A BALLOT SUMMARY PROVIDES FAIR NOTICE OR WHETHER IT IS MISLEADING. WHEN WE DO OUR ADVISORY OPINIONS ON ALL OF THE CITIZENS' INITIATIVES THAT COME TO THIS COURT, AND WE MAKE THOSE DECISIONS, AS A MATTER OF LAW, LOOKING THROUGH EVERY CASE THAT CAME UP TO US IN THE LAST 20 YEARS, EVEN WHEN IT FIRST GOES TO THE CIRCUIT COURT. THERE ISN'T AN EVIDENTIARY HEARING ON THIS. WOULD YOU AGREE THAT THE PRECEDENT OF THIS COURT AND THE WAY THESE BALLOTS SUMMARIES HAVE BEEN LOOKED AT, ARE THE PRECEDENT IS THAT THESE ARE QUESTIONS OF LAW, TO BE DECIDED ON AN OBJECTIVE BASIS, AND NOT ON A SUBJECTIVE QUESTION, AS TO WHETHER INDIVIDUAL VOTERS MAY OR MAY NOT UNDERSTAND A PARTICULAR TERM.

WELL, I DO DISAGREE. AND EVEN IF I AM NOT ENTIRELY RIGHT, THEN I THINK IT OUGHT TO BE THE OTHER WAY. I DO BELIEVE AND WOULD CONCEDE --

YOU DISAGREE WITH HOW IT SHOULD BE. I AM ASKING YOU WHETHER THAT HAS BEEN A PRECEDENT. AND WHAT IS IT.

I DON'T AGREE. I DO AGREE AS TO WHETHER SOMETHING IS FALSE OR NOT. IN PRESENTED IN CONTEXT, THIS COURT COULD DETERMINE WHETHER SOMETHING IS FALSE. I AGREE THAT, INSERT CONTEXT, YOU COULD DETERMINE WHETHER SOMETHING IS DECEPTIVE, WHETHER THE LEGISLATURE HAS HIDDEN THE BALL AND IS TRYING TO FLY UNDER FALSE COLORS AND IS TRYING TO HIDE THE INTENT OR PERCEIVE --

THE QUESTION ISN'T WHETHER SOMEONE INTENDS TO DO SOMETHING OR NOT. THE QUESTION IS -- NO ONE IS ASCRIBEING BAD MOTIVE IN ANYTHING WITH REGARD TO THIS ISSUE.

I DISAGREE WITH YOU. FIRESTONE IS BASED ON FALSE MOTIVES. HIDING THE BALL. FALSE CONTENT. I THINK, IF YOU CAN DETERMINE THAT THIS IS FALSE COLORS OR HIDING THE BALL, THEN YOU CAN REDUCE IT TO A QUESTION OF LAW. IF THE QUESTION IS WHETHER THE AVERAGE VOTER, GOING TO THE POLLS, WILL UNDERSTAND WHAT THEIR CHOICES ARE AND WHAT THEY ARE VOTING ON, QUITE FRANKLY, I THINK THAT IS A QUESTION OF FACT THAT SHOULD BE DETERMINED IN CIRCUIT COURT. I THINK YOUR PRECEDENTS ARE CORRECT, TO THE EXTENT THAT THEY STICK TO A QUESTION OF LAW, IN REGARD TO WHETHER SOMETHING IS FALSE OR WHETHER SOMETHING IS DECEPTIVE, BUT WHENEVER YOU GET INTO WHAT THE AVERAGE VOTER MEANS OR UNDERSTANDS, ALL WE HAVE IS A BUNCH OF LAWYERS AND JUDGES, SUBSTITUTING OUR JUDGMENT AS TO WHAT THE AVERAGE VOTER KNOWS OR DOES NOT KNOW, WITH NO REFERENCE TO ANY RECORD WHATSOEVER.

PLEASE KEEP YOUR EYE ON THE TIME.

I DON'T UNDERSTAND THIS. IT SAYS 94. DOES IS IT SAY I HAVE 94 MINUTES LEFT?

YOUR SIDE HAS 9 AND-A-HALF MINUTES LEFT.

I AM OKAY SO FAR.

LET ME ASK YOU THIS.

9 AND-A-HALF MINUTES.

YOU HAVE USED 9 AND-A-HALF.

I HAVE USED 9 1/2?

YEAH. IT IS GOING UP. I AM OKAY. I AM STILL OKAY.

DO YOU THINK THAT THIS COURT HAS JURISDICTION, IF IT DETERMINES THAT THE LANGUAGE IS MISLEADING?

THIS COURT HAS JURISDICTION, IN ORIGINAL PROCEEDINGS IN MANDAMUS. THE QUESTION IS SHOULD IT EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CASE. THE COURT HAS JURISDICTION, IF IT SAYS IT HAS JURISDICTION. I, REALLY, INTENDED ONLY TO SAY A COUPLE OF THINGS, WHEN I GOT UP HERE, ANYWAY, AND I HAVE, ALREADY, SAID MOST OF THEM, BUT I DO WANT TO POINT OUT TWO THINGS. ONE IS FOOTNOTE ONE ON PAGE ONE OF THE REPLY BRIEF. NOW, IN THAT FOOTNOTE OF THE REPLY BRIEF, IT SAYS THE RESPONDENTS AMICAE REVEALS THEIR RESPONSES FOR THE ELECTION OF CIRCUIT AND COUNTY JUDGES. IT, ALSO, GOES ON TO SAY, IN ANOTHER SENTENCE, "HOWEVER, THIS IS NOT THE FORUM TO DEBATE THE MERIT." NOW, THAT IS A VERY CLEARLY-WORDED FOOTNOTE, BUT PERSONALLY I THINK IT SAYS EXACTLY WHAT THEY MEAN IT TO SAY, AND AS SOLICITOR GENERAL, I AM OFFENDED BY THAT FOOTNOTE. SO IS THE ATTORNEY GENERAL, AND SO THE SECRETARY OF STATE. WE HAVE NO POSITION ON WHETHER OR NOT THE CIRCUIT AND COUNTY JUDGES SHOULD BE ELECTED OR WHETHER WE SHOULD GO TO MERIT SELECTION. OUR I DON'T OBJECT IS TO DEFEND THE LAWS OF THIS STATE AND THE CONSTITUTION OF THIS STATE. THIS IS A LEGAL QUESTION ON THE CONSTITUTIONALITY OF A STATUTE PASSED BY THE LEGISLATURE.

WHAT IS YOUR POSITION, THEN, IF WE FIND THAT THIS LANGUAGE, IN THE 2000 STATUTE, IS, IN FACT, MISLEADING? DO WE REVERT TO THE 1999 STATUTE, OR DO WE, AS MR. ROGOW SUGGESTS, GO WITH THE LANGUAGE THAT IS IN THE CONSTITUTIONAL AMENDMENT?

I DON'T THINK THERE IS A GOOD ANSWER OR RESOLUTION OF THAT, WHICH IS WHY YOU SHOULDN'T GRANT THAT RELIEF. THE '99 STATUTE, OBVIOUSLY, THE LEGISLATURE DETERMINED THAT IT DIDN'T FULLY INFORM THE VOTERS, AND THE CONSTITUTION, ITSELF, DOES NOT FRAME THE BALLOT QUESTION, MEANING SOMEONE HAS TO DO THAT. I DON'T THINK IT WOULD BE APPROPRIATE FOR THIS COURT TO TAKE OVER THAT RESPONSIBILITY AND DRAFT ITS OWN LANGUAGE. I WOULD SAY, SINCE IT IS CLEAR THAT THERE COULD BE POST SELECTION RELIEF, IF THAT IS THE CASE, THAT THESE QUESTIONS, IF IT IS A REASONABLE DOUBT, THIS CASE SHOULD GO FORWARD. IF SOMEBODY WANTS TO CHALLENGE AN ELECTION IN A PARTICULAR COUNTY, SAYING THE VOTERS WERE MISLED, I SUPPOSE THEY COULD, STILL, DO THAT, BUT I DON'T SEE ANY BASIS FOR THIS COURT TO GRANT ANY OF THE RELIEF THAT HAS BEEN ASKED FOR HERE. THE COURT SHOULD NOT DRAFT THIS QUESTION. THE '99 LANGUAGE, CLEARLY, IS NOT AS INFORMATIVE AS THE 2000 LANGUAGE. AS I WAS SAYING, WHAT I WANTED TO MAKE THE POINT WAS THAT WE ARE HERE TO ARGUE THE LEGAL DEBATE, BUT IT IS THE POLITICAL QUESTION, PRECISELY WHAT THE PETITIONERS WANT TO PUT TO THIS COURT, HOPING THAT YOU HAVE A PREFERENCE FOR MERIT SELECTION AND RETENTION. WHY PUT THIS IN THE BRIEF AT ALL? WE ARE NOT FOR IT OR AGAINST IT. WE ARE DEFENDING THE STATUTE AND THE LEGAL PRINCIPLES THAT ARE INVOLVED HERE. THEY WANT YOU TO IGNORE THE TARDINESS OF THE PETITION. THEY WANT YOU TO IGNORE THAT THEY HAVE NO ENFORCE ONLY RIGHT HERE. THEY -- THAT THEY HAVE NO ENFORCEABLE RIGHT HERE. THEY WANT TO IGNORE THAT THEY HAVE NO RIGHT TO CHANGE THE STATUTE. BUT THE CRC DID NOT HIDE THE BALL. THE LEGISLATURE DID NOT HIDE THE BALL. THEY DECIDED THAT, IN THE LEGISLATIVE FORUM, THERE NEEDED TO BE A BETTER DESCRIPTION OF THE PROCESS, SO THAT VOTERS COULD KNOW THE CHANGING OF THIS SYSTEM TO ANOTHER, AND LET THE CHIPS FALL WHERE THEY MAY. THANK YOU.

MAY IT PLEASE THE COURT. I AM DEBBIE CONCERN I, REPRESENT -- I AM DEBBIE KERNY, REPRESENTING KATHERINE HARRIS, AS SECRETARY OF STATE. I WANT TO MAKE THREE POINTS. FIRST OF ALL, WE CLEARLY DON'T HAVE A QUESTION. THE SECRETARY OF STATE'S ROLL TO

NOTIFY THE VARIOUS SUPERVISORS OF ELECTIONS AS TO WHAT GOES ON THEIR BALLOT, WE PREPARE A SAMPLE BALLOT FOR THEM TO HAVE PRINTED IN EACH OF THEIR JURISDICTIONS. WE CAN'T WRITE A QUESTION, I FEEL VERY STRONGLY, THAT IT IS A LEGISLATIVE POWER TO DRAFT BALLOT LANGUAGE, AND WE CAN'T DO IT. TRY AS I MIGHT, STARING AT ARTICLE V, SECTION 10, THERE IS JUST NOT A BALLOT QUESTION THAT IS THERE. SINCE THE LEGISLATURE IS THE ONLY LEGISLATIVE BODY, WITH LEGISLATIVE POWERS, OPERATING AT THIS TIME, I THINK IT IS GOOD THAT THEY DID STEP IN AND CERTAINLY, I HOPE, WE WOULD FIND THAT THEY HAVE THE POWER TO AID THE CRC AND THE VOTERS OF FLORIDA, BY DRAFTING BALLOT LANGUAGE FOR THEM.

MS. KERNEY, DID THE CRC DRAFT ALL OF THE SUMMARIES THAT THEY PLACED ON THE BALLOT IN 1998?

YES, THEY DID.

AND IS THE QUESTION ON THE BALLOT THAT, WHEN THE CRR OPPOSED THE INITIATIVE, THAT IT IS THE CRC THAT, THEN, WOULD BE THE DRAFTER?

YES. SEX 3.101, THE LEGISLATURE ARE REQUIRED TO PROVIDE, WITH THEIR RECOMMENDATION ABOUT TITLE AND SUMMARY.

SO YOU ARE REFERRING TO SUBSECTION 2, WHICH SAYS THAT THE BALLOT SHALL EXPLAIN THE SUBSTANCE AND THE BALLOT TITLE AMENDMENT PROPOSED BY INITIATIVE SHALL BE PREPARED BY THE SPONSOR. THAT IS, THEN, THE SPONSOR OF THE 1998 AMENDMENTS WOULD HAVE BEEN THE CRC?

RIGHT.

IF IT IS THE LEGISLATURE, THEN THEY ARE THE SPONSOR?

RIGHT. [TECHNICAL DIFFICULTIES]

WITH THEIR AMENDMENT. THAT HASN'T HAPPENED. THEY HAVE NOT INTERVENED. RIGHT. THEY DON'T EXIST ANYMORE. THEY DON'T -- THEIR POWERS ARE GONE. THEY HAVE NO ABILITY TO RECONSTITUTE THEMSELVES. I DO FEEL, SOME PERSONAL EMBARRASSMENT, THAT THERE WAS NOT BALLOT LANGUAGE DRAFTED FOR THAT. BUT THE FACT OF THE MATTER IS THAT THERE WAS NOT. [TECHNICAL DIFFICULTIES]xza VOTERS OF FLORIDA PREFER THEIR JUDGES ELECTED OR APPOINTED. I THINK QUESTION IS FAIRLY PUT FOR THE WHAT WILL OUGHT -- FOR THE BALLOT BY LEGISLATIVE DRAFT.

MR. WARNER SAID THIS IS -- [TECHNICAL DIFFICULTIES]