IN THE SUPREME COURT OF FLORIDA

Case No.: SC19-1267
Case No.: SC19-1505 (FIS)

ADVISORY OPINION TO THE ATTORNEY GENERAL RE:

ALL VOTERS VOTE IN PRIMARY ELECTIONS
FOR STATE LEGISLATURE, GOVERNOR, AND CABINET
[Initiative Petition 19-07]

REPLY BRIEF OF THE FLORIDA DEMOCRATIC PARTY OPPOSING PROPOSED AMENDMENT

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The Sponsor's Answer Brief vividly illuminates why the All Voters Vote Initiative should be precluded from appearing on the ballot. In that Answer Brief, the Sponsor announces for the first time something the ballot title and summary only imply: "these primaries will no longer determine party candidates." Voters learn expressly, rather than impliedly, that "the process for electing members of the State Legislature, Governor, and Cabinet will be conducted differently than it has been in the past."[1]

Conceding that the proposed amendment continues to use the term "primary elections" with a fundamentally different meaning, the Sponsor now refers to these elections as "All Voters Vote primary elections." This new vernacular reveals an effort to distinguish these primary elections from existing primary elections, a distinction not made in either the ballot title or the ballot summary.

The Sponsor argues for the first time that the current law regarding write-in candidates is a "scam" that "in need of reform." The Sponsor concedes that the proposed amendment achieves this "reform" by removing those candidates from direct-to-general-election eligibility. The ballot title and the summary do not mention write-in candidates or even no-party-affiliation ("NPA") candidates. Even

[1] This Reply Brief refers only to candidates for state legislature, governor, or the cabinet, unless expressly stated otherwise.

the amendment's text never mentions that the amendment revises the law on general election eligibility for write-in and NPA candidates.

Three words in the ballot summary—"party nominated candidates"—are revealed by the Sponsor to mean something not contained in the title, summary or text; namely, that if the amendment passes, the 9.7 million members of the two major political parties in Florida will now nominate their candidates in a "pre-primary process," one that is "prior to and separate from the All Voters Vote primary." Furthermore, the Sponsor promises that these "party nominated candidates" "will appear on the All Voters Vote primary ballot," even though both the summary and text make it clear that the appearance of party affiliation on the ballot is up to the Legislature to decide. This explanation from the Sponsor is helpful, however, because it demonstrates that even the Sponsor gets confused about the meaning of the ballot summary.

Finally, the logrolling effects of the proposed amendment are laid bare. The Sponsor's Answer Brief admits that the proposed amendment is not just about "conducting primary elections." It is also about *eliminating* primary elections where only two candidates qualify, moving the decision in those races to the general election. The Sponsor posits that it does "not reasonably matter whether such elections are decided in the primary or the general election." The Sponsor misses the point. It is not whether the policy is reasonable or not. It is whether the disparate

provisions of allowing "all voters to vote" in new primaries while eliminating primaries in other circumstances constitutes prohibited logrolling. It does, and the proposed amendment should not be allowed on the ballot.

ARGUMENT

I. The Sponsor's Answer Brief Reveals the Misleading Nature of the Ballot Title and Summary.

Initiative petitions must include "an explanatory statement" (a ballot summary), and "a caption" (a ballot title). *See* § 101.161(1), Fla. Stat. (2019). The Court asks two questions to determine whether these requirements are met: First, whether the ballot title and summary "fairly inform the voter of the chief purpose of the amendment," and, second, whether the ballot title and summary "mislead[] the public." *Advisory Op. to Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 651-52 (Fla. 2004) (internal quotation marks and citations omitted).

The purpose behind these tests is to "provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. re Fee on Everglades Sugar Prod.*, 681 S. 2d 1124, 1127 (Fla. 1996). As this Court stated in *Advisory Op. to Att'y Gen. re Independent Nonpartisan Comm'n to Apportion Legislative and Cong. Districts which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1227 (Fla. 2006), this requirement "functions as a kind of 'truth in

packaging' law for the ballot." (quoting *Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000)).

This Court has held that "the accuracy requirement is of paramount importance for the ballot title and summary[.]" *Armstrong*, 773 So. 2d at 13. Indeed, the legitimacy of the entire process depends on it: "The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy." *Comm'n to Apportion*, 926 So. 2d at 1227 (quoting *Homestead Tax Exemption*, 880 So. 2d at 653-54).

The All Voters Vote Initiative fails these tests of fair notice, not being misleading, truth in packaging, and being accurate and objective. It should not be allowed on the ballot. The Sponsor's Answer Brief illustrates why.

A. The Sponsor's Answer Brief Admits Something the Proposed Amendment Does Not Say.

The proposed amendment does not state that under its new definition of "primary elections," *these primaries will no longer determine party candidates*. That result, however, is a fundamental impact of the amendment on the 9.7 million Floridians affiliated with the two major political parties: they will lose the 106-year-old opportunity to nominate their party's candidates through primary elections. Neither the ballot title nor the ballot summary fairly informs voters of that fundamental, systematic change.

The Sponsor did not argue that point in its Initial Brief. Only in the Sponsor's Answer Brief do voters learn what, apparently, the Sponsor has known all along: "these primaries will no longer determine party candidates." *See* Sponsor's Answer Brief ("Sponsor's A.B."), at 5. That express statement does not appear anywhere in the proposed amendment. Instead, the ballot title and summary *at best* imply such a change and at worst, conceal it.

An average voter reading the ballot summary in the voting booth would be required to infer that "these primaries will no longer determine party candidates." That is an unreasonable requirement, and one that is contrary to the tests of fair notice, not being misleading, truth in packaging, and being accurate and objective required by *Homestead Tax Exemption*, *Everglades Sugar Production*, *Comm'n to Apportion*, and *Armstrong*. The summary simply does not reveal that the proposed amendment is making fundamental changes to primary elections.

The Answer Brief also makes plain what the ballot title and summary do not when it states, "the process for electing members of the State Legislature, Governor, and Cabinet will be conducted differently than it has been in the past." *See* Sponsor's A.B., at 5. The ballot title and summary make no reference to or explanation of the past system it is changing by saying, for example, "Eliminates closed partisan primary elections." It could have. It should have. It just did not.

The Sponsor is likely to argue, as it did elsewhere in its Answer Brief, that the Court "'presumes that the average voter has a certain amount of common understanding and knowledge' based on their practical experience." *See* Sponsor's A.B., at 10, 11 (quoting *Advisory Op. to Att'y Gen. re Protect People from the Health hazards of Second-Hand Smoke by Prohibiting Workplace Smoking*, 814 So. 2d 415, 419 (Fla. 2002)). The amendment in *Second-Hand Smoke*, however, dealt with an activity, smoking, and restrictions on that activity that many Floridians were exposed to in some fashion on a daily basis. ("[I]t does not stretch logic to presume that most, if not all, voters are aware that smoking is presently limited in certain public places, given the pervasiveness of signs and other remonstrations against smoking in those areas . . . ."). *Second-Hand Smoke*, 814 So. 2d at 419.

From this inapplicable case, the Sponsor suggests the conclusion that average voters will share a "common understanding and knowledge" that Florida currently has a closed primary system. This suggestion is without foundation and is contrary to the Sponsor's own experience.

First, unlike smoking or restricting smoking in public places, primary elections generally occur biannually. Every two years, new voters enter the voter registration system, by age, by moving to Florida, by restoration of voting rights, or by simply registering for the first time. It cannot be presumed that "most, if not all, voters are aware" that for more than a century political parties and their members

have used primary elections in Florida as the means of nominating their candidates for the general election. Many may be unaware or have forgotten, but once made aware or reminded, conclude that they like the closed primary system.

Second, even Mike Fernandez, a Miami health care executive who is thought to be the largest financial supporter of the All Voters Vote Initiative—with more than $6 million spent—did not understand the nuances of the primary election process. He is reported to have become so disillusioned with the Republican Party that he changed his registration to "no party affiliation," and in the August 2016, primary, "he showed up to vote, only to discover that he couldn't. Because he was no longer registered with a political party, he was locked out of most of the races: Republican and Democratic state and local primary contests." *See "I'm very scared about our future": Florida billionaire pitches jungle primary to fight political extremism*, Politico.com (Sept. 18, 2019) (https://www.politico.com/states/florida/story/2019/09/18/im-very-scared-about-our-future-florida-billionaire-pitches-jungle-primary-to-fight-political-extremism-1189078) (last visited Oct. 27, 2019). If a sophisticated and politically active business executive did not understand the way primary elections operated in Florida, it is not reasonable to assume that voters will arrive at the ballot box understanding them, either. It is even more unreasonable to assume that those voters will then be able to infer changes to closed primary system from the misleading language of the

proposed amendment. This Court's precedents require fair notice, not being misleading, truth in packaging, and being accurate and objective. These features are lacking in the ballot title and summary.

B. The Sponsor Inherently Concedes It Has Redefined the Term, "Primary Elections" by Using a Modified Term in its Answer Brief.

The Sponsor uses the terms "primaries," "primary ballot," and "primary elections" regularly and consistently throughout its Initial Brief. In its Answer Brief, however, the Sponsor modifies those terms, referring to the "All Voters Vote primary ballot" and the "All Voters Vote primary." *See, e.g.,* Sponsor's A.B., at 4, 8, 11, 14, and 19. This new distinction confirms the validity of arguments made by opponents, including the Florida Democratic Party, that the ballot title and summary are misleading because they use existing terms in completely new ways without notifying voters that they are doing so. *See, e.g.*, Florida Democratic Party Answer Brief, at 9, 10. This new vernacular reveals an effort to distinguish these "All Voters Vote primary elections" from existing primary elections, a distinction not made in either the ballot title or the ballot summary. The misuse of the terms "primary elections," "primaries," "primary ballot," and "primary" in the ballot title and summary are misleading.

C. The Sponsor's Answer Brief Reveals Another Misleading Aspect of the Ballot Title and Summary: a Change to Write-In and NPA Candidate Eligibility.

Under current law, an individual can seek election as a write-in candidate by filing appropriate paperwork during the qualifying period. § 99.061(4)(a), Fla. Stat. (2019). Write-in candidates' names do not appear on any ballot; "however, space for the write-in candidate's name to be written in must be provided on the *general election* ballot." *Id.*, § 99.061(4)(b) (emphasis added).

Similarly, Florida law provides that a candidate with "no party affiliation" ("NPA") who qualifies by timely filing papers and paying a qualifying fee will appear, by name, on the *general election* ballot. *Id.*, § 99.0955 (emphasis added).

Thus, write-in and NPA candidates do not appear in primary elections. Instead, they are immediately eligible for general elections, with NPA candidates' names actually appearing on the general election ballot.

The ballot title and summary do not mention either write-in or NPA candidates. The title and summary do not explain that the proposed amendment changes the instant-eligibility opportunities for these candidates at general elections. As such, the title and summary fail to give voters notice of the changes it makes to existing Florida law.[2]

[2] This unstated change also runs afoul of the prohibition against logrolling discussed *infra* at 13, 14. The Sponsor argues the purpose of the amendment is "conducting primary elections." Eliminating general election eligibility is a different—and unstated—purpose.

The Sponsor seems to suggest that the proposed amendment would make write-in candidates (and, presumably, NPA candidates), no longer directly eligible on a general election ballot. Instead they would be lumped in with all other candidates in the "All Voters Vote primary election." As such, the proposed amendment will eliminate write-in candidacies for general elections. It will also reduce choices available to NPA voters who may very well continue to want an NPA candidate as a general election choice.

The Sponsor justifies this result by arguing policy, not proper notice. The Sponsor first cites "the write-in loophole" that allows a write-in candidate to close a partisan primary by qualifying for the general election, thereby making Article VI, section 5(b) of the Florida Constitution inapplicable (providing for an open primary where only two candidates have qualified for an office, are from the same political party, and the winner will have no general election opposition). *See* Sponsor A.B., at 19. The Sponsor then cites news articles and an editorial where various commentators call the write-in loophole a "scam," "trickery," "rigged," and "in need of reform." *Id.*, at 28 (internal quotation marks omitted). The Sponsor also argues there is no constitutional right to appear on a general election ballot. *Id.*, at 16, 17.

Be that as it may, the Sponsor's arguments miss the point. The issue is not whether sections 99.061(4) and 99.0955 are a good law. The issue is not whether Article VI, section 5(b) is appropriate policy. The issue—without dispute—is that

the ballot title and summary do not tell voters the proposed amendment would apparently supersede the law governing write-in and NPA candidates' *eligibility* to be voted for on a general election ballot and would remove entirely the opportunity to vote for a write-in candidate at the general election ballot. As such, the ballot title and summary are misleading, disqualifying the proposed amendment from being placed on the ballot.

D. The Sponsor's Answer Brief Reveals for the First Time that the Proposed Amendment Contemplates Some Unknown, Undefined Process for Political Parties to Continue to Nominate Their Candidates.

The ballot summary does not expressly state what it does to the century-old process currently used by millions of Floridians to select their nominees for general elections. Its only reference to any nominating process is in the second sentence: "All candidates for an office, including party nominated candidates, appear on the same primary ballot." According to the Sponsor, these three words—"party nominated candidates"—mean something not contained in the title, summary or text: the 9.7 million members of the two major political parties will now nominate their candidates in a "pre-primary process," one that is "prior to and separate from the All Voters Vote primary." *See* Sponsor's A.B., at 19, 4.

Furthermore, the Sponsor promises that these "party nominated candidates" "will appear on the All Voters Vote primary ballot." *See id.*, at 4. Elsewhere in the Answer Brief, though, the Sponsor acknowledges that the parties use of some

unknown and undefined "pre-primary process" is really only a "possibility." *Id.*, at 8 (recognizing "the possibility that parties may nominate candidates"). Moreover, the summary says a "[c]andidate's party affiliation *may* appear on ballot as provided by law."

There are clear problems with these representations from the Sponsor.[3] First, it is sheer speculation that should the All Voters Vote Initiative be placed on the ballot and adopted—which it should not be—then the major political parties would devise some sort of a "pre-primary process" to nominate candidates. Second, even if the parties implemented some "pre-primary process," the Legislature might well decide that *no* candidate's party affiliation should appear on an All Voters Vote primary ballot. If that happened, a pre-primary nominating process would be, essentially, illusory, because ballots would not tell voters whom each party nominated.

Again, however, the issue is not whether or not a "pre-primary process" that is "prior to and separate from the All Voters Vote Primary" is good policy (it is not). The issue is whether average Florida voters could discern such impacts from the language of the ballot title and summary. The answer is no, they could not. Average

[3] These representations from the Sponsor are actually helpful, however, because they demonstrate that even the Sponsor gets confused about the meaning of the ballot summary.

party-affiliated voters could unknowingly and unintentionally disenfranchise themselves by voting for this misleading proposed amendment.

The Sponsor also argues that this hypothetical "pre-primary process" does not assume "that the political parties will mistreat their own members by somehow disenfranchising them in future candidate selection processes." Sponsor's A.B., at 4. The issue is not, though, how the political parties will react to the proposed amendment if adopted. The issue is whether voters are being fairly informed about the proposed amendment or whether they are being misled. Here, they are not being fairly informed, and they are being misled. Accordingly, the All Voters Vote Initiative should be precluded from appearing on the ballot.

II. The All Voters Vote Initiative Includes Impermissible Logrolling.

Article XI, Section 3 of the Florida Constitution requires initiative petitions to "embrace but one subject and matter directly connected therewith." This single-subject requirement is a "rule of restraint" preventing logrolling and is designed "to insulate Florida's organic law from precipitous and cataclysmic change." *See Homestead Tax Exemption*, 880 So. 2d at 648-49, and *Comm'n to Apportion*, 926 So. 2d at 1224. As such, initiative petitions must have a "logical and natural oneness of purpose." *Advisory Op. to Att'y Gen. re Use of Marijuana for Debilitating Med. Conditions (Medical Marijuana II)*, 181 So. 3d 471, 477. An initiative petition's provisions must be "logically viewed as component parts or aspects of a single

dominant plan or scheme." *In re Adv. Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 243 (Fla. 2015).

The Sponsor's Answer Brief confirms, albeit reluctantly, that the proposed amendment's purpose is "conducting primary elections," while also *eliminating* a winner-take-all primary election where only two candidates from the same party qualify with no general election opposition. *See* Sponsor's A.B., at 28 (referencing Article VI, Section 5(b) of the Florida Constitution). Conducting primary elections and eliminating primary elections are disparate purposes.

The Sponsor defends these disparate purposes with policy arguments. *See id.* ("[I]t would not reasonably matter whether such elections are decided in the primary or the general election.") *and* ("[O]pen primaries under Section 5(b) are virtually non-existent due to the abuse of the write-in loophole . . . .").

Those may be compelling policy arguments, or they may not. But it is undisputable that a voter wanting to keep the open primaries of Article VI, Section 5(b)—thereby shortening the election season in those races—cannot vote for the proposed amendment without eliminating those winner-take-all primaries, too. That result constitutes classic logrolling, which is forbidden.

CONCLUSION

The All Voters Vote Initiative fails to meet the governing legal requirements. It violates the single-subject requirement of Article XI, Section 3 of the Florida

Constitution, and its ballot title and summary are misleading, violating the requirements of section 101.161, Florida Statutes. For the foregoing reasons, the Florida Democratic Party urges the Court to prohibit the proposed amendment from being placed on the ballot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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