SC19-1267 & SC19-1505 (CONSOLIDATED)

IN THE SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: ALL VOTERS VOTE IN PRIMARY ELECTIONS FOR STATE LEGISLATURE, GOVERNOR, AND CABINET

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: ALL VOTERS VOTE IN PRIMARY ELECTIONS FOR STATE LEGISLATURE, GOVERNOR, AND CABINET (FINANCIAL IMPACT STATEMENT)

REPLY BRIEF OF REPUBLICAN PARTY OF FLORIDA IN OPPOSITION TO THE INITIATIVE

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The Initial Brief filed by the Republican Party of Florida (hereafter "RPOF") identified a variety of legal defects in the Proposed Amendment and its ballot title and summary. As a result, the RPOF urged this Court to conclude that the initiative is invalid and should be denied placement on the ballot.

The Sponsor's Answer Brief fails to rebut these arguments and devotes many pages to extolling the supposed merits of the proposal. The Proposed Amendment's chief purpose—abolishing party primary elections—is hidden by the amendment's redefinition of the century-old meaning of a "primary" election in Florida without adequate disclosure to the voter. The Proposed Amendment's ballot summary further misleads the public by providing that "party nominated candidates" will appear on the primary ballot, without accurately explaining that the Proposed Amendment completely redefines what a "party nominated candidate" is. The Proposed Amendment fails to disclose it removes a political party's ability to *nominate* a single candidate to appear on the ballot—whether through the state-run party primary process or an internal party process—thereby limiting political parties to offering nothing more than an *endorsement* of their preffered candidate. The Proposed Amendment violates Florida law by using a ballot title that is not the name by which the measure is commonly referred or spoken of. Finally, the Proposed Amendment embraces more than one subject and

engages in logrolling, forcing voters who may favor or oppose different aspects of the initiative to vote in an all-or-nothing manner.

For the reasons described below, as well as in the RPOF's Initial Brief and Answer Brief,[1] this Court should issue an advisory opinion concluding that the Proposed Amendment is invalid and cannot be placed on the ballot.

I. THE PROPOSED AMENDMENT'S BALLOT TITLE AND SUMMARY ARE MISLEADING AND DO NOT FAIRLY AND ACCURATELY INFORM VOTERS OF ITS CHIEF PURPOSE.

The RPOF's Initial Brief demonstrated that the Proposed Amendment's ballot title and summary is misleading in several respects and fails to fairly and accurately inform the voter of the chief purpose of the amendment. *See, e.g.*, *Adv. Op. to Att'y Gen. re Water & Land Conservation*, 123 So. 3d 47, 50 (Fla. 2013).

In response, the Sponsor claims that the "plain meaning" of the ballot summary "clearly and unambiguously informs voters of its chief purpose" when read in context and in its entirety. AB at 2. Not so. The ballot summary's use of the terms "primary elections," "primaries," and "party nominated candidates" to mean something *other* than their long-standing plain meaning is misleading. Failing to accurately inform the voter of this "hides the ball" as to the chief purpose and

[1] The RPOF filed its Initial Brief in Opposition to the Proposed Amendment on October 1, 2019, and its Answer Brief in Opposition to the Proposed Amendment on October 16, 2019. Rather than repeat arguments made extensively in earlier briefing, the RPOF adopts and incorporates by reference its prior filings and addresses here only certain arguments raised in the Sponsor's Answer Brief.

effect of the Proposed Amendment—rendering it invalid.

The ultimate purpose of the ballot title and summary requirements 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." *Adv. Op. to Att'y Gen. re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998) (citation omitted). Voters deserve the opportunity to make a policy decision on the type of elections they want for state legislature, governor, and cabinet. However, a voter cannot weigh the merits of the Proposed Amendment when the ballot title and summary "hide the ball" and fail to satisfy the basic "truth-in-advertising" requirements. *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

A. The Ballot Title and Summary fail to clearly and unambiguously disclose the Proposed Amendment's chief purpose—to abolish party primaries.

For more than a century, a "primary election" in Florida has meant the same thing: the election where all registered members of a political party may vote to nominate their party's nominee for the general election. *See* § 97.021(30), Fla. Stat. (defining primary election as "an election held preceding the general election *for the purpose of nominating a party* nominee. . .") (emphasis added). The Proposed Amendment would replace Florida's longstanding primary election process with an entirely different election process: a "Jungle Primary" or "Top-Two Primary" in which every single candidate meeting the minimum qualification requirements will

appear on the same ballot regardless of party affiliation. Instead of referring to this new type of primary election by a different name, the ballot title and summary mislead the public by continuing to call this a "primary election."

The Sponsor maintains that voters will not be confused by the Proposed Amendment's use of the term "primary election" to mean something other than its statutory definition because voters regularly participate in primary elections for county and municipal officers that are nonpartisan. AB at 9-10. This argument is nonsensical. By its own language, the Proposed Amendment solely affects primary elections for *partisan offices*: state legislature, governor, and the cabinet offices. And even county and municipal races are contested in partisan races unless provided otherwise by special act, charter, or ordinance. *See* §§ 100.081, 100.3605, Fla. Stat.

The Sponsor cannot reasonably contend that "voters commonly understand and regularly participate in primary elections that do not determine party nominees" when the Proposed Amendment specifically pertains only to races for state legislature, governor, and cabinet in which primary elections are used to determine party nominees. AB at 10. By giving a new meaning to the terms "primaries" and "primary elections" in the title and summary that is in contrast to what those terms have meant for over a century in Florida, the ballot title and summary fail to clearly and unambiguously disclose the chief purpose of the

amendment—to abolish party primary elections. This Court should conclude the Proposed Amendment's misleading ballot title and summary renders it invalid.

B. The Ballot Summary is misleading by stating that "party nominated candidates" will appear on the primary ballot.

By abolishing party primary elections as the mechanism to select a political party's standard bearer for the general election, the Proposed Amendment also eliminates the natural result of a party primary election—a party nominated candidate. Yet, the ballot summary misleadingly suggests otherwise by stating that "All candidates for an office, *including party nominated candidates*, appear on the same primary ballot." (Emphasis added). In this respect, the ballot summary differs from the actual language of the Proposed Amendment, which states "All candidates *qualifying* for election to the office shall be placed on the same ballot for the primary election. . .." By including a ballot summary stating that the primary ballot will contain "All candidates, *including party nominated candidates*" instead of simply "All candidates qualifying for election," the Sponsor misleads voters into believing that the Proposed Amendment would continue to allow members of political parties to nominate a sole standard bearer as the party nominated candidate to appear on the ballot. This, of course, is not the case.

The Proposed Amendment not only abolishes party primaries that are state-run, but also prohibits political parties from holding internal party primaries that produce a sole party nominee to appear on the Jungle Primary ballot representing

the party. Throughout its Answer Brief, the Sponsor wrongly conflates the concepts of a "party nomination" and a "party endorsement." AB at 7-12. The two are not the same. Under the Proposed Amendment, a political party would no longer have the ability to select a single "party nominated candidate" to represent that party on the ballot—meaning that party nominations would have no effect. The Sponsor suggests that the Proposed Amendment would allow parties to "nominate" a candidate through a separate, party-controlled process. But the process described by the Sponsor is not a "nomination" in any meaningful sense, because it does not winnow the field or select a single standard bearer to represent the party on the ballot.

By stating that "party nominated candidates" will appear on the primary ballot, the summary misleads and uses language that does not appear in the text of the Proposed Amendment. The difference between a party nomination and party endorsement is apparent in section 103.121(4), Florida Statutes, which recognizes that a party may *endorse* multiple candidates for a party's single *nomination*:

> The central committee or other equivalent governing body of each state executive committee shall adopt a rule which governs the time and manner in which the respective county executive committees of such party may **endorse**, certify, screen, or otherwise recommend **one or more candidates** for such **party's nomination for election**. Upon adoption, such rule shall provide the exclusive method by which a county committee may so endorse, certify, screen, or otherwise recommend.

(Emphasis added). [2]

An informed voter reading the summary that "party nominated candidates" will appear on the same ballot as "[a]ll other candidates" will be misled into believing that the Proposed Amendment will continue to allow each political party to select a "party nominated candidate"—a single candidate from that party to appear on the new Jungle Primary ballot along with NPA and write-in candidates. Although there is no limit on the number of candidates from a particular party that may *qualify* for election, under the common and plain meaning of the word, only one candidate from each party may be the party's *nominee*. So, under the Proposed Amendment, a political party can no longer nominate a candidate through the state-run primary election process (which is abolished) or through their own internal party process (as the Sponsor suggests) because *all* qualifying candidates appear on the same ballot for the Jungle Primary ballot regardless of their political party affiliation or lack thereof. Thus, "party nominated candidates" as that term is commonly known will not appear on the new Jungle Primary ballot.

The following example, drawn from the 2018 Florida gubernatorial race, illustrates how the Proposed Amendment's Ballot Summary would misinform voters as to the effect of the Proposed Amendment's Text:

[2] The RPOF has adopted a party rule on endorsement of candidates. *See* Rule 8, Party Rules of Procedure, Republican State Executive Committee (*available at:* https://dos.myflorida.com/elections/candidates-committees/political-parties/) (last visited: Oct. 28, 2019).

Proposed Amendment Summary:
"**All candidates** for an office, **including party nominated candidates**, appear on the same primary ballot." (Emphasis added).

Governor
(Vote for One; Top Two Advance)

○ **Ron DeSantis**	**REP**
○ **Andrew Gillum**	**DEM**
○ **Darcy Richardson**	**REF**
○ **Kyle "KC" Gibson**	**NPA**
○ **Ryan Christopher Foley**	**NPA**
○ **Bruce Stanley**	**NPA**
○ _____	
Write-In Candidate	

Proposed Amendment Text:
"**All candidates qualifying** for election to the office shall be placed on the same ballot for the primary election regardless of any candidate's political party affiliation or lack of the same." (Emphasis added).

Governor
(Vote for One; Top Two Advance)

○ **Don Baldauf**	**REP**
○ **Ron DeSantis**	**REP**
○ **Timothy M. Devine**	**REP**
○ **Bob Langford**	**REP**
○ **John Joseph Mercadante**	**REP**
○ **Bruce Nathan**	**REP**
○ **Adam H. Putnam**	**REP**
○ **Bob White**	**REP**
○ **Andrew Gillum**	**DEM**
○ **Gwen Graham**	**DEM**
○ **Jeff Greene**	**DEM**
○ **Chris King**	**DEM**
○ **Phillip Levine**	**DEM**
○ **Alex "Lundy" Lundmark**	**DEM**
○ **John Wetherbee**	**DEM**
○ **Darcy Richardson**	**REF**
○ **Kyle "KC" Gibson**	**NPA**
○ **Ryan Christopher Foley**	**NPA**
○ **Bruce Stanley**	**NPA**
○ _____	
Write-In Candidate	

The Sponsor asserts voters will not be confused by the new meaning it gives to the phrase "party nominated candidates" because the phrase is "not statutorily defined" or a "legal term of art." AB at 12. The Sponsor's assertion is erroneous.

The Florida Election Code repeatedly refers to candidates for "nomination" as partisan candidates who qualify to seek their party's nomination, as distinguished from candidates for "election" who qualify for the general election ballot. *See* § 97.021(6), Fla. Stat. ("'Candidate' means any person . . . who seeks to qualify for nomination or election . . . ."). Candidates qualify for "nomination or election" by filing a candidate oath and the necessary qualification papers and qualifying fees. §§ 99.021, 99.061, 99.092, Fla. Stat.; *see also* § 100.05, Fla. Stat. ("The supervisor of elections of each county shall print on [general election] ballots . . . the names of **candidates** who have been **nominated by a political party**. . . ."); § 101.2512, Fla. Stat. (providing that the general election ballot includes names of party candidates "**nominated by primary election**" and other candidates who have "obtained a position on the general election ballot" upon qualifying, *e.g.*, NPA candidates). (Emphasis added).

Likewise, section 100.061, Florida Statutes, provides "[t]he **candidate** receiving the highest number of votes cast in each contest in the primary election **shall be declared nominated** for such office. . . ."). (Emphasis added).

Furthermore, in contrast to the Sponsor's assertion that "party nominated

candidates" is not a "legal term of art," the statutory definition of "primary election" is an election "for the purpose of **nominating a party nominee** to be voted for in the general election to fill a national, state, county or district office." § 97.021(30), Fla. Stat. (emphasis added).

The Sponsor argues the Proposed Amendment advises voters that party nominated candidates "can be chosen by the party prior to and separate from" the Jungle Primary, and thus, does not "eliminate parties' and their members' ability to select their own candidates for office." AB at 4. This is not true. By abolishing party primaries and allowing all qualifying candidates regardless of party affiliation to appear on the Jungle Primary ballot, the Proposed Amendment eliminates the ability of a political party to produce a "party nominated candidate" to appear on the Jungle Primary ballot. By failing to disclose this, the ballot summary is misleading.

The Sponsor further contends that the phrase located at the end of the summary—"[c]andidate's party affiliation may appear on ballot as provided by law"—is sufficiently broad enough to inform the voter that a political party's endorsement or "nomination" will appear on the new primary ballot. This is not the case either. "Party affiliation" in Fla. Admin. Code R. 1S-2.032 ("Uniform Design for Election Ballots") refers to the political party a candidate is registered with and has chosen to be affiliated with through qualifying. The Florida Election Code also

refers to "party affiliation" as the party with which a voter chooses to be registered *See* § 97.052(2)(j), Fla. Stat. ("The uniform statewide voter registration application must be designed to elicit the following information from the applicant . . . Party affiliation."); §§ 97.053(5)(b), 97.071(1)(d), Fla. Stat. Even the Proposed Amendment's summary refers to "party affiliation" as the political party a voter is registered with—"Allows all registered voters to vote . . . regardless of political party affiliation." A candidate's "party affiliation" in a primary election has nothing to do with a political party's endorsement or nomination.[3]

The Sponsor accurately notes that "the ballot title and summary 'need not explain every detail or ramification of the proposed amendment.'" AB at 5-6 (quoting *Adv. Op. to Att'y Gen. re Solar Energy Choice Rights of Electricity Consumers*, 188 So. 3d 822, 831 (Fla. 2016)). But, failing to inform the voter that the Proposed Amendment abolishes party primaries and removes the ability of political parties to nominate their own candidates to appear on the ballot is not merely an omission of a detail or ramification—it is the heart of the Proposed Amendment. The ballot summary conceals this chief purpose and misleads voters in violation of Florida law. This Court should declare the Proposed Amendment

[3] Fla. Admin. Code R. 1S-2.032(9)(c)1 ("Party Affiliation. In a general election, the appropriate three-letter abbreviation of a political party name or no party affiliation (NPA) in capital letters shall be included for each candidate . . . in a partisan contest."); *see* Fla. Admin. Code R. 1S-2.032(2)(m) ("'Universal Primary Contest' refers to a contest in a primary election in which all candidates for an office have the same party affiliation. . . .").

invalid.

C. The Proposed Amendment's Ballot Title does not reflect the caption or title "by which the measure is commonly known or referred to" as required by Florida law.

The RPOF's Initial Brief demonstrates that the Sponsor's ballot title also violates a separate requirement imposed by Florida law. Specifically, the ballot title "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet" is not a "caption . . . by which the measure is commonly referred to or spoken of" as required by section 101.161(1), Florida Statutes. RPOF IB at 21-24.

The Sponsor's Answer Brief refers to this straightforward application of the statutory text as a "novel argument." The Sponsor fails, however, to identify *a single example* of the Proposed Amendment being "commonly referred to or spoken of" as the "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet" initiative. *Compare* AB at 13 (claiming that "public media accounts" refer to the measure as "All Voters Vote" but providing no examples), *with* RPOF IB at 22-24 (citing numerous media accounts commonly referring to the Proposed Amendment as an "Open Primary" or "Jungle Primary" initiative and *none* referring to the measure using its full title). By failing to rebut RPOF's factual evidence regarding the ballot title, the Sponsor effectively concedes that the Proposed Amendment is not "commonly referred to or spoken of" as "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet."

Therefore, the ballot title is invalid and misleading under section 101.161(1), Florida Statutes, and the Proposed Amendment should be denied ballot placement.

II. THE PROPOSED AMENDMENT VIOLATES THE FLORIDA CONSTITUTION'S SINGLE-SUBJECT REQUIREMENT.

The RPOF's Initial Brief demonstrated that the Proposed Amendment violates the Florida Constitution's single-subject requirement by addressing disparate subjects, thereby denying voters the ability to vote upon "a change regarding one specific subject of government." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984); RPOF IB at 30-33.

The Sponsor argues that the Proposed Amendment embraces the single subject of "conducting primary elections for specified state elective office regardless of party affiliation." AB at 22. This is an overly broad and simplistic explanation, which fails to address each of the disparate component parts of the Proposed Amendment. *See Evans v. Firestone*, 457 So. 2d 1351, 1353 (Fla. 1984) ("[E]nfolding disparate subjects within the cloak of a broad generality does not satisfy the single-subject requirement."). Instead, the Proposed Amendment completely restructures the primary and general elections for the state legislature, governor, and cabinet officers, while simultaneously altering which voters and candidates can participate in those elections.

Contrary to the Sponsor's argument, *who* can vote in a primary election and *how* primary and general elections are conducted are not "two sides of the same

coin." AB at 22-23. This Court has previously found a single-subject violation where a single initiative proposal attempted to change both *who* conducted Florida's decennial redistricting and *how* redistricting would be conducted. *Adv. Op. to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legis. & Cong. Districts Which Replaces Apportionment by Legis.*, 926 So. 2d 1218, 1225-26 (Fla. 2006). The Proposed Amendment violates the Florida Constitution's single-subject requirement for the same reason.

Next, the Proposed Amendment engages in the prohibited practice of logrolling. The Sponsor contends that "one cannot have a primary that allows all registered voters to vote for the affected offices without changing the existing closed party primary system for those offices; the two cannot co-exist." AB at 27. Indeed, the Sponsor is correct that under Florida's traditional closed primary system only voters registered with a particular party may vote in that party's primary election. *See* § 101.021, Fla. Stat. But the Sponsor's argument on this point misrepresents the true nature of the changes it seeks to make with the Proposed Amendment.

As discussed in the RPOF's Initial Brief, there are six types of state primary elections. RPOF IB at 6-9.[4] Only the top-two primary system eliminates individual

[4] Nat'l Conf. of State Legislatures, *State Primary Election Types*, http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx (last visited Oct. 28, 2019).

partisan primaries in favor of a single, nonpartisan primary. In other words, the subject of opening up partisan primary elections to unaffiliated and third-party voters is completely distinct and logically separable from the subject of combining all candidates for an office on a single primary ballot and allowing only the top two vote getters to advance to the general election.

Forcing voters, in a single initiative proposal, to choose between creating choice in the primary election and eliminating choice in the general election is unconstitutional logrolling and must not be permitted on the ballot. *See Adv. Op. to Att'y Gen. re Save our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994) (defining logrolling as the "practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue"). This Court should declare the Proposed Amendment invalid as it violates the Florida Constitution's single-subject requirement.

CONCLUSION

This Court should conclude that the Proposed Amendment and its ballot title and summary are invalid and cannot lawfully be placed on the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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