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]

BRIEF OF THE FLORIDA DEMOCRATIC PARTY OPPOSING PROPOSED AMENDMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

LAWS OF FLORIDA

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Florida Attorney General has requested this Court's opinion on the validity of a constitutional amendment proposed through the initiative petition process of Article XI, Section 3 of the Florida Constitution.[1] The title of the amendment is "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet" (the "All Voters Vote Initiative"). This Initial Brief is submitted by the Florida Democratic Party as a political party with the right to associate protected by the First and Fourteenth Amendments. This Court has jurisdiction. *See* Art. V, § 3(b)(10), Fla. Const.

The Florida Democratic Party submits that the proposed amendment's text violates the single-subject requirement of Article XI, Section 3, of the Florida Constitution, while the title and ballot summary are misleading and confusing, violating Section 101.161, Florida Statutes (2019). Thus, this Court should not approve the proposed amendment for placement on the ballot.

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[1] Article IV, Section 10 of the Florida Constitution requires the Attorney General to "request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI." Section 16.061, Florida Statutes, implements this provision by requiring the Attorney General to petition this Court within 30 days after receiving the Secretary of State's certification of entitlement to an advisory opinion, "requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s.3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161."

TEXT, TITLE, AND BALLOT SUMMARY OF THE PROPOSED AMENDMENT

The ballot title for the proposed amendment is "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet."

The ballot summary for the proposed amendment states as follows:

> Allows all registered voters to vote in primaries for state legislature, governor, and cabinet regardless of political party affiliation. All candidates for an office, including party nominated candidates, appear on the same primary ballot. Two highest vote getters advance to general election. If only two candidates qualify, no primary is held and winner is determined in general election. Candidate's party affiliation may appear on ballot as provided by law. Effective January 1, 2024.

The proposed amendment states that it "Amends Article VI Section 5 by adding subsection (c)[.]"

The text of the proposed amendment provides as follows:

Article VI, Section 5. Primary, general, and special elections. –

* * * * *

(c) All elections for the Florida legislature, governor and cabinet shall be held as follows:

(1) A single primary election shall be held for each office. All electors registered to vote for the office being filled shall be allowed to vote in the primary election for said office regardless of the voter's, or any candidate's, political party affiliation or lack of same.

(2) 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 same.

(3) The two candidates receiving the highest number of votes cast in the primary election shall advance to the general election. For elections

in which only two candidates qualify for the same office, no primary will be held and the winner will be determined in the general election.

(4) Nothing in this subsection shall prohibit a political party from nominating a candidate to run for office under this subsection. Nothing in this subsection shall prohibit a party from endorsing or otherwise supporting a candidate as provided by law. A candidate's affiliation with a political party may appear on the ballot as provided by law.

(5) This amendment is self-executing and shall be effective January 1, 2024.

SUMMARY OF THE ARGUMENT

The All Voters Vote Initiative violates the single-subject rule. It creates precisely the kind of "precipitous and cataclysmic change" about which this Court has cautioned for years in initiative petition cases. Without clearly and unambiguously informing voters, the proposed amendment changes a century-old primary election system. For the first time since at least 1913, primary voters would not choose a political party's nominee for the general election. While the amendment provides that "[n]othing in this subsection shall prohibit a political party from nominating a candidate to run for office under this subsection," it requires each political party to forego a primary election to nominate its candidates for governor, cabinet, and state legislative races. Thus, the political party nomination process becomes illusory.

Additionally, the proposed amendment *eliminates* primary elections entirely where only two candidates have qualified for the same office, leaving the winner to

be decided in the general election. In so doing, it introduces a second subject—the elimination of primary elections in certain circumstances.

Furthermore, the proposed amendment results in a confusing mixture of methods of conducting elections in the State of Florida: one method for conducting elections for federal candidates; another method for conducting elections for governor, cabinet, and state legislative races; another method for conducting elections for county constitutional officers; and yet another for non-partisan elections.

The proposed amendment engages in impermissible logrolling: a voter who supports nonpartisan primaries but who opposes eliminating any primaries faces an irreconcilable conflict. These multiple systematic changes are inappropriate for an initiative petition.

The ballot title and ballot summary violate the governing requirements of law by misleading the public in the following ways:

(1) The ballot title affirmatively states that "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet," yet the ballot summary explains that in some instances primary elections will be eliminated.

(2) The ballot summary contains an irreconcilable contradiction that will be misleading and confusing to voters. In its second sentence, the summary states that *all* candidates for an office, including party nominated candidates, will appear on the

same primary ballot. Two sentences later it apparently modifies that superlative statement, saying, "If only two candidates qualify, no primary is held . . . ."

(3) The ballot summary is confusing by what it does not say: that the All Voters Vote Initiative irreconcilably conflicts with Article VI, Section 5(b) of the Florida Constitution (providing that where all candidates for an office share the same party affiliation and no general election opposition, "all qualified electors, regardless of party affiliation, may vote in the *primary elections* for that office." (Emphasis added)). The proposed amendment eliminates primaries where, for example, there are only two candidates and they share the same party affiliation.

(4) Despite eliminating political party primaries for governor, cabinet, and state legislature, the proposed amendment misleadingly implies political parties will nominate candidates for primaries (something the Florida Democratic Party has not done at least since 1913 because partisan candidates have been nominated through primary elections).

(5) Specific language in the ballot summary creates impermissible ambiguities:

(a) The first sentence disenfranchises Florida's 3.6 million registered voters who do not declare a party affiliation. That sentence provides, "Allows all registered voters to vote in primaries for state legislature, governor, and cabinet *regardless of political affiliation*." (Emphasis added). The phrase

"regardless of political affiliation" implies an existing party affiliation and does not include the nearly 27% of Florida registered voters with no political affiliation. The amendment text goes further than the summary, stating, "regardless of the voter's, or any candidate's, political party affiliation *or lack of same*." (Emphasis added). That critical modifier does not appear in the ballot summary, making the summary—which is all that voters will see in the voting booth—misleading.

(b) The first sentence of the summary implies that the proposed initiative will result in all voters voting in each and every state legislative election, not just their local district. Elections for governor and cabinet are statewide elections. By including the state legislature in that list, a reasonable voter could conclude the proposed amendment opens legislative elections to all voters statewide.

(c) The ballot summary is confusing because while the first sentence refers to specific offices (governor, cabinet, and state legislature), the second sentence refers to candidates "for an office" without specifying which offices.

For the foregoing reasons, the Court should not approve the All Voters Vote Initiative for placement on the ballot.

ARGUMENT

Standard of Review: This Court explained its standard of review in initiative petition cases:

> This Court has traditionally applied a deferential standard of review to the validity of a citizen initiative petition and "has been reluctant to interfere" with "the right of self-determination for all Florida's citizens" to formulate "their own organic law." *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions (Medical Marijuana I)*, 132 So. 3d 786, 794 (Fla. 2014) (quoting *Advisory Op. to Att'y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses*, 818 So. 2d 491, 494 (Fla. 2002)) (emphasis in original). This court does "not consider or address the merits or wisdom of the proposed amendment" and must "act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." *In re Advisory Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So. 3d 235, 242 (Fla. 2015) (quoting *In re Advisory Op. to Att'y Gen. re Fairness Initiative Requiring Legis. Determination that Sales Tax Exemptions & Exclusions Serve a Pub. Purpose*, 880 So. 2d 630, 633 (Fla. 2004) (citations omitted)).

Advisory Op. to Att'y Gen. re Voting Restoration Amend., 215 So. 3d 1202, 1205 (Fla. 2017) (quoting *Advisory Op. to Att'y Gen. re Rights to Elec. Consumers Regarding Solar Energy Choice*), 188 So. 3d 822, 827 (Fla. 2016)).

Moreover, in rendering an advisory opinion on a citizen initiative petition, "the Court limits its inquiry to two issues: (1) whether the amendment itself satisfies the single-subject requirement of article XI, section 3, Florida Constitution; and (2) whether the ballot title and summary satisfy the clarity requirements of section 101.161, Florida Statutes." *Voting Restoration Amend.*, 215 So. 3d at 1205 (quoting

Advisory Op. to Att'y Gen. re use of Marijuana for Debilitating Med. Conditions (Medical Marijuana II), 181 So. 3d 471, 476 (Fla. 2015) (citation omitted)). Thus, the Court is "obligated to uphold the proposal unless it is 'clearly and conclusively defective.'" *Voting Restoration Amend.*, 215 So. 3d at 1205 (quoting *Advisory Op. to Att'y Gen. re Fla.'s Amend. To Reduce Class Size*, 816 So. 2d 580, 582 (Fla. 2002)).

In this case, after exercising extreme care, caution, and restraint, the Court should find the proposed amendment is clearly and conclusively defective and not allow it to be placed on the ballot.

I. The All Voters Vote Initiative Violates the Single-Subject Rule.

Article XI, Section 3 of the Florida Constitution provides that a proposed constitutional amendment arising via the citizen initiative process "shall embrace but one subject and matter directly connected therewith." This single-subject requirement provides a protection for the people considering the lack of deliberative debate in initiative petitions when compared to amendments proposed by other means:

> The inclusion of the single-subject requirement recognizes that only the citizens' initiative process—as contrasted with the legislative joint resolution process, the constitutional revision commission process, or the constitutional convention process—lacks the "filtering process" for carefully considered drafting and the public hearing process contained in those other methods of amendment or revision.

Solar Elec. Supply, 177 So. 3d 235, 242 (Fla. 2015) (quoting *Advisory Op. to Att'y Gen. – Save Our Everglades,* 636 So. 2d 1336, 1339 (Fla. 1994) and *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984)).

The single-subject rule, thus, is a "rule of restraint." *Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 648-49 (Fla. 2004) (quoting *Advisory Op. to Att'y Gen. re Prohibiting Public Funding of Political Candidates' Campaigns,* 693 So. 2d 972, 975 (Fla. 1997)). It was "placed in the constitution by the people to allow the citizens, by initiative petition, to propose and vote on *singular changes* in the functions of our governmental structure." *Homestead Tax Exemption*, 800 So. 2d at 649 (quoting *Fine,* 448 So. 2d at 988) (emphasis added).

The single-subject rule prevents an amendment from engaging in either of two practices: (a) "logrolling," which is the combining of different issues into one initiative so that people have to vote for something they might not want, in order to gain something that they do want, *see Fairness Initiative,* 880 So. 2d at 633; *Save Our Everglades,* 636 So. 2d at 1339; and (b) "substantially altering or performing the functions of multiple branches of state government." *Fairness Initiative,* 880 So. 2d at 633. As such, the rule is designed "to insulate Florida's organic law from precipitous and cataclysmic change." *Save Our Everglades*, 636 So. 2d at 1339; *Advisory Op. to Att'y Gen. re Independent Nonpartisan Commission to Apportion*

Legislative and Congressional Districts which Replaces Apportionment by Legislature, 926 So. 2d 1218, 1224 (Fla. 2006).

A. The All Voters Vote initiative petition creates "precipitous and cataclysmic change."

Florida law has provided for primaries in general election years to nominate candidates from political parties since at least 1913. *See* Ch. 6469, § 5, at 250, Laws of Fla. (providing a primary "for the nomination of candidates by all political parties."). One hundred and six years later, the general law is not much different. *See* § 100.061, Fla. Stat. (2019) (providing a primary "for nomination of candidates of political parties . . . .").

These primaries "are not in reality elections, but are simply nominating devices." *Wagner v. Gray*, 74 So. 2d 89, 91 (Fla. 1954) (citation omitted). Unknown at common law and "purely creatures of [] statute," primaries are "merely the selective mechanism by which the members of a political party express their preference in the selection of the party's candidates for public office." *Id. See also Ex parte Smith*, 118 So. 306, 308 (Fla. 1928).

Primaries arose not at the request of political parties, but in spite of them:

> Primary elections were in no sense the offspring of political parties. The fact is that in their inception they met their strongest opposition in the organization of the major political parties. They grew out of the alleged corrupt practices of the convention and a widespread demand on the part of the people for a direct vote in designating the nominees of the party for office rather than have them named by party conventions, committees, or by some other indirect method.

State ex rel. Landis v. Dyer, 148 So. 201, 202 (Fla. 1933).

As such, primaries have a special place in heart of our democratic government. *Id.* ("It would be difficult to conceive of any institution in our political fabric more thoroughly impregnated with a public interest than a primary election."); *Brinkman v. Francois*, 184 So. 3d 504, 513 (Fla. 2016) (primaries are "essential to the functioning of a popular free government") (quoting *Wagner*, 74 So. 2d at 90 (primaries are "identified with the essential public interest.") (citations omitted)). Indeed, this Court has found that primaries "give vitality to the constitutional guaranty of a free and untrammeled ballot by affording freedom of choice of candidates to the individual party voter who may be expected to support the party nominee at the ensuing general election." *State ex rel. Andrews v. Gray*, 169 So. 501, 505 (Fla. 1936).

Political parties have rights of freedom of association guaranteed and protected by the First and Fourteenth Amendments to the U.S. Constitution. *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981). This associational freedom "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Id.*, 450 U.S. at 122, 126 (striking down a Wisconsin election law that required the National Democratic Party to seat delegates at the Democratic National

Convention in a manner that was contrary to the national party's rules). This freedom of association has been at the core of cases discussing various types of primaries.

For example, Florida is one of nine states with "closed" primaries, according to the National Conference of State Legislatures. *See* http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx (accessed on Sept. 27, 2019) ("NCSL"). In a closed primary, voters declare a party affiliation when they register to vote and are then allowed to vote for candidates from only that party, thereby selecting the party's nominee to the general election. *See* § 101.021, Fla. Stat. ("In a primary election a qualified elector is entitled to vote the official primary election ballot of the political party designated in the elector's registration, and no other.") *See also California Democratic Party v. Jones*, 530 U.S. 567, 570 (2000).

In "open" primaries, voters need not declare a party affiliation, but are allowed to vote for candidates of only one party. *See La Follette*, 450 U.S. at 111-12, n.4 ("[S]tates with open primaries . . . allow any qualified voter to participate in a party primary without designating party affiliation or preference.") (citation omitted). Eleven states hold open primaries. *NSCL*.

"Blanket primaries," by contrast, are primaries where any registered voter can vote for any candidate on the ballot, with or without a party affiliation. *Jones*, 530 U.S. at 570 (describing California's then-newly adopted change from a closed

primary to a blanket primary). These primaries, however, do not nominate party candidates.

The Supreme Court in *Jones* distinguished between a "partisan blanket primary"—which it invalidated—and a "nonpartisan blanket primary." *Id.*, 530 U.S. at 585. In the former, the candidate of each party with the greatest number of votes was that party's nominee to the general election. *Id.*, 530 U.S. at 570. In the latter, the "top two vote getters" advanced to the general election, even if they were members of the same political party. *Id.*, 530 U.S. at 585.

The *Jones* court struck down California's partisan blanket primary as an unconstitutional infringement on political parties' right to freedom of association. *Id.*, 530 U.S. at 586. The Court reasoned that opening the primaries to all voters, and then declaring the top vote getter from each party as that party's nominee, forced a political party to accept a nominee selected by persons who were not members of that party. *Id.*, 530 U.S. at 581 ("In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process—the basic function of a political party—by opening it up to persons wholly unaffiliated with the party.") (citation and internal quotation marks omitted).

The *Jones* court offered an alternative: *nonpartisan* blanket primaries, where the top two candidates were not nominees of *any* party; they were simply the two

general election candidates.[2] *Id.*, 530 U.S. at 585. The Court observed: "This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: *Primary voters are not choosing a party's nominee*." *Id.*, 530 U.S. at 585-86 (emphasis added).

Four states have nonpartisan blanket primaries, also called "top two primaries." *NCSL* (listing California, Louisiana, Nebraska—but only for nonpartisan legislative races—, and Washington[3]). The All Voters Vote Initiative seeks to make primaries for state legislature, governor, and cabinet nonpartisan blanket primaries.[4]

The Washington nonpartisan blanket primary was the result of a citizen initiative petition, known as "I-872." *Washington State Grange*, 552 U.S. at 444. Unlike the All Voters Vote Initiative facing this Court, however, I-872 expressly informed Washington voters that it was fundamentally changing a century-old primary system:

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[2] Nonpartisan blanket primaries are also known as "jungle primaries." *See Ravalli County Republican Central Committee v. McCulloch*, 154 F. Supp. 3d 1063, 1066-67 (D. Mont. 2015).

[3] Washington's current nonpartisan blanket primary system survived a constitutional challenge in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). At issue was a provision in the new system that allowed candidates to "self-designate[]" their political party affiliation on the primary ballot. *Id.*, 552 U.S. at 444. The Court concluded the self-designation did not facially violate political parties' right to freedom of association. *Id.*, 552 U.S. at 458-59.

[4] The remaining states use various versions of partially open and partially closed primaries. *NCSL*.

> **Sec. 5.** RCW 29A.04.127 and 2003 c 111 s 122 are each amended to read as follows:
>
> "Primary" or "primary election" means a ((~~statutory~~)) procedure for ((~~nominating~~)) winnowing candidates ((~~to~~)) for public office ((~~at the polls~~)) to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.

http://sos.wa.gov/elections/initiatives/text/i872.pdf (official record of the Secretary of State of Washington) (deletions and additions in original).

The All Voters Vote Initiative provides no such clarity. It does not clearly and unambiguously inform voters what the U.S. Supreme Court said so succinctly about nonpartisan blanket primaries in *Jones*: "Primary voters are not choosing a party's nominee." 530 U.S. at 586. The proposed amendment does not inform voters that it implements a fundamental change in political parties' right to freedom of association. It does not state that it is changing a century-old system. It does not advise voters that it makes the party-nominating process illusory because primaries will no longer nominate candidates chosen by the party's own members. It creates precipitous and cataclysmic change.[5]

Moreover, the proposed amendment further fails to inform voters it creates a fourth type of election process: one method for conducting elections for federal

[5] Indeed, as discussed in section II *infra*, its ballot title is misleading because it implies that political parties will "nominate[] candidates" for primaries, something the Florida Democratic Party has not done since 1913 because primaries have always nominated candidates for general elections.

candidates; another method for conducting elections for governor, cabinet, and state legislative races; another method for conducting elections for county constitutional officers; and yet another for non-partisan elections. Were the amendment adopted, reasonable voters could well be surprised to learn they approved a confusing mixture of election methods. To be clear: voters could so choose to make such a change, but they should do so by making an informed choice. The All Voters Vote Initiative does not provide enough information to allow for that informed choice.

Any modification to Florida's century-old primary election system must not result in "precipitous and cataclysmic change" caused by unintended consequences wrought by an initiative petition unfiltered by deliberative debate and public scrutiny. Avoiding such a result is a fundamental reason against logrolling. It is also why this initiative petition fails.

B. The All Voters Vote initiative petition violates the prohibition against logrolling.

This Court has described the "universal test" for logrolling to be whether an amendment has a "[u]nity of object and plan," meaning "a logical and natural oneness of purpose" and "a natural relation and connection as component parts or aspects of single dominant plan or scheme." *Id.*

The proposed amendment does not pass this universal test. While it purports to create a constitutional system where "all voters vote" in certain primary elections, it goes a step too far by also eliminating primary elections with only two candidates.

The creation of nonpartisan blanket primaries is not logically related to the elimination of primary elections in other circumstances.

For example, Article VI, Section 5(b) of the Florida Constitution provides, "If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified electors, regardless of party affiliation, may vote in the primary elections for that office." The result of section 5(b) is that, under the circumstances described, the winner will be selected in the primary.

The proposed amendment changes that result, but not for all elections. The amendment would create new section 5(c)(3): "The two candidates receiving the highest number of votes cast in the primary election shall advance to the general election. *For elections in which only two candidates qualify for the same office, no primary will be held and the winner will be determined in the general election.*" (Emphasis added).

Arguably, the drafters of the proposed amendment could have avoided logrolling by eliminating the emphasized sentence entirely and merely stating, "The two candidates receiving the highest numbers of votes cast in the primary election shall advance to the general election, subject to article VI, section 5(b)." But they did not. Instead, they chose not only to ignore 5(b), as discussed further *infra*, but also to eliminate a primary entirely. The following chart illustrates the impact of the

proposed change, using hypothetical candidates "R_1" and "R_2" (affiliated with the same political party), "D" (of a different political party) and "WI" (qualifying as a write-in candidate for the general election)[6]:

Contest	**General Election Opposition?**	**Result Under 5(b)**	**Result Under 5(c)**
R_1 v. R_2	No	Primary winner is elected	No primary at all; Election season continues; General election winner is elected
R_1 v. D	No	Closed primary; General election winner is elected	No primary at all; Election season continues; General election winner is elected
D	Yes, by WI	Closed primary; General election winner is elected	No primary at all; Election season continues; General election winner is elected
R_1 v. R_2	Yes, by WI	Closed primary; General election winner is elected	Jungle primary; General election winner is elected
R_1 v. D	Yes, by WI	Closed primary; General election winner is elected	Jungle primary; General election winner is elected

Thus, in the first three scenarios, the proposed amendment eliminates primary elections for "all voters." In the last two scenarios, the amendment opens the primaries to "all voters."

[6] An individual seeking election as a write-in candidate, who files appropriate paperwork during the qualifying period, is a "qualifying" candidate under section 99.061(4), Florida Statutes. That write-in candidate is also "opposition" for the general election. *Brinkman v. Francois*, 184 So. 3d 504, 514 (Fla. 2016).

The reasonable voter, therefore, faces a quandary: how to vote to keep primary elections that decide the ultimate winner because all the candidates are from the same party with no general election opposition (as provided by existing section 5(b)), while simultaneously opening primaries to "all voters"? The voter cannot make that choice, because the All Voters Vote Initiative does not make "singular changes" in the functions of our governmental structure. Instead, it fails the universal test of having a logical and natural "oneness of purpose."

Accordingly, the proposed initiative should not be allowed on the ballot.

II. The Ballot Title and Summary Are Misleading and Will Confuse the Public.

Whenever a constitutional amendment is submitted to the vote of the people, a title and summary of the amendment must appear on the ballot. Prior to an election, voters will have an opportunity to read the entire text of the amendment, and the full text is posted or available at polling sites, but once in the voting booth, all a voter sees on the ballot is the amendment's title and the ballot summary. *See* §§ 101.161(1) and 101.171. Thus, "[t]he 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). For these reasons, the title and summary are subject to the following statutory requirements:

> Except for amendments and ballot language proposed by joint resolution, the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. . . . The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

§ 101.161(1), Fla. Stat.

The basic purpose of this provision 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 So. 2d 1124, 1127 (Fla. 1996). The requirement "functions as a kind of 'truth in packaging' law for the ballot. *Comm'n to Apportion*, 926 So. 2d at 1227 (quoting *Armstrong v. Harris*, 773 So. 2d 7, 13 (Fla. 2000)).

In analyzing a proposed amendment's compliance with the statute, this Court has stated that it should ask two questions: "First, whether the ballot title and summary fairly inform the voter of the chief purpose of the amendment[,] [and] [s]econd . . . whether the language of the title and summary, as written, misleads the public." *Homestead Tax Exemption*, 880 So. 2d at 651-52 (internal quotations and citations omitted).

This Court has cautioned proponents of proposed constitutional amendments against using catchy phrases or advantageous wordsmithing as ballot titles and summaries lest the titles and summaries become misleading "in an attempt to persuade voters to vote in favor of the proposal." *Florida Dept. of State v. Slough*,

992 So. 2d 142, 149 (Fla. 2008). Misleading ballot titles and summaries will doom a proposed amendment. *Id.* To avoid such doom, amendment sponsors "need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous." *Id.*

Finally, a ballot title and summary are to be read together to determine whether they are misleading or confusing. *Medical Marijuana I*, 132 So. 3d 786, 804 (citing *Advisory Op. to Att'y Gen. re Voluntary Universal Pre-Kindergarten Educ.*, 824 So. 2d 161, 166 (Fla. 2002) ("[T]he ballot title and summary may not be read in isolation, but must be read together in determining whether the ballot information properly informs the voters.")). Indeed, this Court has long held that constitutional amendments are construed by following statutory construction principles:

> If the title of a statute be a restrictive one, carving out for consideration a part only of a general subject, matters not germane to or properly connected with that part of the general subject so singled out, as reasonably and fairly understood, cannot be validly incorporated in the act. All provisions beyond such limits are invalid, even though such matters might have been incorporated in the act under a broader title, because *as to such unrelated matters the title is misleading*.

Slough, 992 So. 2d at 148-49 (quoting *State v. Sullivan*, 128 So. 478, 480 (Fla. 1930) (emphasis supplied by *Slough*)).

Thus, if a ballot summary includes a provision not germane to or properly connected with the title, then the title and summary are misleading.

A. The ballot title says one thing ("All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet,"), but the summary says another.

A reasonable voter reading the ballot title and summary together will be confused. The title announces that the proposed amendment concerns voting in primary elections for certain offices. It is a restrictive title, *voting* in primaries, within the general subject of primary elections, which would include qualifying, scheduling, adding run-offs, eliminating, and voting. *Eliminating* certain primaries—revealed for the first time in the ballot summary—is not germane to or properly connected with *voting* in primaries.

The title might have announced, "Changes Voting Requirements and Eliminates Some Primary Elections for State Legislature, Governor, and Cabinet." That title, while not particularly catchy, might have been deemed "straightforward, direct, accurate and . . . not fail[ing] to disclose significant effects of the amendment." *Slough*, 992 So. 2d at 149. The current title of the proposed amendment, however, is not straightforward, direct, or accurate. It fails to disclose significant effects of the amendment.

For example, the Court rejected a ballot summary as misleading in *Fairness Initiative.* There, the Court held the proposed amendment engaged in impermissible

logrolling, and the summary failed to alert voters that the amendment "could essentially create a tax on services[.]" 880 So. 2d at 636. The Court concluded, "that a voter must be directly informed of such an important consequence, and that this summary fails to do so." *Id.*

Likewise, the All Voters Vote ballot title and summary fail to inform voters clearly and unambiguously that some primary elections will be eliminated. As such, the title and summary are misleading, and the proposed amendment should not be allowed on the ballot.

B. The ballot summary implies political parties will still nominate candidates for primaries.

The second sentence of the ballot summary states, "All candidates for an office, *including party nominated candidates*, appear on the same primary ballot." (Emphasis added). This statement would lead a reasonable voter to conclude that political parties will somehow nominate candidates for primary elections.

The Florida Democratic Party itself does not nominate a candidate for a primary election (especially for governor, cabinet, or the state legislature, as contemplated by the proposed amendment). Instead, since at least 1913, the party has nominated general election candidates through the closed primary system. Thus, the ballot title suggests something that has never happened.

The clear purpose of the "including party nominated candidates" language is to provide misleading comfort to party-affiliated voters. It is to assure those voters

that their candidates will not be locked out of this completely new jungle primary process. If the initiative petition's drafters had omitted the highlighted language from the second sentence of the ballot summary, it would have read: "All candidates for an office appear on the same primary ballot." That language would have been clear and concise. By injecting "including party nominated candidates" into the sentence, however, the summary implies that political parties will continue to nominate candidates the way they always have, and that is simply not true.

The text of the proposed amendment muddies the waters even further. In subsection (c)(4), the first sentence says, "Nothing in this subsection shall prohibit a political party from nominating a candidate to run for office under this subsection." This sentence appears to mean that the amendment does not prevent political parties from nominating candidates to run in these new primaries for state legislature, governor, and the cabinet. Nomination of candidates by political parties, however, occurs *through* the primary election process, not outside of it. If this provision was intended to shed light on the "including party nominated candidates" misleading comfort language in the ballot summary, it failed to do so. Taken together, the two provisions would lead a reasonable voter to conclude that this amendment would not make drastic changes to the political party primary process, which is exactly what it does.

C. The ballot summary itself contains an irreconcilable contradiction that will mislead and confuse voters.

The ballot summary announces in its first sentence, "Allows all registered voters to vote in primaries for state legislature, governor, and cabinet . . . ." That is a statement without condition: in primaries for those offices, all registered voters will be allowed to vote.

Three sentences later, however, the ballot summary explains that if only two candidates qualify, "no primary is held and winner is determined in general election." So, all registered voters are not actually allowed to vote in primaries for state legislature, governor, and cabinet because, depending on the number of candidates who qualify, there may not even be a primary for one of those offices.

These two provisions in the ballot summary are internally inconsistent and will mislead and confuse voters.

Moreover, the "no primary is held" sentence conflicts with Article VI, Section 5(b) of the Florida Constitution. That section provides that where there are only two candidates, they are from the same party, and there is no general election opposition, not only will a primary be held, but the winner will be deemed elected on the spot. Neither the ballot summary, nor the title, nor even the text of the proposed amendment explain this constitutional conflict. Nor do they provide guidance as to which provision would control. As such, the ballot summary is misleading and confusing, and the proposed amendment should be rejected. *See Fine*, 448 So. 2d at

990 (appropriate for the Court to consider proposed amendment's impacts on other constitutional provisions, and rejecting proposal that substantially affected multiple provisions "which are not in any way identified to the electorate.").

D. Specific language in the ballot summary creates three impermissible ambiguities.

1. The ballot summary contains 73 words, thus bringing it within the 75-word limit of section 101.161(1). The first sentence, however, apparently sacrifices accuracy for brevity. That sentence provides, "Allows registered voters to vote in primaries for state legislature, governor, and cabinet *regardless of political affiliation*." (Emphasis added). "Regardless" in the foregoing sentence is used as an adverb, modifying the verb, "allows." As an adverb, Merriam-Webster's Dictionary defines "regardless" as "despite everything." *See* https://www.merriam-webster.com/dictionary/regardless (accessed on Sept. 27, 2019). Its synonyms include, "whatever." *See* https://www.merriam-webster.com/dictionary/regardless#synonyms (accessed on Sept. 27, 2019). Thus, a fair understanding of the first sentence of the ballot summary is that the proposed amendment allows registered voters to vote in primaries for state legislature, governor, and cabinet despite or whatever any political affiliation. It clearly and unambiguously means that registered voters affiliated with any political party whatsoever are allowed to vote in those certain primaries notwithstanding their political affiliation.

But 27 percent—or 3.6 million—of Florida's registered voters are currently not affiliated with *any* political party. *See* https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/ (accessed Sept. 27, 2019). The ballot summary language excludes them.

This argument is not just semantics; the sponsors of the proposed amendment themselves appear to have caught the problem and corrected it in the amendment's text. The second sentence of subsection (c)(1) provides, "All electors registered to vote for the office being filled shall be allowed to vote in the primary election for said office regardless of the voter's, or any candidate's, political party affiliation *or lack of same*." (Emphasis added). The modifying use of "or lack of same" in the text clearly and unambiguously brings the remaining 27% of the registered electorate within the scope of the amendment. That critical modifier, however, does not appear in the ballot summary, making the summary misleading.

Indeed, the misleading summary could cut both ways: a partisan could vote for the amendment, reasonably concluding that the amendment opened certain primaries only to fellow partisans, regardless of party affiliation; and unaffiliated

voters could oppose the amendment, reasonably thinking that it continued to exclude them from political primaries.[7]

2. The first sentence of the ballot summary implies that the proposed initiative will result in all voters voting in each and every state legislative election, not just their local district. ("Allows all registered voters to vote in primaries for state legislature, governor, and cabinet regardless of political party affiliation.") Elections for governor and cabinet are statewide elections. By including the state legislature in that list without restriction, a reasonable voter could conclude the proposed amendment opens legislative elections to all voters statewide.

3. While the first sentence in the ballot summary refers to primaries "for state legislature, governor, and cabinet" the second sentence refers to "[a]ll candidates for *an office*[,]" instead of all candidates for "those offices." (Emphasis added). A reasonable voter could be confused as to whether offices in addition to the three listed are affected by the amendment.

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

[7] The misleading nature of the sentence might have been avoided, while staying within the 75-word limit, by the following phrase: "Allows registered voters to vote in primaries for state legislature, governor, and cabinet with or without political party affiliation."

Constitution, and its ballot title and summary violate the "truth in packaging" 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 1st day of October, 2019 to:

The Honorable Ashley Moody
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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.

s/ Mark Herron
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