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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)

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

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INTRODUCTION

Nearly three-quarters of Florida's registered voters have chosen to affiliate with a political party.[1] The Florida Constitution currently protects the right of those 9.8 million Florida voters to participate in the selection of their party's chosen standard-bearer through the primary election process. Masquerading as an "open primary" proposal that would allow all registered voters to vote in the current party primary system, the Proposed Amendment would actually *abolish* party primary elections for certain offices and replace them with free-for-all "jungle primaries." At the same time, the Proposed Amendment would limit voters' options at the general election to two—and only two—candidates, and eliminate any guarantee that voters will be provided a true choice at the general election between nominees representing different political parties or ideological perspectives on significant matters of public policy.

Voters considering whether to adopt such a radical change to Florida's election process are entitled to a ballot summary that clearly and unambiguously describes the choice before them and is not misleading. The proposal here fails to satisfy this basic—yet critically important—legal requirement. Instead, the sponsor

[1] Florida Department of State, "*Voter Registration - By Party Affiliation*" (available at: https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/) (last visited Oct. 1, 2019).

of the Proposed Amendment has drafted an unclear and misleading ballot summary that misrepresents the proposal's true chief purpose and effect. And the significant deficiencies in the Proposed Amendment's ballot title and summary are compounded by the proposal's violation of the single-subject requirement. Voters who may favor one aspect of the Proposed Amendment while disfavoring other parts will be forced to cast a single yes-or-no vote on the initiative as a whole, in violation of the Florida Constitution.

The right of Florida's voters to amend their constitution through the initiative process is subverted when the voters are presented a misleading ballot title and summary or a proposal that logrolls multiple subjects into a single initiative. As a result of these multiple profound legal defects, this Court should deny ballot placement to the Proposed Amendment.

IDENTITY AND INTEREST OF OPPONENTS

Founded in 1867, the Republican Party of Florida ("RPOF") is a political party committee recognized under both state and federal law. As one of two major political parties in Florida, the RPOF is the statewide political party organization representing Republican candidates and Florida's more than 4.7 million registered Republican voters. Florida's Governor, Lieutenant Governor, Attorney General, and Chief Financial Officer are registered members of the Republican Party, as are both of Florida's United States Senators and a majority of Florida's congressional

delegation. The Republican Party also holds majorities in both the Florida House of Representatives and the Florida Senate.

The RPOF has an interest in the Proposed Amendment because it would abolish Florida's longstanding primary election process that, for more than a century, has allowed registered Republican voters to nominate the party's general-election candidates for the Florida Legislature, Governor, and the Cabinet offices at the ballot box. The RPOF has an interest in this Court's review of the Proposed Amendment because the proposal presents a misleading ballot title and summary that fails to fairly inform voters, in clear and unambiguous language, of its chief purpose and because the proposal addresses multiple distinct subjects in violation of the Florida Constitution and statutes.

STATEMENT OF THE CASE AND FACTS

A. Background

1. Overview of Florida's Current Nomination and Election Process

Florida's Constitution provides for the selection of officeholders through primary and general elections. Art. VI, § 5, Fla. Const. In each year in which a general election is held, a primary election "for nomination of candidates of political parties" is also held. § 100.061, Fla. Stat. As used in the Florida Election Code, the term "[p]rimary election" means "an election held preceding the general election *for the purpose of nominating a party nominee* to be voted for in the

general election. . . .” § 97.021(30), Fla. Stat. (emphasis added). The candidate receiving the highest number of votes in each party’s primary election “shall be declared nominated for such office.” *Id*. In a primary election, a voter is entitled to vote only the official primary ballot of the political party of which he or she is a registered member. § 101.021, Fla. Stat.

Following the primary election, a general election is held for the purpose of electing candidates to office. § 100.031, Fla. Stat. The general election ballot includes the names of the candidates nominated by Florida’s major and minor political parties, as well as all candidates who qualified for the ballot with no party affiliation. § 101.2512, Fla. Stat. When write-in candidates have qualified for an office, the general election ballot also includes a blank space under that office to permit voters to cast their vote for a qualified write-in candidate. § 101.151(2)(b), Fla. Stat. All elections by the people “shall be by direct and secret vote.” Art. VI, § 1, Fla. Const.; § 101.041, Fla. Stat. And the Florida Constitution provides that “[g]eneral elections shall be determined by a plurality of votes cast.” Art. VI, § 1, Fla. Const.

2. History of Florida’s Primary Election System

For more than 100 years, Florida’s political parties have selected their nominees for the general election at primary elections on dates fixed by the Florida Legislature. *See State ex rel. Andrews v. Gray*, 169 So. 501, 506 (Fla. 1936)

(tracing institution of compulsory party primaries for making nominations to the 1913 "Bryan Primary Law"). This Court recently acknowledged the well-established purpose of primary elections in *Brinkmann v. Francois*, 184 So. 3d 504 (Fla. 2016), stating that the primary election mechanism "permit[s] a given political party to select a representative whom that party genuinely intended to support in a general election for public office." *Id* at 513. Citing longstanding precedent affirming the primary election's ability to "give vitality to the constitutional guaranty of a free and untrammeled ballot," the *Brinkmann* court concluded that "primary elections are 'essential to the functioning of popular free government' and 'an integral part of the election machinery of this State.'" *Id*. (citing *Wagner v. Gray*, 74 So. 2d 89, 90–91 (Fla. 1954)).

This Court in *Brinkmann* also recognized that the federal courts have identified many legitimate interests that are furthered by limiting participation in a primary election to that party's registered voters: preserving political parties as "viable and identifiable interest group[s]"; the importance of party-building efforts and the interest in maintaining party identity; ensuring that the State's registration rolls continue to accurately reflect voters' political preferences, which in turn "encourage[s] Florida citizens to vote"; an "independent interest in the orderly operation of elections"; and the State's interest in preventing "party raiding" and "excessive factionalism." *Id*. at 513-14 (citing *Clingman v. Beaver*, 544 U.S. 581

(2005); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Lacasa v. Townsley*, 883 F.Supp.2d 1231 (S.D. Fla. 2012)).

3. The 1998 Constitution Revision Commission's "Universal Primary Amendment"

In 1998, the voters adopted a narrow constitutional exception to Florida's longstanding closed party primary system. Under a proposal submitted to the electorate by the Constitution Revision Commission, "[i]f 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." Art. VI, § 5(b), Fla. Const. The portion of the ballot summary describing this change stated that the proposal "allows all voters, regardless of party, to vote in any party's primary election if the winner will have no general election opposition. . . ."[2]

4. Primary Elections in Other States

State primary elections can generally be divided into one of six categories—closed, partially closed, partially open, open to unaffiliated voters, open, or top-

[2] 1998 Proposed Amendment "Ballot Access, Public Campaign Financing, and Election Process Revisions", *available at*: https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=11&seqnum=7 (last visited Oct. 1, 2019).

two.[3] Florida and eight other states hold traditional closed primaries where only members of a particular political party may vote in that party's primary election.[4] Some states allow political parties to choose which voters can vote in their party's primary, while others let voters choose to switch parties on or near election day in order to vote in a certain party's primary.[5] Twenty states have traditional open primaries where unaffiliated voters can vote in any party primary or where all voters (regardless of party affiliation or lack thereof) can vote in any party primary.[6]

Just four states—California, Louisiana, Nebraska, and Washington—hold some form of a "top-two" primary election.[7] Under the top-two system, a single primary election is held for a particular elected office. All candidates from all parties will appear on the same ballot for that office, and all voters, regardless of party affiliation, may vote in the primary. The two candidates who receive the most votes will then advance to the general election. This free-for-all, anything goes,

[3] Nat'l Conference of State Legislatures, *State Primary Election Types*, http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx (last visited Oct. 1, 2019).
[4] *Id.* In Florida, however, the primary is open to all voters, regardless of party affiliation, "[i]f all candidates for an office have the same party affiliation and the winner will have no opposition in the general election" Art. VI, § 5(b), Fla. Const.
[5] *State Primary Election Types*, *supra* note 3.
[6] *State Primary Election Types*, *supra* note 3.
[7] *State Primary Election Types*, *supra* note 3.

multipartisan primary system has been aptly dubbed a "jungle primary."[8] As one commentator recently observed: "Every other election year, it's the law of the jungle!"[9]

The first five categories of primaries described above generally maintain a traditional partisan system, allowing members of political parties to have varying roles in nominating candidates of their choice for the general election. Only the top-two primary system does away entirely with the role political parties and their members play in primary elections.

California implemented a jungle primary in 2011 after the voters approved Proposition 14 to amend the state's constitution.[10] Proponents of Proposition 14

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[8] *See, e.g.*, *All Things Considered: How California's 'Jungle Primary' System Works*, NPR (June 5, 2018), https://www.npr.org/2018/06/05/617250124/how-californias-jungle-primary-system-works (describing California's top-two primary as a "free-for-all"); Chris Good, *Welcome to the 'Jungle' Primary in Washington*, The Atlantic (Aug. 17, 2010), https://www.theatlantic.com/politics/archive/2010/08/welcome-to-the-jungle-primary-in-washington/61640/ (describing Washington's top-two primaries as "battles royale"); La. Sec'y of State, *Review Types of Elections*, https://www.sos.la.gov/ElectionsAndVoting/GetElectionInformation/ReviewTypesOfElections/Pages/default.aspx (last visited Oct. 1, 2019) (describing Louisiana's open primary as a "jungle primary because all candidates for an office run together in one election and the majority vote wins").

[9] Mark Lane, *Amendment Would Bring Jungle Primaries to Florida*, Daytona Beach News-Journal (Sept. 24, 2019), https://www.news-journalonline.com/news/20190924/mark-lane-amendment-would-bring-jungle-primaries-to-florida/1.

[10] *See* Cal. Sec'y of State, *Statement of Vote: June 8, 2010, Statewide Direct Primary Election* 129,

hailed it as a way to reduce partisan gridlock, elect more moderate candidates, and increase voter turnout by offering voters more choices.[11] Opponents warned that it would eliminate a full vetting of a candidate's positions (as happens in partisan primary elections), open the door wider for special interests, and freeze out certain candidates from the general election.[12]

The opponents were right. In the last nine years, major-party and third-party candidates, as well as candidates with no party affiliation, have been shut out of the general election for some of California's most important elected offices. For example, in 2018, 35 candidates appeared on the same primary ballot for one of California's seats in the United States Senate—10 Democrats, 11 Republicans, and 14 third-party or write-in candidates.[13] But in the general election, California voters were given the choice between just two Democrats.[14] The same thing happened in 2016 for California's other Senate seat. There were 37 candidates on the primary ballot, including 7 Democrats and 12 Republicans, but the top two vote

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https://web.archive.org/web/20100722063405/http://www.sos.ca.gov/elections/sov/2010-primary/pdf/2010-complete-sov.pdf.

[11] *See* Jean Merl, *Californians to Decide on Open Primary Amendment*, Los Angeles Times (Nov. 27, 2009), https://www.latimes.com/archives/la-xpm-2009-nov-27-la-me-open-primary27-2009nov27-story.html.

[12] *Id.*

[13] Cal. Sec'y of State, *Statement of Vote: June 5, 2018*, https://www.sos.ca.gov/elections/prior-elections/statewide-election-results/statewide-direct-primary-june-5-2018/statement-vote/.

[14] Cal. Sec'y of State, *Statement of Vote: November 6, 2018*, https://www.sos.ca.gov/elections/prior-elections/statewide-election-results/general-election-november-6-2018/statement-vote/.

getters were Democrats, so only those candidates advanced to the general election.[15] In 2012, the first year California used the top-two primary, nine of the state's 53 congressional districts had same-party candidates in the general election.[16]

B. The Proposed Amendment

On July 26, 2019, the Attorney General petitioned this Court for an advisory opinion as to the validity of an initiative petition entitled "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet." This Court has jurisdiction. Art. V, § 3(b)(10), Fla. Const. The full text of the Proposed Amendment, which would amend Article VI, Section 5 of the Florida Constitution, is set forth in the Attorney General's Petition.

The Proposed Amendment includes the following ballot title and summary:

> BALLOT TITLE: All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet
>
> BALLOT SUMMARY: 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

[15] Cal. Sec'y of State, *Statement of Vote: June 7, 2016*, https://www.sos.ca.gov/elections/prior-elections/statewide-election-results/presidential-primary-election-june-7-2016/statement-vote/; *Statement of Vote: November 6, 2016*, *supra* note 14.

[16] Luis Gomez, *What is the California 'Jungle Primary' and how did it Change State Elections?*, San Diego Union-Tribune (May 31, 2018), https://www.sandiegouniontribune.com/opinion/the-conversation/sd-what-is-california-jungle-primary-how-does-it-work-20180529-htmlstory.html.

> 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 Attorney General subsequently petitioned the Court for an advisory opinion as to the Financial Impact Statement for the Proposed Amendment that was prepared by the Financial Impact Estimating Conference. On September 11, 2019, this Court consolidated the two cases for all purposes and established a briefing schedule.

The Republican Party of Florida submits this brief as an interested party opposed to the Proposed Amendment.

SUMMARY OF THE ARGUMENT

The Proposed Amendment is clearly and conclusively defective on multiple grounds, any one of which constitutes sufficient grounds for this Court to deny ballot placement.

The proposal's ballot title and summary are misleading and fail to accurately inform voters of the proposal's chief purpose. Reading the title and summary together, even a well-informed voter would misunderstand the proposal to be opening the existing party primary system to all registered voters, regardless of party affiliation. Not so. The ballot title and summary here employ familiar terms in an unfamiliar way to conceal and mislead as to the Proposed Amendment's true chief purpose: *abolishing* Florida's longstanding party primary elections.

The proposal in fact eliminates party primary elections for certain offices, while repurposing the constitutional term "primary election" to refer to an entirely different process for narrowing the field of candidates for these offices in the general election: a Top-Two "Jungle Primary." The ballot title and summary fail to adequately explain this significant constitutional change.

Beyond failing to disclose the Proposed Amendment's chief purpose, the title and summary affirmatively mislead by falsely suggesting that the proposal would allow "all voters" to vote in Florida's *current* primary system. But the actual effect of the Amendment is to eliminate Florida's current primary system and replace it with a system that renders party nominations meaningless.

The ballot title is also facially defective under Florida law because it does not reflect the caption or title by which the proposal is commonly known. Further, the ballot title and summary fail to disclose the proposal's significant impacts on the existing rights of voters, candidates, and political parties.

Independent from its misleading ballot title and summary, the Proposed Amendment also violates the Florida Constitution's single-subject requirement. The proposal makes three distinct changes to the elections for governor, the cabinet offices, and the state legislature, each of which is logically separable and distinct. The Proposed Amendment also engages in the prohibited practice of "logrolling" separate subjects in violation of the single-subject requirement.

This Court should deny ballot placement to the Proposed Amendment.

ARGUMENT

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

Florida law requires the sponsor of an amendment proposed by initiative to prepare a ballot title and summary. § 101.161(1), Fla. Stat. The ballot summary is an explanatory statement, not exceeding 75 words in length, setting out the "chief purpose of the measure" in "clear and unambiguous language." *Id.* The ballot title is "a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." *Id*.

When reviewing the validity of a ballot title and summary under section 101.161, Florida Statutes, this Court has asked two questions: 1) whether the ballot title and summary fairly and accurately inform the voter of the chief purpose of the amendment; and 2) whether the language of the title and summary, as written, is likely to mislead the public. *See, e.g., Adv. Op. to Att'y Gen. re Water & Land Conservation*, 123 So. 3d 47, 50 (Fla. 2013); *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008). 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). "Reduced to colloquial terms, a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an amendment." *Slough*, 992 So. 2d at 147.

Here, the Proposed Amendment's ballot title and summary fail to satisfy these basic "truth-in-advertising" requirements on several grounds.

A. The Ballot Title and Summary fail to clearly and unambiguously disclose the Proposed Amendment's chief purpose: the abolition of party primary elections.

With its very first sentence, the ballot summary of the Proposed Amendment misleads voters by stating that it would "[a]llow all registered voters to vote in primaries for state legislature, governor, and cabinet regardless of political party affiliation." Reading the introductory sentence in conjunction with the ballot title—"All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet"—even a well-informed voter would misunderstand the proposal to be opening the existing party primary system to all registered voters, regardless of party affiliation. That mistaken conclusion would be bolstered by the well-informed voter's understanding that, for more than a century, the essential purpose of Florida's "primary elections" has been to select each party's nominees for the general election.

But that well-informed voter's conclusion would be wrong. In fact, the ballot title and summary here employ familiar terms in an unfamiliar way to conceal and

mislead as to the Proposed Amendment's true chief purpose: *abolishing* Florida's longstanding party primary elections. As this Court has said, a ballot title and summary must "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 the Att'y Gen. re Right of Citizens to Choose Health Care Providers*, 705 So. 2d 563, 566 (Fla. 1998) (quoting *Advisory Op. to Att'y Gen.-Fee on Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996)). The ballot title and summary here fall far short of that standard.

Through the use of unclear and ambiguous language, the ballot title and summary suggest that the Proposed Amendment's chief purpose is to change the current "closed primary" system into an "open primary" system. The 1998 Universal Primary Amendment used strikingly similar ballot summary language to provide for open primaries in limited circumstances. Unlike the Universal Primary Amendment, however, the Proposed Amendment *eliminates* party primary elections for certain offices, while repurposing the constitutional term "primary election" to refer to an entirely different process for narrowing the field of candidates for these offices in the general election: a Top-Two "Jungle Primary." The ballot title and summary fail to adequately explain this constitutional change. "When the summary of a proposed amendment does not accurately describe the scope of the text of the amendment, it fails in its purpose and must be stricken."

Dep't of State v. Hollander, 256 So. 3d 1300, 1307 (Fla. 2018) (quoting *Adv. Op. to Atty. Gen. re Term Limits Pledge*, 718 So. 2d at 804).

Because the ballot title and summary do not use clear and unambiguous language to fairly inform the voter of the chief purpose of the amendment, and because the language of the title and summary as written misleads the public, this Court should deny ballot placement to the Proposed Amendment.

B. The Ballot Title and Summary are misleading because they suggest that the Proposed Amendment allows all voters to vote in the existing party primary system.

In addition to failing to disclose that the Proposed Amendment's chief purpose is the abolition of the existing party primary system, the ballot title and summary falsely suggest to voters that the Proposed Amendment would allow all voters to vote in Florida's *current* party primary system. Stated differently, the ballot title and summary will mislead voters into believing that the Proposed Amendment would simply expand the scope of the 1998 amendment by opening party primary elections to all voters, regardless of party affiliation. Because the actual effect of the Proposed Amendment is radically different from that implied by its ballot title and summary, the proposal should be denied ballot placement.

The text of the ballot title and the first sentence of the ballot summary mislead voters by attributing an undisclosed and different meaning to commonly used terms. The ballot title states "All Voters Vote in Primary Elections for State

Legislature, Governor, and Cabinet." The first sentence of the ballot summary describes the substance of the amendment as "Allows all registered voters to vote in primaries for state legislature, governor, and cabinet regardless of political party affiliation." Under the longstanding definition of a "primary election" in Florida, a voter would assume that this title means that the amendment is proposing that Florida move from a closed party primary system to an open party primary system in which "All Voters Vote."

This Court warned in *Slough* about sponsors of constitutional amendments crafting ballot titles and summaries using "misleading 'wordsmithing'. . . in an attempt to persuade voters to vote in favor of [a] proposal." *Slough*, 992 So. 2d at 149. The sponsor here has engaged in precisely the sort of wordsmithing condemned by this Court by mirroring the language passed by voters in 1998 ("allows all voters, regardless of party to vote in any party's primary election. . .") with an undisclosed difference in meaning. The ballot summary also misleads by omission by failing to inform the voter that the Proposed Amendment abolishes current primary elections and replaces them with another system that renders party "nominations" meaningless. And not only do sponsors omit this crucial information, but they also create ambiguity and affirmatively mislead voters into thinking that party primaries will still exist by stating that "party nominated candidates" will appear on the ballot and that a "[c]andidate's party affiliation may

appear on ballot. . . ."

"When such wording selections render a ballot title and summary deceptive or misleading to voters, the law requires that such proposal be removed from the ballot—regardless of the substantive merit of the proposed changes." *Id.; see also In re Advisory Op. to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 814–15 (Fla. 2014) (Polston, dissenting) ("Furthermore, the title and summary in this case are an example of 'wordsmithing'. . . the sponsor here deceptively uses the terms "debilitating diseases" and "certain medical conditions" in the title and summary in an attempt to gain an electoral advantage with voters who might object to a broader use of medical marijuana"). This Court should deny ballot placement to the Proposed Amendment.

C. The Ballot Title and Summary are unclear, ambiguous, and misleading in their use of the terms "primary elections," "primaries," and "party nominated candidates."

As noted above, the ballot title and summary are also misleading in their use of the terms "primary elections," "primaries," and "party nominated candidates." The Proposed Amendment would abolish the current party primary system for nominating general election candidates and would replace it with an entirely different methodology for electing certain state officers. Under existing law, a primary election for partisan offices is not simply an election before the general election. Yet the true effect of the Proposed Amendment is concealed from the

voters by the use of the familiar term "primary" in the ballot title and summary. If the Proposed Amendment were to be adopted, the same constitutional term—"primary"—would have a different meaning in current section 5(b) of Article VI than it would in the newly-enacted section 5(c).[17] This unexpected difference in meaning is obscured from the voters through the sponsor's use of unclear and ambiguous language, rendering the ballot title and summary misleading.

The ballot summary also misleads by stating that "party nominated candidates" will appear on the primary ballot. Nothing in the text of the Proposed Amendment protects the existing right of Florida's 9.8 million voters who are affliated with a political party to nominate their respective political parties' standard bearers in the general election. To the contrary, as discussed above, the undisclosed chief purpose and effect of the Proposed Amendment is the *abolition* of the current party primary system by which "party nominated candidates" are chosen by the voters and its replacement with a different system that does not provide for the selection of "party nominated candidates."

[17] It is a canon of statutory construction that a word or phrase is presumed to bear the same meaning throughout a text. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal* Texts, 170 (2012); *see also Slough*, 992 So. 2d at 148 ("We have consistently followed principles parallel to those of statutory interpretation when reviewing issues related to constitutional provisions."). Notwithstanding this canon, and despite the term "primary election" having a well-known and common meaning under Florida's Constitution and statutes, the sponsor chose to use the same term in the ballot title and summary to mean something completely different.

The sponsor may contend that the Proposed Amendment does not prohibit a political party from "nominating" a candidate through some process other than the primary election—at a party meeting or behind closed-doors in a "smoke-filled room." But nothing in the ballot summary provides fair notice to the voters of this unusual use of the term "party nominated." Without a clear explanation in the ballot summary, a reasonable voter would understand a "party nominated candidate" to be a candidate who has been nominated by a political party through the same process that has been used to nominate candidates for decades in Florida: the primary election. Or, at the very least, that the only party candidates appearing on the primary ballot would be those nominated by the parties. However, the voter's reasonable understanding would be wrong.

The summary specifically states that "party nominated candidates" will appear on the same primary ballot as all candidates for an office, and the Proposed Amendment fails to distinguish party nominated candidates from other candidates of the same party affiliation. It would be more accurate if the sponsor stated that "party endorsed candidates" will appear on the same primary ballot as all candidates for an office, because a "nomination" implies that the party has had a role in winnowing down a list of candidates to submit to the general electorate. When a party nomination under the Proposed Amendment has no greater effect than a party endorsement, use of the term "party nominated" is misleading.

The Proposed Amendment radically redefines the nature of a "primary election" in Florida, but conceals that effect by using familiar terms in unfamiliar ways. By using language that describes the existing partisan primary process—"primary" and "party nominated"—to describe the dismantling of that same process, the ballot title and summary are unclear, ambiguous, and misleading in violation of Florida law. The Proposed Amendment should be denied ballot placement.

D. The Proposed Amendment's ballot title is misleading and does not reflect the caption or title "by which the measure is commonly known or referred to" as required by Florida law.

In addition to providing an unclear and misleading summary to the voters regarding the chief purpose of the proposed amendment, the sponsor's ballot title independently 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. This Court should deny ballot placement to the Proposed Amendment because its ballot title is both misleading and contrary to the governing statute.

Every proposed constitutional amendment must include both a ballot title and a ballot summary. § 101.161(1), Fla. Stat. The ballot title must be "a caption, not exceeding 15 words in length, by which the measure is commonly referred to

or spoken of." *Id*. The ballot summary, on the other hand, is "an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure." *Id*. The ballot title and summary serve separate but complementary purposes: the ballot title *identifies* the proposal for the voter using a short title by which the measure is commonly known; the ballot summary *describes* the substance and chief purpose of the proposal for the voter in a manner that facilitates an informed voter to approve or to reject the measure. The ballot title and summary play a critical role in ensuring that voters are able to cast an informed ballot. As this Court noted in *Slough*, "[t]he text of the constitutional amendment will not be present in the voting booth; rather, the ballot title and summary will be the only information that is available to voters." 992 So. 2d at 149.

The ballot title proposed by the sponsor here violates section 101.161 because it does not identify the Proposed Amendment for the voter in the manner required by law. Put simply, the Proposed Amendment being reviewed by the Court in this case is not "commonly referred to or spoken of" as the "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet" initiative. Instead, the Proposed Amendment is commonly referred to as an "Open Primary" or "Jungle Primary" initiative. *See, e.g.*, Brent Batten, *"Jungle" primary ballot amendment nearing signature goal*, Naples Daily News (Sept. 19, 2019); Gary Fineout, *"I'm very scared about our future": Florida billionaire pitches jungle*

primary to fight political extremism, PoliticoFlorida (Sept. 18, 2019); Ryan Nicol, *Proposed constitutional amendment would set up jungle primaries in Florida*, FloridaPolitics.com (Mar. 6, 2019); Mark Lane, *Amendment would bring jungle primaries to Florida*, Daytona Beach News-Journal (Sept. 24, 2019); A.G. Gancarski, *"Open primaries" effort has now raised more than $6 million for initiative campaign*, FloridaPolitics.com (July 10, 2019).

The failure to accurately identify the Proposed Amendment by the name it is commonly known is not a consequence of the media inaccurately describing the Proposed Amendment after it was filed. The sponsors did not invent this primary election method. It has similarly been used in California and Washington for years and commonly referred to by the media and state officials as a "Jungle Primary" or "Top Two Primary." *See, e.g.*, Joe Klein, *California's New Jungle Primary System*, Joe Klein, TIME Magazine, (May 15, 2014); Washington Secretary of State, *Top 2 Primary: FAQs for Voters*, sos.wa.gov/elections/top2primaryfaq (last visited Oct. 1, 2019); California Secretary of State FAQs, ("The Top Two Candidates Open Primary Act"), sos.ca.gov/elections/frequently-asked-questions/#primary-election (last visited Oct. 1, 2019).

The failure of the ballot title to accurately identify the Proposed Amendment for voters by using the name by which the measure is commonly known renders the initiative legally defective and risks voter confusion at the polling location.

Voters who have educated themselves regarding the many policy flaws with the "Jungle Primary" or "Top Two Primary" systems may not connect those concerns with a proposal deceptively titled "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet." As described above, voters who encounter the proposal in the ballot booth may wrongly believe that a proposal providing that "all voters vote in primary elections" simply opens the existing closed party primary system to voters who have registered to vote without party affiliation.

Because the Proposed Amendment's ballot title is misleading and does not reflect the caption or title "by which the measure is commonly known or referred to," the ballot title violates section 101.161(1) of the Florida Statutes and the Proposed Amendment should be denied ballot placement.

E. The Ballot Title and Summary fail to disclose the Proposed Amendment's significant impacts on the existing rights of voters, candidates, and political parties.

Finally, the ballot title and summary fail to disclose to voters that the Proposed Amendment will significantly restrict or burden existing rights of voters, candidates, and political parties. *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) ("The purpose of section 101.161 is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment."). Failure to disclose these impacts renders the ballot summary defective.

1. Impact on Associational Rights of Parties and its Members Not Disclosed

The right to associate with a particular political party is protected by the First and Fourteenth Amendments. *See infra*. Nothing in the ballot title or summary informs voters that the Proposed Amendment is stripping Floridians of this important and cherished right.

By "hiding the ball" and not disclosing the Proposed Amendment's chief purpose of *abolishing* party primaries and its impact of rendering party nominations meaningless, the Proposed Amendment fails to clearly explain to the voter all of its ramifications. Although the text of the amendment states that nothing prohibits a political party from nominating or endorsing a candidate (concessions required by the First Amendment), the summary does not adequately inform the voter that members of political parties will no longer be able to winnow down a list of candidates through the nomination process and choose the candidate that best represents their party's ideas and values to appear on the ballot. Nowhere in the summary does the Proposed Amendment inform all 9.8 million party registered voters in Florida that "party nominated candidates appear on the same primary ballot" really means "party *endorsed* candidates appear on the same primary ballot" and even if a party "nominates" a candidate to appear on the new primary ballot, any other candidate affiliated with that party may also appear on the ballot, rendering the nomination meaningless. The proposal turns political parties into mere spectators without the ability to influence who from their party

appears on the ballot.

Today, parties get to choose which candidates they wish to affiliate themselves with. Under the Proposed Amendment, candidates get to choose which parties *have* to affiliate with them. *See Jones*, 530 U.S. at 575 ("Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." (quoting *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (internal quotation marks omitted))). No longer will a party have a say in who uses its name and reputation to appeal to the general electorate. Under the Proposed Amendment, any candidate can hijack a party's name without being endorsed or nominated by the members of that party ("A candidate's affiliation with a political party may appear on the ballot as provided by law.").

This is especially disconcerting given that the First Amendment to the United States Constitution and Article I, Section 5 of the Florida Constitution protect the rights of individuals to associate with whom they please and to assemble with others for political purposes. *See Wyche v. State*, 619 So. 2d 231, 234 (Fla. 1993); *Republican Party of Miami-Dade Cty. v. Davis*, 18 So. 3d 1112, 1118 (Fla. 3d DCA 2009) ("Political party members have a constitutional right "not to associate" with those who do not share their party platforms or rules. . . .").

The Proposed Amendment also fails to disclose that a voter will have no way of knowing from the ballot that a candidate has been party nominated or endorsed—information the voter has today on the face of the ballot. It provides that a candidate's "affiliation with a political party may appear on the ballot as provided by law," but listing every candidate's "affiliation" will further confuse voters and render the party nomination or party endorsement process meaningless without any guarantee that a voter will know which candidate is the political party nominee by looking at the ballot.

The proposal transforms party nominations from having ultimate effect to having virtually no effect at all. And it fails to disclose this radical transformation to every party-registered voter that would lose their ability to decide which candidate will represent their party on the ballot. Voters should be informed of the rights they are giving up as members of a political party when voting in favor of the Proposed Amendment.

2. Impact on NPA, Minor Party, and Write-In Candidates Not Disclosed

Without notice to the voter, the Proposed Amendment also diminishes the existing rights of NPA, minor party, and write-in candidates to appear on the general election ballot by throwing them into the "jungle primary" and limiting the general election to only the top two candidates. Current law provides NPA, minor party, and write-in candidates with the same right of access to the general election

ballot as major party candidates. The Florida Constitution explicitly protects minor party candidates and their access to the ballot. Art. VI, § 5(b), Fla. Const. NPA and write-in candidates currently have automatic access to the general election ballot after qualifying. § 99.0955, Fla. Stat. ("Upon qualifying, the [NPA] candidate is entitled to have his or her name placed on the general election ballot."); and § 99.061, Fla. Stat. ("A write-in candidate is not entitled to have his or her name printed on any ballot; however, space for the write-in candidate's name to be written in must be provided on the general election ballot.").

Today, candidates unaffiliated with any party run against the candidates from political parties that were nominated through the primary election. § 100.061, Fla. Stat. Under the proposed amendment, NPA and write-in candidates will no longer automatically have access to the general election ballot. Instead, these candidates will only appear on the general election ballot if they are one of the "two-highest vote getters."

Minor party candidates also usually do not have a party primary (because often only one candidate from the minor party qualifies) and so they also advance immediately to the general election after qualifying. Now, under the Proposed Amendment, in the same way as NPA candidates and write-in candidates, minor party candidates will only have access to the general election ballot if they are one of the "two-highest vote getters." This creates a substantial disadvantage for NPA,

minor party, and write-in candidates who now have a decreased chance of appearing on the general election ballot. In most races, the "two-highest vote getters" will be candidates from one or both of the major political parties.

It is not for this Court to weigh or address the substantive merits of the proposed initiative, but to look simply at "whether the ballot title and summary in clear and unambiguous language, fairly inform the voters of the chief purpose of the amendment; and whether the language of the ballot title and summary, as written, will be affirmatively misleading to voters." *Adv. Op. to Atty. Gen. re: Voter Control of Gambling*, 215 So. 3d 1209 (Fla. 2017) (citing *Adv. Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d at 816 ; *Adv. Op. re Right to Treatment and Rehab. for Non-Violent Drug Offenses*, 818 So. 2d 491, 494 (Fla. 2002)). Here, it is not the merits that this Court should examine, but that the ballot summary misleads voters by not fully explaining the negative impact this amendment will have on candidates not affiliated with a major political party.

Not only does the ballot summary not inform voters of this effect, but the sponsor is also publicly advertising the Proposed Amendment as a change that would allow NPA voters to participate *more* meaningfully in elections, while at the same time making it *less likely* for an NPA candidate to appear on the general election ballot. The sponsor's website states:

> Partisan extremism has divided our country and our state, while the major parties are increasingly dominated by their fringes. . . In a few

> short years, the number of voters with no party affiliation will be as many as those registered with either of the major parties. But, without changing the law, they will be blocked from voting in the elections that matter most.[18]

On one hand, the sponsor publicly advertises its amendment as broadening the electorate and reducing partisan extremism, but on the other hand it fails to inform the voter that the amendment no longer allows NPA candidates an automatic position on the general election ballot, thereby making it increasingly more difficult for an NPA candidate to win and more likely that only the major political parties will be represented in the general election. As this Court stated in *Askew v. Firestone*, "[t]he problem, therefore, lies not with what the summary says, but, rather, with what it does not say." 421 So. 2d at 156.

Because the Proposed Amendment does not adequately explain its effect on the rights of political parties and their members, or on candidates not affiliated with a major political party, the Proposed Amendment should be denied ballot placement.

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

The Florida Constitution restricts constitutional amendments proposed by initiative petition to "one subject and matter directly connected therewith." Art. XI, § 3, Fla. Const. The single-subject requirement is a "rule of restraint" placed in the

[18] All Voters Vote, *About Us*, https://allvotersvote.org/about (last visited Oct. 1, 2019).

constitution upon the ballot initiative process to allow the people to propose and vote upon "singular changes in the functions of our governmental structure." *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). This Court requires "strict compliance" with the single-subject rule. *Id.* at 989. For that reason, this Court is called upon to provide "careful scrutiny" of an initiative proposal to ensure it meets the single-subject requirement. *In re Adv. Op. to Att'y Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply*, 177 So. 3d 235, 242 (Fla. 2015).

As an analytical matter, this Court has evaluated compliance with the single-subject requirement by determining whether the initiative engages in "logrolling" of distinct subjects; or substantially alters or performs the functions of multiple branches of state government. *Adv. Op. to Att'y Gen. re Water & Land Conservation*, 123 So. 3d 47, 50 (Fla. 2013).

First, the Proposed Amendment violates the single-subject requirement by addressing multiple subjects that lack a "logical and natural oneness of purpose." *Adv. Op. to Att'y Gen. re Voting Restoration Amend.*, 215 So. 3d 1202, 1206 (Fla. 2017). The Proposed Amendment makes three distinct changes to the elections for state legislature, governor, and the cabinet offices: 1) it abolishes party primary elections in favor of a single primary election for all candidates for those offices; 2) it opens up the primary election for those offices to all registered voters regardless of party affiliation; and 3) it provides that only two candidates for those

offices may advance to the general election.

These three changes are logically separable and distinct from one another. Allowing all registered voters to vote in a primary election does not necessitate holding only a single primary election for all candidates for a particular elected office. And neither of those aspects of the Proposed Amendment necessitate the dramatic change the amendment would make to general elections in Florida. *Who* can vote in a primary election is a logically separable subject from *how* primary and general elections are conducted.

The Proposed Amendment also engages in the prohibited practice of "logrolling" separate subjects in violation of the single-subject requirement. Logrolling is 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." *In re Adv. Op. to Att'y Gen. re Save our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994); *see also Adv. Op. to Att'y Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 926 So. 2d 1218, 1224 (Fla. 2006) (defining logrolling as the practice wherein a single proposal combines unrelated issues, "some of which electors might wish to support, in order to get an otherwise disfavored provision passed").

For example, a voter considering the Proposed Amendment may favor a single nonpartisan primary for the governor or cabinet officers, but not for the

members of the state legislature. Another voter may generally prefer the concept of allowing all registered voters to vote in primaries regardless of political affiliation while opposing the elimination of the existing party primary system. And another voter may prefer opening up primaries to all registered voters while opposing having only two candidates on the general election ballot, which dramatically reduces the likelihood of a third-party or NPA candidate appearing on the general election ballot. Despite the possibility of such divergent views, the Proposed Amendment "forces the voter who may favor or oppose one aspect of the ballot initiative to vote . . . in an 'all or nothing' manner." *Right of Citizens to Choose Health Care Providers*, 705 So. 2d at 566.

The Proposed Amendment violates the single-subject requirement by addressing disparate subjects in a single initiative and engaging in the prohibited practice of logrolling. This Court should deny ballot placement to the Proposed Amendment as a result of its constitutional deficiencies.

CONCLUSION

"One of the most important rights enjoyed by the people of Florida under our constitution is the right to vote on constitutional amendments proposed through the initiative process. That right and the initiative process are subverted when the voters are presented a misleading ballot summary." *Marijuana I*, 132 So. 3d at 819-20 (Canady, dissenting). The Proposed Amendment's ballot title and summary

are radically defective and will affirmatively mislead the voters in several different ways concerning the measure's chief purpose. This Court should find the Proposed Amendment invalid and prohibit it from being placed on the ballot.

Respectfully submitted,

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I hereby certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210(a), Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 1st day of October, 2019, through the Florida Courts E-Filing Portal to:

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