

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]

**ANSWER BRIEF OF THE FLORIDA DEMOCRATIC PARTY
OPPOSING PROPOSED AMENDMENT**

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SUMMARY OF THE ARGUMENT

The cases and arguments relied upon by the sponsor of the All Voters Vote Initiative in its initial brief ignore the reality that the chief purpose of the proposed amendment is to redefine primary elections in Florida. “Conducting primary elections,” as argued by the sponsor, is one of the underlying purposes, but the chief purpose is to change a century-old primary election system. Indeed, the initiative reveals multiple separate purposes, violating the prohibition against logrolling.

The proposed amendment redefines the very term “primary election,” but does so by implication, not expressly. Its failure to define that key term results in a proposal that lacks a “logical and oneness of purpose.”

Worse still, the proposed amendment uses the existing term, “primary election,” in a completely different way, making the ballot title and summary misleading and confusing to voters.

Accordingly, the proposed amendment should be precluded from placement on the ballot.

ARGUMENT

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

A. The initiative’s chief purpose is to redefine primary elections, not just to conduct them.

The sponsor of the All Voters Vote Initiative asserts that the proposed amendment “embraces a single subject: conducting primary elections for state

elective office regardless of party affiliation.” *See* Initial Brief of the Sponsor, All Voters Voter, Inc., at 9 (“I.B. Sponsor”). The sponsor is wrong.

The chief purpose of the amendment is to redefine what a primary election is in Florida, changing a 106-year-old election system for some, but not all, Florida elections. Having changed that system, the second purpose of the amendment is to implement a new system with the same name. The third purpose is to explain how this new system of “primary elections” will be conducted. The fourth purpose is to eliminate entirely existing primary elections in some circumstances. The fifth purpose is to advise the electorate that nothing new really happened because political parties can still nominate candidates for “primary elections,” something they have never actually done.

The sponsor argues that these changes are necessary because “a group of like-minded Florida registered voters [] are dissatisfied with the political rhetoric from the extreme wings of both major political parties and the divisiveness it has caused our society.” *Id.*, at 1. They assert such divisiveness “is causing voters to reject membership in the two major political parties at startling rates.” *Id.*

The demise of the two major political parties is greatly exaggerated. Nearly 9.7 million Floridians are registered voters in the two major political parties, the majority of them every year affiliated with the Florida Democratic Party. *See* Florida Department of State, Division of Elections, *Voter Registration – By Party Affiliation*

(Aug. 31, 2019), <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/> (last visited Oct. 16, 2019) (showing voter registration 2017–2019), and, *id.*, <https://dos.dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/by-party-affiliation-archive/> (last visited Oct. 16, 2019) (showing registration 1972–2016) (cited collectively hereafter). Indeed, voter registration in the Florida Democratic Party has increased every year since 1972. *Id.* Today, nearly 5 million Floridians are registered Democrats, more than double the 2.4 million registered Democrats in 1972. *Id.*

Thus, the premise behind the proposed amendment is suspect. Indeed, the sponsor may be pointing its solution at the wrong target: extremism and divisiveness may well be caused more by partisan gerrymandering, foreign influence and interference in elections, and a proliferation of extremist media outlets, or a combination of all of those reasons.

B. The proposed amendment lacks a “logical and natural oneness of purpose,” in part, by failing to state its purpose.

Voter registration in Florida is a choice. Party affiliation—or not—is also a choice. Those who choose to affiliate with a political party when they register to vote thus choose to participate in the century-old system of primary elections where

the parties nominate their candidates for the general election. Those who do not affiliate at registration choose not to participate in those primary elections.

The All Voters Vote Initiative seeks to override the choices of 9.7 million Floridians in an effort to rescue 3.8 million voters from a decision of their own making. It does so by impermissible logrolling and should not be allowed to be on the ballot.

For example, a reasonable voter (1) could favor the proposed amendment, thinking it is time to redefine the process by which candidates advance to the general election in Florida, but (2) oppose the elimination of the current primary election system whereby political parties nominate candidates for the general election, thinking that process has worked for 106 years.¹ On the other hand, a reasonable voter (1) could think, as the supporter apparently does, that the existing party-nominating process of primary elections should be ended, while also thinking that (2) if only two candidates qualify for an election, then the winner should be selected in the primary and that race should be over.

In either situation, the reasonable voter is left with a Hobson's choice: take it all, or take none. It is exactly these types of choices that the Florida Constitution prohibits in initiative petitions by forbidding logrolling. *See* Art. XI, § 3, Fla. Const.

¹ Of course, this reasonable voter would have to first understand that the proposed amendment redefines the term "primary election," something that is not apparent from the ballot title, summary, or text.

(requiring initiatives to “embrace but one subject and matter directly connected therewith.”).

The sponsor relies on *Advisory Op. to Att’y Gen. re Rights of Elec. Consumers Regarding Solar Energy Choice*, 188 So. 3d 822 (Fla. 2016), to argue that the initiative petition merely “establishes” rules for primaries and “provides” for the implementation of those rules. *See* I.B. Sponsor, at 9. That case, however, dealt with the creation of a new constitutional right and the government’s authority to regulate that right. *Solar Energy Choice*, 188 So. 3d at 828. The Court concluded those two provisions were “two sides of the same coin: individual rights and regulation of those rights.” *Id.* (“[W]e have approved ballot initiatives that similarly have created constitutional rights and allowed the government to regulate the right.”) (citing *Advisory Op. to Att’y Gen. re Use of Marijuana for Debilitating Med. Conditions (Medical Marijuana II)*, 181 So. 3d 471 (Fla. 2015)).

The All Voters Vote Initiative does not create a new individual right nor does it regulate a new individual right. Instead, it creates a hodgepodge of new processes for some elective offices operating under the guise of the old name (“primary elections”). It does not “establish” a right, like the new constitutional rights created by *Solar Energy Choice* and *Medical Marijuana II*. Instead, it takes an existing system, changes it without expressly redefining it, and creates various rules of operation, some of which a reasonable voter might like (nonpartisan elections), and

some of which that voter might oppose (eliminating primary elections in some circumstances).²

The proposed amendment’s sponsor relies on three additional cases to support its single-subject argument. *See* I.B. Sponsor, at 10, 11. Neither of the cited cases support that argument.

In *Advisory Op. to Att’y Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So. 3d 235, 243 (Fla. 2015), the Court noted that while the proposed amendment contained several provisions, “some dealing with economic barriers to supply of solar electricity and others dealing with governmental regulation with respect to rates, service, or territory,” those provisions were consistent with the amendment’s stated purpose. That amendment, however, expressly stated its purpose in a section titled, “PURPOSE AND INTENT.” *Id.* (“to encourage and promote local small-scale solar-generated electricity production . . . to enhance the availability of solar power to customers[,]” and to “limit[] and prevent[] regulatory and economic barriers . . .”). The All Voters Vote Initiative does not have a similar provision explaining its purpose and intent.

The proposed amendment’s sponsor also relies on *Advisory Op. to Att’y Gen. re Use of Marijuana for Certain Med. Conditions (Medical Marijuana I)*, 132 So.

² Note that the longest part of the proposed amendment in *Solar Energy Choice* was the section defining key terms in the amendment. *See* 188 So. 3d at 826. The All Voters Vote Initiative contains no section defining its key terms.

3d 786 (Fla. 2014). Like *Medical Marijuana II*, however, *Medical Marijuana I* created a new constitutional right and contained provisions regulating that right (concluding the proposed amendment had “a logical and natural oneness of purpose—namely, whether Floridians want a provision in the state constitution authorizing the medical use of marijuana, as determined by a licensed Florida physician, under Florida law.”). 132 So. 3d at 796.³

By contrast, the All Voters Vote Initiative covers multiple and unrelated purposes, namely, whether Floridians want a provision in the state constitution implicitly changing the definition of “primary elections,” allowing all registered voters to cast ballots in these new “primary elections” for certain offices regardless of whether or not a voter or candidate is affiliated with a political party, while cancelling “primary elections” with only two qualified candidates and making the campaigns for those offices last until November, and not prohibiting political parties from devising an entirely new and undescribed way to “nominate” their preferred candidates for these new primary elections where the Legislature may or may not permit party affiliation to be listed on the ballot. Accordingly, *Medical Marijuana I* does not support the sponsor’s proposed amendment.

³ That provision also included a “Definitions” section with ten subparagraphs and, importantly, defined the key term, “marijuana.” *See* 132 S. 3d at 792-93.

Finally, the sponsor relies on *Advisory Op. to the Att’y Gen. re: Protect People, Especially Youth, from Addiction, Disease, and Other Health Hazards of Using Tobacco*, 926 So. 2d 1186 (Fla. 2006), but this case, like the others, is of no help to the sponsor’s argument. In *Health Hazards of Using Tobacco*, the Court approved the proposed amendment for having a single chief purpose: “to use a portion of the Tobacco Settlement money to create a tobacco education and prevention program especially directed toward youth.” 926 So. 2d at 1193. Like *Solar Electricity Supply*, the proposed amendment expressly stated its intent and purpose (“to protect people, especially youth, from health hazards of using tobacco . . . ; to discourage use of tobacco, particularly among youth . . . ; to fund a comprehensive statewide tobacco education and prevention program . . .”). *Id.*, 926 So. 2d at 1189. *See also Medical Marijuana I*, 132 So. 3d at 791-92 (expressly stating the new public policy created by the proposed amendment).⁴

The All Voters Vote Initiative has none of these features. It does not expressly state its intent and purpose. It does not state the reasons why this amendment is necessary (arguably, because there is no consensus that Florida’s closed primary system is the source of “extremism” or “divisiveness”). It does not have a logical

⁴ Also like both *Solar Electricity Supply* and *Medical Marijuana I*, the proposed amendment in *Health Hazards of Using Tobacco* defined its key term. *See Health Hazards of Using Tobacco*, 926 So. 2d at 1190 (defining “tobacco”).

and oneness of purpose. Accordingly, the proposed amendment should not be allowed on the ballot.

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

A. The ballot title and summary fail to define their key term and use it to mean something entirely different.

The ballot title refers to “primary elections.” The ballot summary refers to “primaries,” the “primary ballot,” and “primary.” The ballot text refers to “primary election” four times and to “primary” once. The proposed amendment does not define those terms. The key term is “primary election,” defined in Florida law quite differently from the use of the term in the proposed amendment.

A “primary election” is “an election held preceding the general election *for the purpose of nominating a party nominee* to be voted for in the general election to fill a national, state, county, or district office.” § 97.021(30), Fla. Stat. (2019) (emphasis added). Similarly, section 100.061 provides that “a primary election *for nomination of candidates of political parties* shall be held on the Tuesday 11 weeks prior to the general election.” (Emphasis added). Finally, section 101.021 describes who can vote in such elections: “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.” (Emphasis added).

The proposed amendment’s failure to state expressly that it is changing the definition of this established term makes the use of that term misleading. Indeed, in both *Medical Marijuana I* and *Medical Marijuana II* the key term was “marijuana.” The sponsors of those amendments made clear they were not fundamentally changing the definition of that key term. *See Medical Marijuana I*, 132 So. 3d 786, 792 (“‘Marijuana’ has the meaning given cannabis in Section 893.02(3), Florida Statutes (2013)”) and *Medical Marijuana II*, 181 So. 3d 471, 474 (“‘Marijuana’” has the meaning given cannabis in Section 893.02(3), Florida Statutes (2014), and, in addition, ‘Low-THC cannabis’ as defined in Section 381.986(1)(b), Florida Statutes (2014), shall also be included in the meaning of the term ‘marijuana.’”).

By contrast, the All Voters Vote Initiative does not include, and could not include, a definition of “primary election” that cross-referenced to section 97.021(30) because the initiative gives “primary election” an altogether different definition. Instead, the proposed amendment simply uses the same term but in a completely different way. It does so without informing voters of this fundamental change. The use, and the lack of an express acknowledgment of the changed definition, make the ballot title and the ballot summary misleading, disqualifying the proposed amendment from being placed on the ballot.

B. The State of Washington’s ballot summary for a similar initiative provides an example of a non-misleading summary.

Washington had a partisan blanket primary system in effect since 1935, whereby the candidate from each political party receiving the most votes became that party’s nominee. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008). After a nearly identical system in California was struck down by the U.S. Supreme Court in 2000, an initiative petition was placed on the 2004 Washington ballot converting from a partisan to a nonpartisan blanket primary, the difference being that in the latter, the top two vote getters advanced to the general election, and primaries did not nominate party candidates. *Id.*

Even though the initiative made this slight change from one form of blanket primary to another, the ballot summary for that initiative clearly informed voters it was creating “a new system for conducting primaries” for certain offices:

This measure proposes a new system for conducting primaries for partisan offices. This proposal continues current practice of permitting voters to vote for any candidate for any office in primary and general elections, without limitation based on party. The two “top” candidates with the most votes in the primary advance to the general election. Candidates continue to designate their party. It becomes effective only if the court decision invalidating the traditional blanket primary becomes final.

See Washington Secretary of State, Elections, *Proposed Initiative to the People – 2004* <https://www.sos.wa.gov/elections/initiatives/people.aspx?y=2004> (last visited

Oct. 16, 2019). The foregoing summary even explained the initiative’s impact on the current primary system.⁵

Moreover, the text of the initiative itself showed how it redefined the terms “primary” or “primary election.” Using underlines and strikethroughs, it showed voters that a “primary election” was currently a “statutory procedure for nominating candidates to public office,” but was changing to:

a procedure for winnowing candidates for public office to a final list of two as part of a special or general election [where e]ach voter has the right to cast a vote for any candidate for each office without limitation based on party preference or affiliation, or either the voter or the candidate.

See Initial Brief of the Florida Democratic Party, at 15. The All Voters Vote Initiative does not provide the same clarity.

Instead, the All Voters Vote Initiative makes precipitous and cataclysmic changes to the 106-year-old primary elections system in Florida. *See id.*, at 10-16. Yet it purports to do so without clearly informing voters that it creates “a new system for conducting primaries.” It does not describe the amendment’s impact on the current primary system. Coupled with the misleading use of the term “primary

⁵ The ballot summary’s clarity, devoid of advocacy, may be the result of Washington law that provided initiative ballot titles and summaries were written by the Washington Attorney General, not the initiative’s sponsor. *See* Wash. Rev. Code § 29A.72.050 (2004).

election,” the ballot title and summary are misleading and should not be allowed on the ballot.

CONCLUSION

The All Voters Vote Initiative fails to meet the governing legal requirements. It violates the single-subject requirement of Article XI, Section 3 of the Florida Constitution, and its ballot title and summary are misleading, violating the requirements of section 101.161, Florida Statutes. For the foregoing reasons, the Florida Democratic Party urges the Court to prohibit the proposed amendment from being placed on the ballot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

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

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