

SC19-1267, SC19-1505 (consolidated)

In the Supreme Court of Florida

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

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

ATTORNEY GENERAL'S REPLY BRIEF

ASHLEY MOODY
Attorney General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399

AMIT AGARWAL (FBN 125637)
Solicitor General

EDWARD M. WENGER (FBN 85568)
Chief Deputy Solicitor General

DANIEL W. BELL (FBN 1008587)
Deputy Solicitor General

Counsel for the Attorney General

RECEIVED, 10/28/2019 07:06:29 PM, Clerk, Supreme Court

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ARGUMENT

An overwhelming majority of Florida’s registered voters have chosen to affiliate with a political party,¹ giving them the right to cast a direct vote in the selection of their party’s candidate for key statewide offices. The proposed amendment must be denied ballot placement because its corresponding ballot language fails to disclose that the amendment would curtail that right to a direct vote. The ballot language instead affirmatively misleads voters by drawing them to the incorrect conclusion that the amendment would *expand* Floridians’ right to participate in the process by which “party nominated candidates” are selected. The sponsor’s arguments in defense of that fatally defective ballot language are unpersuasive.

I. THE BALLOT LANGUAGE FAILS TO DISCLOSE THAT THE PROPOSED AMENDMENT WOULD CURTAIL FLORIDIANS’ RIGHT TO CAST A DIRECT VOTE FOR THE NOMINATION OF THEIR PARTIES’ CANDIDATES FOR THE AFFECTED OFFICES.

Offered to the electorate as a means to ensure that “all voters [will] choose from among all candidates, regardless of political party affiliation,” Sponsor’s A.B. at 1, the proposed amendment would in fact abolish Florida’s existing system of

¹ Florida Department of State, *Voter Registration - By Party Affiliation* (Sept. 30, 2019), <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/>.

party primary elections for the affected offices. Under that system, every qualified member of the electorate may cast a direct vote to nominate his party's candidate,² the purpose of which is "to assure that intraparty competition is resolved in a democratic fashion."³ Under the proposed amendment, members of political parties would no longer be guaranteed that direct vote. As the sponsor agrees, "[t]he proposed amendment reserves . . . to the private political parties the manner of selecting their respective candidates nominated for each position." Sponsor's A.B. at 2 n.1; *see id.* at 12 ("[T]he proposed amendment text does not attempt to tell parties how they are to select their own candidates."). For example, the amendment would allow parties to adopt a convention format or other system in which their respective candidates are selected not by the direct vote of party members, but by delegates or other party representatives. The proposed amendment must be denied ballot placement because the corresponding ballot title and summary do not disclose that sea change, and without "this clear explanation, the voters will be unaware of the valuable" benefit—a guaranteed direct vote—"which [will] be lost if the amendment is adopted." *Fla. Dep't of State v. Fla. State Conference of NAACP*

² *See* § 101.021, Fla. Stat. ("[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.").

³ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000).

Branches, 43 So. 3d 662, 669 (Fla. 2010).

As a threshold matter, the argument does not assume that political parties “will mistreat their own members” by “disenfranchising them in future candidate selection processes.” Sponsor’s A.B at 4. The direct vote that members of political parties currently enjoy is made possible by the existence of a state-operated primary election in which party members cast their votes. The proposed amendment would eliminate that state-operated election, leaving the parties and their members to either eschew the candidate selection process entirely or bear the cost of establishing and operating new means of candidate selection in a state with more than 20,000,000 residents. Given those realities, political parties might well conclude that the selection of party candidates by delegation or convention rather than direct vote is a practical necessity. Thus, the amendment not only sanctions, but affirmatively invites, the result that the sponsor attempts to lay at the feet of the parties themselves.

The sponsor’s primary argument appears to be that the ballot title and summary “need not explain every detail or ramification of the proposed amendment.” Sponsor’s A.B. at 5-6 (quoting *Advisory Opinion to Atty. Gen. re Rights of Elec. Consumers Regarding Solar Energy Choice*, 188 So. 3d 822, 831 (Fla. 2016)). While that is correct insofar as it goes, ending the direct selection of party candidates by party members is no mere “detail,” but instead a key aspect of “the legal effect of the amendment,” disclosure of which is necessary to render the

ballot language legally sufficient, *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984). In other words, ballot language revealing “that elections for the affected offices will be conducted differently than the current system” and “how the new process will work,” Sponsor’s A.B. at 6, is insufficient because it fails to disclose what voters will lose—the right, as members of a political party, to cast a direct vote for the nomination of that party’s candidate.

In response, the sponsor points to statements in the ballot language that “[a]ll candidates for an office, including party nominated candidates, appear on the same primary ballot” and that a “[c]andidate’s party affiliation may appear on ballot as provided by law.” Sponsor’s A.B. at 7. In the sponsor’s view, that language avoids any misunderstanding because it “discloses to voters that party nominated candidates are to be chosen by the respective parties prior to and separate from the All Voters Vote primary elections.” *Id.* at 8. That party nominations would precede the “primary election” created by the amendment is irrelevant; the problem is that the phrase “party nominated candidates” evokes the familiar way in which Floridians have selected party nominees for more than 100 years (by direct vote), when in fact the amendment would do away with that selection process. Accordingly, ballot placement must be denied.

II. THE BALLOT LANGUAGE MISLEADS VOTERS BY SUGGESTING THAT THE PROPOSED AMENDMENT WOULD EXPAND THEIR RIGHT TO PARTICIPATE IN THE PROCESS BY WHICH POLITICAL PARTIES SELECT THEIR CANDIDATES.

The ballot language not only fails to disclose that the amendment would curtail Floridians' right to cast a direct vote in the selection of their parties' nominees, but affirmatively misleads voters by drawing them to the incorrect conclusion that Floridians who choose not to affiliate with a political party will nevertheless have the right to participate in the selection of party candidates. Specifically, as discussed above, the phrase "party nominated candidates" evokes the process by which Floridians have, for more than 100 years, selected party nominees for the affected offices: by direct vote in a "primary election." By telling voters, in the same breath, that "all registered voters [will] vote in primaries," the ballot language communicates that, regardless of political affiliation, all voters will participate in the selection of party nominated candidates.

The sponsor argues that the phrase "party nominated candidates" adequately "tells voters that there is a separate process by which political parties can nominate their own candidates for the All Voters Vote primary." Sponsor's A.B. at 11. But the ballot summary's passing reference to that phrase fails to disabuse voters of the understandable yet mistaken assumption that that "separate process" is a form of "primary election" in which "all registered voters [will] vote."

The sponsor's answer to this concern is that, in the State of Florida, the phrase

“primary election” refers not only to the process by which members of political parties nominate candidates for statewide office but also to the nomination process for certain non-partisan, local elections. *See* Sponsor’s A.B. at 9. That is no answer, as the amendment and ballot language at issue concern the election of the Governor, cabinet, and members of the Legislature, all of which Floridians have historically elected through a party primary election system. Because the proposed amendment “fl[ies] under false colors” as to its legal effect, *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000) (internal quotation marks omitted), ballot placement must be denied.

CONCLUSION

For the foregoing reasons, the proposed amendment should not be placed on the ballot.

Respectfully submitted.

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Daniel W. Bell

AMIT AGARWAL (FBN 125637)

Solicitor General

EDWARD M. WENGER (FBN 85568)

Chief Deputy Solicitor General

DANIEL W. BELL (FBN 1008587)

Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL

The Capitol, PL-01

Tallahassee, Florida 32399-1050

(850) 414-3300

amit.agarwal@myfloridalegal.com

edward.wenger@myfloridalegal.com

daniel.bell@myfloridalegal.com

CERTIFICATE OF COMPLIANCE

I 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/ Daniel W. Bell
Daniel W. Bell

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished by e-mail or electronic service through the Florida Courts E-Filing Portal on this 28th day of October, 2019, to the following:

Joe Jacquot, General Counsel
EXECUTIVE OFFICE OF THE GOVERNOR
The Capitol
400 S. Monroe Street
Tallahassee, Florida 32399-0001
joe.jacquot@eog.myflorida.com

*Counsel to Governor Ron
DeSantis*

Brad McVay, General Counsel
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
brad.mcvay@dos.myflorida.com

*Counsel to Secretary of State
Laurel Lee*

Adam S. Tanenbaum, General Counsel
FLORIDA HOUSE OF REPRESENTATIVES
420 The Capital
402 South Monroe Street
Tallahassee, Florida 32399-1300
adam.tanenbaum@myfloridahouse.gov

*Counsel to House Speaker
Jose Oliva*

Jeremiah Hawkes, General Counsel
THE FLORIDA SENATE
409 The Capital
404 S. Monroe Street
Tallahassee, Florida 32399-1100
hawkes.jeremiah@flsenate.gov

*Counsel to Senate President
Bill Galvano*

Amy J. Baker, Coordinator
FINANCIAL IMPACT ESTIMATING CONF.
OFFICE OF ECONOMIC AND
DEMOGRAPHIC RESEARCH
111 West Madison Street, Suite 57
Tallahassee, Florida 32399-6588
baker.amy@leg.state.fl.us

Maria Matthews
DIRECTOR, DIVISION OF ELECTIONS
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building, Room 316
500 South Bronough Street
Tallahassee, Florida 32399-0250
DivElections@dos.myflorida.com

Glenn Burhans Jr.
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Highpoint Center
106 East College Avenue – Suite 700
Tallahassee, FL 32301
gburhans@stearnsweaver.com
cabbuhl@stearnsweaver.com
ptassinari@stearnsweaver.com

Eugene E. Stearns
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Museum Tower

150 West Flagler Street – Suite 2200
Miami, Florida 33130
estearns@stearnsweaver.com
jaybar@stearnsweaver.com

Counsel for All Voters Vote, Inc.

Benjamin Gibson
Daniel Nordby
Amber Stone Nunnally
SHUTTS & BOWEN LLP
215 South Monroe Street, Suite 804
Tallahassee, FL 32301
bgibson@shutts.com
dnordby@shutts.com
anunnally@shutts.com
mpoppell@shutts.com

Counsel for the Republican Party of Florida

Mark Herron
Robert A. McNeely
MESSER CAPARELLO, P.A.
Post Office Box 15579
Tallahassee, FL 32317
mherron@lawfla.com
clowell@lawfla.com
rmcneely@lawfla.com
cbrinker@lawfla.com
statecourtpleadings@lawfla.com

Counsel for the Florida Democratic Party

/s/ Daniel W. Bell
Daniel W. Bell