CASE NO.: SC19-2116

In the Supreme Court of Florida

ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: ADULT USE OF MARIJUANA

MAKE IT LEGAL, FLORIDA'S RESPONSE IN OPPOSITION TO THE FLORIDA SENATE'S MOTION TO DISMISS

Make It Legal, Florida, a political committee and the sponsor of the petition initiative at issue in this proceeding, respectfully requests this Court deny the Florida Senate's Motion to Dismiss ("Motion"), which is premised on a fundamental misreading of article XI, section 3 of the Florida Constitution.

INTRODUCTION

The Senate's Motion is premised on three terminal fallacies. First, the Senate claims that the criteria for an initiative's placement on the 2022 election ballot is unknown. This is not true. The criteria for placement on the 2022 ballot is known

with complete certainty for any initiative that qualifies for the ballot before the November 3, 2020 presidential election.[1]

Second, and relatedly, the Senate presumes that in order to determine the criteria for ballot placement, one must look at the ballot on which an initiative will appear for a vote, and work backwards to the most recent presidential election—even if it has not occurred yet. But the Florida Constitution says no such thing. Article XI, section 3, plainly refers backward to the last preceding election in which presidential electors were chosen. The present constitutional criteria for ballot placement is therefore based on the November 8, 2016 presidential election, and is set in stone until after November 3, 2020. Any initiative that satisfies that criteria before that date is eligible for placement on the 2022 ballot.

Third, the Senate erroneously contends the two-year validity period for an initiative petition signature relates to the date of the election in which the initiative will be considered, rather than the point of qualification for placement on the ballot. In actuality, a signature's validity attaches to its eligibility towards qualification for the ballot—not the date of the election. Section 100.371, Florida Statutes, does not impose a rolling deadline after qualification that requires initiative sponsors to constantly replace expiring signatures with new ones all the way through election day.

[1] The selection of presidential electors is set for the Tuesday after the first Monday in November. *See* 3 U.S.C. § 1.

At bottom, the Senate rewrites article XI, section 3 to impose signature criteria measured from the presidential election that precedes the date on which the amendment *appears on the ballot*, as opposed to the date that the amendment *qualifies for ballot placement*. This reading appears nowhere in the Constitution, and creates nine months of inexplicable dead space during which article XI, section 3 is effectively suspended.

If Make It Legal, Florida garners the requisite number of signatures at any point before the November 3, 2020 presidential election, then the petition initiative at issue in this case will have qualified for placement on the 2022 ballot under the requirements of article XI, section 3 of the Florida Constitution. Moreover, Make It Legal, Florida has already qualified for this Court's review of its initiative petition under the current statutory framework. This case is not moot, and the Court should not dismiss the Attorney General's petition for review.

LEGAL ARGUMENT

Make It Legal, Florida's petition initiative is well on its way to qualification for ballot placement.[2] "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist."

[2] As of January 28, 2020, the Division of Elections website reported 435,020 of the requisite 766,200 verified petitions had been submitted for Petition 19-11. *See* https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=74455&seqnum=2 (last visited Jan. 28, 2020, at 10:15 a.m.).

Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992). The parties' dispute has not been resolved, and the Court's determination of the initiative's compliance with article XI, section 3 of the Florida Constitution remains necessary. Thus, this case is not moot, and this Court should exercise its jurisdiction and issue a ruling in the present case.

I. The Senate misreads article XI, section 3 of the Florida Constitution.

Article XI, section 3 of the Florida Constitution confers on Florida's voters the right to amend their constitution through petition initiative. This right

> may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment, signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceding election in which presidential electors were chosen.

Art. XI, § 3, Fla. Const. The right to amend the Florida Constitution through petition initiative—i.e., to place a proposed amendment on a ballot for a vote—is invoked the moment a petition garners the requisite number of signatures and is filed with the state.

To qualify for placement on the ballot, the Florida Constitution requires the sponsor of an initiative petition to obtain a particular number of validated signatures in support of the initiative. That number is determined by the number of voters who participated in the preceding presidential election. Article XI, section 3 sets this requirement in clear, unambiguous language. Thus, if an initiative petition

meets the current signature threshold at any time before the November 3, 2020 presidential election, then the initiative petition qualifies for ballot placement, regardless of whether it is for placement on the 2020 or 2022 ballot. If, on the other hand, the 2020 presidential election occurs *before* a pending initiative petition meets the current signature threshold, then new signature criteria are imposed based on the number of voters who participated in the 2020 presidential election. A subsequent presidential election does not annul the qualification of a proposed amendment that has already attained placement on the ballot.

Put differently, the plain language of article XI, section 3 determines the minimum signature threshold by looking backwards from the date that an initiative petition purports to qualify for placement on the ballot. Once an initiative qualifies for ballot placement, the fact that a presidential election later occurs is immaterial.

The Senate misreads, and ultimately rewrites, article XI, section 3 of the Florida Constitution to add hurdles to ballot qualification that do not appear in Florida law. By implying that an intervening presidential election annuls a previously-qualified petition initiative, the Senate rewrites the existing language—"in the last preceding election in which presidential electors were chosen"—as "the last preceding election [*immediately before the initiative appears on the ballot*] in which presidential electors were chosen." *See* Art. XI, § 3, Fla. Const.

In championing its alternative interpretation, the Senate overcomplicates the constitutional text by conflating the last clause of article XI, section 3 (". . . in the last preceding election in which presidential electors were chosen"), with the legislatively-imposed deadline of February 1st set forth in section 100.371(1), Florida Statutes ("Constitutional amendments proposed by initiative shall be placed on the ballot for the general election, provided the initiative petition has been filed with the Secretary of State no later than February 1 of the year the general election is held."). Properly interpreted, the constitution determines an initiative's qualification for a ballot based on the preceding presidential election, while section 100.371(1) merely dictates on which ballot the qualified initiative will appear. These are two separate inquiries.[3]

The Senate argues, however, that during presidential election years, if an initiative petition does not qualify for ballot placement by February 1st, then it is prohibited from qualifying for future ballot placement until at least nine months

[3] Indeed, they must remain separate inquiries, because the Legislature has no authority to impose substantive requirements for ballot qualification that do not appear in the constitution's text. The Legislature only has authority to regulate the process for elections. Art. VI, § 1, Fla. Const.; *Am. Fed. of Labor and Congress of Indus. Org. v. Hood*, 885 So. 2d 373, 375 (Fla. 2004) ("Under this provision, the Legislature is directed to enact laws regulating the election process. . . . legislative acts that impose unreasonable or unnecessary restraints on the elective process are prohibited." (marks omitted)). The February 1st deadline in Section 100.371(1) appropriately exercises this authority, so that the Department of State and local supervisors of elections are able to determine which amendments will be printed on the ballot in November. It does not, and cannot, create a substantive hurdle to ballot qualification.

later—after the next presidential election occurs. *See* Senate Mot. ¶¶ 7–12. In practice, this means that no achievable qualification criteria exist under article XI, section 3 between February and November during presidential election years.

The Senate's reading needlessly weakens voters' fundamental right to amend the constitution through petition initiative. It creates nine months of inexplicable dead space in every presidential election year during which no initiative can qualify for ballot placement—and realistically, during which no initiatives would be initiated or pursued. The Senate relies on this byzantine reasoning to support its contention for mootness.[4]

But the text of article XI, section 3 does not impose an atrophied life cycle for petition initiatives during presidential election years. Instead, it creates a benchmark for ballot qualification that self-adjusts on a date certain every four years, but can be achieved at any time throughout the year. The statutory deadline in section 100.371 is a separate, legislatively-crafted requirement that simply dictates for *which* ballot a petition qualifies. Instead of creating a dormant period

[4] The Senate also suggests that pending legislation regarding future election procedures is a basis for dismissing this proceeding. Senate Mot. ¶ 13. The cited legislation, even if it were to pass, might possibly be relevant to voters considering whether to vote for or against an initiative petition, but is irrelevant to this Court's consideration of whether the ballot proposal satisfies the current strictures of Florida law. To the extent the Legislature proposes to change the current petition initiative process, it remains an open question whether the Legislature could do so retroactively to affect active petition initiatives, like the one at issue here. Any conjecture on this issue is not appropriate for resolution in this proceeding, let alone through a motion to dismiss for alleged mootness.

every four years, the above interpretation harmonizes the requirements of article XI, section 3 and section 100.171, Florida Statutes.

Finally, and fundamentally, this Court does not wait until an initiative qualifies for ballot placement to review the initiative. *See* §§ 15.21, 16.061, Fla. Stat. Rather, the Attorney General invokes this Court's jurisdiction well before an initiative qualifies for ballot placement based upon an initiative petition meeting a statutorily designated threshold. *See* Art. 4, § 10, Fla. Const.; § 16.061, Fla. Stat.; and § 15.21, Fla. Stat. (directing the Secretary of State to submit an initiative petition to the Attorney General upon the receipt of verified forms "equal to 10 percent of the number of electors statewide and in at least one-fourth of the congressional districts required by s. 3, Art. XI of the State Constitution"). The instant initiative qualified for review by this Court months ago, and the Attorney General petitioned this Court to proceed with that review. Nothing justifies halting that process.

II. The Senate misreads section 100.371, Florida Statutes.

The Senate implies that once a signature turns two years old, it can no longer be counted towards the minimum signature requirement, even if the signature has already been verified, and the initiative has already qualified for ballot placement. *See* Senate Mot. ¶¶ 9–10. Thus, according to the Senate, every petition initiative

remains in constant jeopardy of losing its qualification for ballot placement. Yet the Senate cites no authority for this proposition

A signature is valid for two years for purposes of counting towards ballot qualification. Section 100.371(11), Florida Statutes, provides that "[e]ach signature shall be dated when made and shall be valid for a period of 2 years following such date, provided all other requirements of law are met." The statute goes on to state that the "sponsor shall submit signed and dated forms to the supervisor of elections for the county of residence listed by the person signing the form for verification of the number of valid signatures obtained," and "[t]he supervisor shall promptly verify the signatures within 30 days after receipt of the petition forms[.]" *Id.* The Secretary of State later determines the total number of "verified valid signatures and the distribution of such signatures by congressional district" in order to certify the initiative for placement on the ballot. *Id.* § 100.371(12).

Validity of a signature attaches to an initiative's qualification for the ballot, not a future election date. The relevant statutory provisions do not mention the date on which the initiative appears on the ballot for a vote. Rather, the two-year period in section 100.371(11) refers to the time frame to verify signatures and qualify for ballot placement. If more than two years elapse after a voter signs a petition, then his or her signature cannot count towards the initiative's total signatures required by article XI, section 3 of the Florida Constitution. *See id.* §§ 100.371(11), (12).

From a practical standpoint, this is the only sensible interpretation. The Senate's proposal of a constantly moving target, even after qualification for this Court's review and for placement on the election ballot, would render a proposed amendment's compliance with article XI, section 3's signature requirements indeterminable until the moment of election day, at which point it would be far too late to remove the amendment from the ballot if some number of signatures aged out of compliance with section 100.371.

CONCLUSION

Neither common sense nor the plain language of article XI, section 3 supports the Senate's motion. Florida law only imposes a requirement to qualify for the ballot based upon thresholds set in the last presidential election and using signatures that are no more than two years old. Qualification for review and ballot placement is the central focus of both article XI, section 3 of the Florida Constitution and section 100.371, Florida Statutes. It follows that qualification for ballot placement—not the date of the election in which an initiative may be considered—is the benchmark from which compliance with these provisions is measured. The Senate's theory contorts the Constitution's plain text.

This proceeding is not moot. Make It Legal, Florida has a reasonable expectation that its initiative will qualify for placement on the 2022 ballot in short order, and well before the November 2020 presidential election. This Court retains

jurisdiction over this case, and should exercise its constitutional role to review the Amendment's compliance with article XI, section 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on January 28, 2020, the foregoing was filed through the Florida Courts e-Filing Portal, which furnished a copy by email to the individuals identified on the Service List that follows.

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