SC19-2116

In the Supreme Court of Florida

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

ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF REGARDING JURISDICTION

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INTRODUCTION

The Court has invited interested parties to address whether this case is either "moot" or "not yet ripe" given that "the initiative is not going to meet the criteria for ballot placement on the 2020 ballot." Mot. to Dismiss ¶¶ 7, 8. The Attorney General believes the Court has continuing jurisdiction. In the unique context of advisory opinions to the Attorney General, the Court's jurisdiction is triggered when (1) the Secretary of State certifies that the sponsor acquired signatures equal to 10 percent of 8 percent of the votes cast in the preceding presidential election and (2) the Attorney General requests an advisory opinion. Once those requirements are met, the Court's jurisdiction is settled. Nothing in the text of the Florida Constitution or any statute divests this Court of jurisdiction due simply to the prospect, or the occurrence, of an intervening presidential election.

ARGUMENT

I. THIS COURT HAS JURISDICTION EVEN THOUGH THE DEADLINE FOR BALLOT PLACEMENT IN 2020 HAS PASSED.

A. Jurisdiction is triggered when the Sponsor obtains signatures totaling 10% of 8% of electors in the preceding presidential election and the Attorney General petitions this Court.

Florida's citizen-initiative process for amending the state constitution proceeds in two parts. Though related, the requirements for each are distinct. First, the sponsor must obtain the requisite number of signatures for supreme court review, triggering the Attorney General's obligation to petition this Court for an advisory

opinion. Second, the sponsor must obtain the requisite number of signatures for ballot placement. Because the first step relies in part on a signature-counting formula established by the constitutional provisions governing the second step, it makes sense to discuss these steps in reverse order.

Ballot Placement. Article XI, Section 3 sets forth the requirements before a citizen initiative will be placed on the ballot for approval by voters. It provides that the power to amend the constitution via citizen-initiative

> 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. That is, on the date the sponsor "invoke[s]" the citizen-initiative power by filing the relevant paperwork with the Secretary, it must have obtained signatures equaling 8 percent of the votes cast in the "last preceding [presidential] election." *Id.* Once that occurs, the initiative qualifies for ballot placement.

Whether an initiative qualifies for ballot placement is a separate question from *when* the initiative will appear on the ballot. That timing question is addressed by a different section of the constitution, Article XI, Section 5. When Article XI was originally adopted as part of the 1968 Constitution, Section 5(a) dictated that any proposed amendment to the state constitution "shall be submitted to the electors at

the next general election held more than ninety days after the joint resolution, initiative petition or report of revision commission or constitutional convention proposing it is filed with the secretary of state." Art. X, § 5(a), Fla. Const. (1968). In other words, as soon as the initiative qualified for ballot placement, the appropriate general election was determined by counting forwards 90 days; the initiative would then be placed on the ballot for whichever general election was soonest in time after that date.

Today, the timing of citizen-initiative ballot placement is governed by Article XI, Section 5(b) as amended in 2004. While amendments proposed via joint resolution, revision commission, or constitutional convention are still subject to Section 5(a)'s 90-day rule, a citizen initiative "shall be submitted to the electors at the general election provided the initiative petition is filed with the custodian of state records no later than February 1 of the year in which the general election is held." Art. XI, § 5(b), Fla. Const. (2020).

Once placed on the ballot, an initiative becomes law if approved by 60 percent of the electorate. Art. XI, § 5(e), Fla. Const.

As a result of these provisions, an initiative that attains signatures equaling 8 percent of the votes cast in the preceding presidential election has qualified for ballot placement. If the initiative qualifies *before* February 1 in the year of the upcoming general election, it shall be placed on that general election ballot. If it qualifies *after*

February 1 of the upcoming election, it shall be placed on the general election ballot following the upcoming general election.

Supreme Court Review. At issue here is the Court's power to issue advisory opinions regarding pending citizen initiatives. Its jurisdiction is governed by Article IV, Section 10 and Article V, Section 3(b)(10) of the Florida Constitution, along with various statutes. Collectively, these constitutional provisions state that "[t]he attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI," Art. IV, § 10, Fla. Const., and that this Court "[s]hall, when requested by the attorney general pursuant to the provisions of Section 10 of Article IV, render an advisory opinion of the justices, addressing issues as provided by general law." Art. V, § 3(b)(10), Fla. Const.

Article IV, Section 10 specifies that this Court's review will proceed "as directed by general law," thereby delegating to the Legislature the power to establish procedures governing the issuance of advisory opinions. This "general law," in turn, is set out by the Legislature in two statutes: sections 15.21 and 16.061. As explained below, the Legislature opted for a procedure by which this Court's jurisdiction to issue an advisory opinion would be triggered *before* the sponsor had obtained the requisite signatures for ballot placement.

First, section 15.21 specifies, among other things, the number of signatures a

sponsor must obtain to trigger this Court's advisory opinion review. It dictates that the Secretary of State shall notify the Attorney General when the sponsor of a citizen initiative has

> [o]btained a letter from the Division of Elections confirming that the sponsor has submitted to the appropriate supervisors for verification, and the supervisors have verified, forms signed and dated 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.

§ 15.21(3), Fla. Stat.[1]

The cross-reference to Article XI, Section 3, governing ballot placement, incorporates that section's signature-counting formula. Read together, the two provisions require the sponsor, in order to trigger supreme court review, to obtain and file "forms signed and dated equal to 10 percent of" "eight percent of the votes cast . . . in the last preceding election in which presidential electors were chosen." § 15.21(1), Fla. Stat.; Art. XI, § 3, Fla. Const. Thus, this Court's review turns, first and foremost, on the obtaining of signatures equaling 10 percent of 8 percent of the votes cast in the preceding presidential election.

As in the ballot placement context, the phrase "last preceding election" refers to the presidential election preceding the triggering event. For example, for any

[1] At the time of this filing, the Legislature has passed a bill amending section 15.21 to raise the signature threshold for supreme court review from 10 to 25 percent of the signatures required for ballot placement. *See* SB 1794, § 1 (2020). That bill has not yet been signed into law by the Governor.

initiative pending after the November 2016 presidential election, the sponsor has four years to obtain 10 percent of 8 percent of the votes cast in that election. If the requisite number of signatures are gathered during that period, the Division of Elections must issue a confirmatory letter to the sponsor and the Secretary must send a notification letter to the Attorney General. If the sponsor is unable to obtain the requisite signatures within that four-year span, however, the signature-counting formula resets and going forward is based on the results of the November 2020 presidential election.

Next, the Attorney General, upon receiving from the Secretary the notification letter prescribed by section 15.21, must invoke the Court's jurisdiction by requesting an advisory opinion. *See* § 16.061(1), Fla. Stat. General law states:

> The Attorney General shall, within 30 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, petition the Supreme Court, requesting an advisory opinion regarding the compliance of the text of the proposed amendment or revision with s. 3, Art. XI of the State Constitution and the compliance of the proposed ballot title and substance with s. 101.161.

Id. Accordingly, whereas section 15.21 dictates whether the initiative has qualified for supreme court review, section 16.061 determines when the Attorney General must invoke this Court's jurisdiction: within 30 days of receiving the Secretary's notification letter.

Once these requirements are met, this Court "[s]hall . . . render an advisory

opinion of the justices." Art. V, § 3(b)(10), Fla. Const. The deadline for issuing that opinion is "no later than April 1 of the year in which the initiative is to be submitted to the voters." Art. IV, § 10, Fla. Const.

* * *

Under those interlocking but otherwise straightforward rules, the Court has jurisdiction here. First, the Sponsor received a letter from the Division of Elections verifying that, on November 19, 2019, the Sponsor had obtained signatures equaling 10 percent of 8 percent of votes cast in the last preceding presidential election. Because the last presidential election preceding November 19, 2019 was held on November 6, 2016, the Secretary relied on the number of votes cast in *that* election when applying the signature-counting formula. Second, upon receiving a notification letter from the Secretary, the Attorney General petitioned this Court for an advisory opinion.

B. The Attorney General's request for an advisory opinion is neither moot nor unripe.

As explained below, the fact of an upcoming presidential election does not divest the Court of jurisdiction.

Mootness. At the outset, it is not correct that "[t]he initial request by the Attorney General was for a review for placement on the 2020 ballot," and that because "the initiative is not going to meet the criteria for placement on the 2020 ballot, such a review is moot." Mot. to Dismiss ¶ 7. In her December 19, 2019 letter

petitioning this Court for an advisory opinion, the Attorney General wrote: "it is my responsibility as Attorney General to petition this Honorable Court for a written opinion as to the validity of an initiative petition circulated pursuant to Article XI, section 3, Florida Constitution." Letter from Att'y Gen., at 1 (docketed Dec. 19, 2019). Nowhere in that letter did the Attorney General condition her request for review on the timing of ballot placement.

Indeed, although the Attorney General informed the Court of certain threshold requirements for placement on the 2020 ballot, she explicitly left unanswered the date of the general election for which the Sponsor sought ballot placement, writing that the date was "Unknown." *Id.* at 4. She noted that "[t]he *earliest date* of election that this proposed amendment can be placed on the ballot is November 3, 2020, provided the sponsor successfully obtains the requisite number of valid signatures by February 1, 2020," *id.* (emphasis added), leaving open the possibility that the Sponsor might obtain ballot placement for some later general election.

In short, the Attorney General's letter requesting an advisory opinion cannot be read to terminate this Court's jurisdiction in the event the Sponsor did not achieve ballot placement on the 2020 general election. Instead, the Court will possess jurisdiction over this case until such time as it issues the advisory opinion or the Sponsor withdraws its initiative with the Secretary of State, thereby mooting the proceedings.

Ripeness. Nor is it true that this Court lacks jurisdiction because "[t]he criteria for placement on the 2022 ballot is not yet known because there will be an intervening presidential election in 2020." Mot. to Dismiss ¶ 8. Under that view, this case will only be "ripe" once "the signature criteria can be determined and it is verified that the sponsor has met the threshold for 2022 ballot review." *Id.* In turn, this position hinges on the assumption that even after this Court's "initial review" is triggered, *id.* at ¶ 10, the Court's jurisdiction is not fully established, and the Court may therefore lose jurisdiction in the event of an intervening presidential election. That theory is flawed for three reasons.

First, as a matter of plain text, the Florida Constitution and general law dictate that this Court's advisory opinion jurisdiction is settled based on a signature-counting formula reliant on an election that occurred in the *past*, not on any election that will occur in the *future*. If—at the time the initiative power is "invoked"—the sponsor has obtained signatures equal to 10 percent of 8 percent of the votes cast in the "last preceding election," the initiative qualifies for supreme court review and the Secretary must issue a notification letter. *See* Art. XI, § 3, Fla. Const.; § 15.21(3), Fla. Stat. "[W]ithin 30 days" of receiving the Secretary's notification letter, the Attorney General must then "petition the Supreme Court, requesting an advisory opinion" § 16.061(1), Fla. Stat. Those textual indications show that the Court's jurisdiction exists if the signature criteria are met at a settled point in time.

No constitutional or statutory provision suggests that the Court will thereafter be divested of jurisdiction in the event of an intervening presidential election. Properly considered, the issue is not one of "ripe[ness]," Mot. to Dismiss ¶ 8, but of whether the constitutional and statutory criteria for supreme court review—which no one denies were previously satisfied here—are no longer met. But the Court does not lose jurisdiction simply because the result of the signature-counting formula would be different if that calculus were performed *today*, rather than in November and December 2019 when the triggering events occurred.

To the contrary, when evaluating the constitutional or statutory criteria governing a court's jurisdiction, the general rule is that "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991); *accord White v. Marine Transport Lines, Inc.*, 372 So. 2d 81, 84 (Fla. 1979) (adopting, as "the test for jurisdiction," that the "good faith demand of the plaintiff *at the time of instituting suit* determines the ability of the particular court to entertain the action" (emphasis added)).

Second, historical practice supports this interpretation. Since 1988, when it began issuing advisory opinions in citizen initiative cases, the Court has never suggested that its jurisdiction is anything other than settled once the Attorney General petitions for an advisory opinion, or that the fact of an upcoming presidential

election might divest it of jurisdiction. Even in presidential election years, for instance, the Court has often issued advisory opinions *before* the initiative qualified for ballot placement.[2] If the Court lacks jurisdiction in this case, it arguably lacked jurisdiction in those cases as well because the requisite number of signatures would have been indeterminate.

Third, embracing the theory that this Court's advisory opinion jurisdiction is subject to fluctuation would lead to consequences the drafters of both the constitutional and statutory texts could not have intended, among them the

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[2] *See Advisory Op. to Att'y Gen. ex rel. Amendment to Bar Government from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888 (Fla. July 13, 2000) (never qualified for ballot); *In re Advisory Op. to Att'y Gen. re Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So. 2d 522 (Fla. May 13, 2004) (qualified for ballot on July 23, 2004; election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Legislative Determination That Sales Tax Exemptions and Exclusions Serve a Public Purpose*, 880 So. 2d 630 (Fla. July 15, 2004) (never qualified for ballot); *Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646 (Fla. July 15, 2004) (never qualified for ballot); *Advisory Op. to Att'y Gen. re Repeal of High Speed Rail Amendment*, 880 So. 2d 624 (Fla. July 15, 2004) (qualified for ballot on July 29, 2004; general election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Public Protection from Repeated Medical Malpractice*, 880 So. 2d 667 (Fla. July 15, 2004) (qualified for ballot on July 29, 2004; election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Health Care Service to Every Patient*, 880 So. 2d 659 (Fla. July 15, 2004) (never qualified for ballot); *In re Advisory Op. to the Att'y Gen. re Medical Liability Claimant's Compensation Amendment*, 880 So. 2d 675 (Fla. July 15, 2004) (qualified for ballot on July 19, 2004; election held Nov. 2, 2004); *In re Advisory Op. to the Att'y Gen. re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 938 So. 2d 501 (Fla. June 22, 2006) (qualified for ballot on June 22, 2009; election held Nov. 2, 2010).

following:

- In a presidential election year, an initiative could qualify for neither ballot placement nor supreme court review between the dates of February 1 and the election held the first Tuesday in the month of November. *See* Resp. of Sponsor at 7 (observing that this would "create[] nine months of inexplicable dead space in every presidential election year"). But if that were true, surely the text of some constitutional or statutory provision would say so.

- The Court would lose jurisdiction any time that, due to staleness, the number of valid signatures fell below the 10-percent-of-8-percent threshold. By statute, a signature is "valid for a period of 2 years." § 100.371(11), Fla. Stat. The Court would therefore be obliged to continually revisit the signature count to ensure jurisdiction was still supported by enough valid signatures. Put differently, the Attorney General might properly request an advisory opinion only to see the Court be divested of jurisdiction the very next day were enough of the sponsor's signatures to become stale overnight.

- In every presidential election year in which an advisory opinion case were pending, the Court would possess jurisdiction on January 31 but lose jurisdiction the next day, February 1, when it became clear the initiative had missed the cutoff for placement on the upcoming ballot. This theory of jurisdiction therefore draws the arbitrary line that an opinion released on January 31 would be valid, while the very same opinion released on February 1 would be invalid. But that reading violates the deadline provision in Article IV, Section 10, which makes April 1—not January 31—the latest day for releasing advisory opinions. Thus, that reading would shorten the constitutionally-imposed deadline by *two months* in each presidential election year. There is no textual basis for such a result.

- More fundamentally, this Court could never know with any degree of confidence whether it possessed jurisdiction to issue an advisory opinion *until* the sponsor had obtained the requisite number of signatures for ballot placement. But that conflates the lower signature threshold for supreme court review with the signature threshold for ballot qualification. By specifying that supreme court review requires a mere 10 percent of the signatures necessary for

> ballot qualification, the Legislature expressed an intent that this Court's review be triggered well before a sponsor obtained ballot placement.

Other Considerations. Finally, the result is not different simply because, "in the interim, not only could the ballot eligibility and review requirements be amended as proposed legislation would do, but there could also be substantive changes to federal and state marijuana laws, all of which could impact the Court's review of this initiative." Mot. to Dismiss ¶ 13 (internal citations omitted). That is true in *every* citizen initiative case. Even in non-presidential election years, this Court might issue an advisory opinion relying on the current state of the law only to see the law change before the next election. The only way to avoid that problem would be to release the advisory opinion on the day before the election on which the initiative is to appear, thereby ensuring that the Court's advisory opinion reflects the law applicable on the date Florida residents will vote to approve or reject the initiative. That "solution," however, is precluded by Article IV, Section 10's April 1st deadline. Moreover, it would not be practicable to release an opinion at such a late date because the Secretary needs instructions months earlier on how to print the general election ballots.

In all events, misgivings about the wisdom of a particular constitutional scheme, however well-founded, cannot warrant departing from plain text.

II. THE COURT NEED NOT RENDER AN OPINION UNTIL APRIL 1 BEFORE THE ELECTION FOR WHICH THE INITIATIVE QUALIFIES.

As a result of the foregoing, this Court possesses jurisdiction to issue an advisory opinion in this case.[3] *When* it must issue that opinion is a different matter. Per Article IV, Section 10, the constitutional deadline for rendering an advisory opinion is "April 1 of the year in which the initiative is to be submitted to the voters." Because the Adult Use of Marijuana initiative did not qualify for 2020 ballot placement, the earliest that deadline may occur is April 1, 2022.

Thus, while there may be prudential reasons[4] for issuing the advisory opinion in advance of that date, nothing compels the Court to render its opinion until then.

CONCLUSION

This Court possesses jurisdiction to issue an advisory opinion.

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[3] Should the Court nevertheless find that it lacks jurisdiction in this case, that ruling would apply to the other advisory opinion cases pending before the Court. *See Advisory Op. to Att'y Gen. re Provide Medicaid Coverage to Eligible Low-Income Adults*, SC19-1070; *Advisory Op. to Att'y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing, and Other Restrictions*, SC19-1536; *Advisory Op. to Att'y Gen. re Prohibits Possession of Defined Assault Weapons*, SC19-1266.

[4] For example, the Westlaw commentary to the joint resolution creating this Court's advisory opinion jurisdiction, similar to the commentary that this Court has occasionally cited as persuasive, notes that "[i]t was felt that fairness dictated that ballot sponsors be able to obtain an opinion with regard to the technical requirements prior to going to the great effort and expense of collecting all of the necessary signatures for ballot placement." William A. Buzzett & Deborah K. Kearney, Commentary to Fla. H.J. Res. 71 (1986).

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CERTIFICATE OF SERVICE

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

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