

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 INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

I. OVERVIEW OF STATE PRIMARY ELECTION FORMATS

“The laws governing state primaries are complex and nuanced to say the least, and state primary laws have been a cause of confusion among voters and election administrators alike.” National Conference of State Legislatures, *State Primary Election Types* (June 26, 2018), <http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx>. That is in part because “[t]he manner in which party primary elections are conducted varies widely from state to state.” *Id.*¹

Sixteen states, including the State of Florida, deploy “closed” primary elections—those in which “a voter seeking to vote” in a party’s primary election “must first be a registered party member.” *Id.* “This system deters ‘cross-over’ voting by members of other parties,” and “[i]ndependent or unaffiliated voters, by definition, are excluded from participating in the party nomination contests.” *Id.*²

Fifteen states deploy “open” primary elections. For each office, those states hold a separate primary election for each party, but “voters may choose privately in which primary to vote.” *Id.* “In other words, voters may choose which party’s ballot

¹ The information collected by the National Conference of State Legislatures is current as of June 26, 2018.

² Seven “closed” primary states permit political parties to “choose whether to allow unaffiliated voters . . . to participate in their party nominating contests before each election cycle.” *Id.*

to vote, but this decision is private and does not register the voter with that party. This permits a voter to cast a vote across party lines for the primary election.” *Id.*

Nine states deploy primary elections that are “partially open” in the sense that they permit independent voters “to participate in any party primary they choose, but do not allow voters who are registered with one party to vote in another party’s primary.” *Id.* Another six states deploy primary elections that are “partially open” in the sense that they “permit[] voters to cross party lines, but they must either publicly declare their ballot choice or their ballot selection may be regarded as a form of registration with the corresponding party.” *Id.*

Of particular relevance to this case, the remaining four states—California, Louisiana, Nebraska, and Washington—deploy a “top two” primary system. *Id.* The National Conference of State Legislatures has described that system as follows:

The “top two” format uses a common ballot, listing all candidates on the same ballot. In California and Louisiana, each candidate lists his or her party affiliation, whereas in Washington, each candidate is authorized to list a party “preference.” The top two vote getters in each race, regardless of party, advance to the general election. Advocates of the “top-two” format argue that it increases the likelihood of moderate candidates advancing to the general election ballot.

Id. While the “top two” format has its proponents, it has also been criticized as anti-democratic, with “[o]pponents maintain[ing] that it reduces voter choice by making it possible that two candidates of the same party face off in the general election. They also contend that it is tilted against minor parties who will face slim odds of earning

one of only two spots on the general election ballot.” *Id.*

II. THE STATE OF FLORIDA’S PRIMARY ELECTION FORMAT

By statute, Florida’s Governor, Attorney General, Chief Financial Officer, Commissioner of Agriculture, and members of the Florida Legislature are selected by general election. *See* § 100.041, Fla. Stat. “In each year in which a general election is held, a primary election for nomination of candidates of political parties shall be held.” *Id.* § 100.061. “The candidate receiving the highest number of votes cast in each contest in the primary election shall be declared nominated for such office,” *id.*, and the party’s nominee shall appear on the general election ballot, *id.* § 100.051. In the 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.” *Id.* § 101.021. Conversely, “[i]t is unlawful for any elector to vote in a primary for any candidate running for nomination from a party other than that in which such elector is registered.” *Id.* Florida’s party primary system has been “closed” in that sense for more than 100 years.

III. THE PROPOSED AMENDMENT

On June 26, 2019, the Secretary of State submitted an initiative petition presenting a proposed constitutional amendment for placement on a future general election ballot. If approved by the electorate, the proposed amendment would add the following to Article VI, Section 5 of the Florida Constitution:

(c) All elections for the Florida legislature, governor and cabinet shall be held as follows:

(1) A single primary election shall be held for each office. All electors registered to vote for the office being filled shall be allowed to vote in the primary election for said office regardless of the voter's, or any candidate's, political party affiliation or lack of same.

(2) All candidates qualifying for election to the office shall be placed on the same ballot for the primary election regardless of any candidate's political party affiliation or lack of same.

(3) The two candidates receiving the highest number of votes cast in the primary election shall advance to the general election. For elections in which only two candidates qualify for the same office, no primary will be held and the winner will be determined in the general election.

(4) Nothing in this subsection shall prohibit a political party from nominating a candidate to run for office under this subsection. Nothing in this subsection shall prohibit a party from endorsing or otherwise supporting a candidate as provided by law. A candidate's affiliation with a political party may appear on the ballot as provided by law.

(5) This amendment is self-executing and shall be effective January 1, 2024.

The ballot title for the proposed amendment is: "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet." The ballot summary for the proposed amendment states:

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 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.

Upon referral from the Secretary of State, the Attorney General initiated this action by submitting a petition for an advisory opinion on July 26, 2019, in accordance with Article IV, Section 10 of the Florida Constitution. This Court has jurisdiction under Article V, Section 3(b)(10) of the Florida Constitution.

SUMMARY OF ARGUMENT

The proposed amendment should be denied ballot placement because its corresponding ballot title and summary fail to disclose the amendment's chief purpose and would affirmatively mislead voters as to its true legal effect. The amendment would do away with "primary elections" as Florida voters know and understand them, replacing the current system with a "top two" format: a general election followed by a run-off comprised of the two candidates receiving the most votes in the general, which the ballot language at issue refers to as a "primary." The amendment would allow parties to nominate candidates to appear on the ballot in that election, and nothing in the amendment's text would limit the manner in which parties may do so.

The corresponding ballot language is defective for at least two reasons:

First, the ballot language tells the public that the proposed amendment would allow “all” voters to vote in “primary elections” or “primaries,” “regardless of political party affiliation.” The ballot language then says that all candidates, including “party nominated candidates,” would appear on the same primary election ballot. The problem is that the public would understand the terms “primaries” and “primary elections” to include the process by which “party nominated candidates” are selected. In the ubiquitous experience of Florida voters, those terms are synonymous, and the ballot language says nothing to dispel that common understanding, leading voters to the incorrect conclusion that the amendment would give them a role in the party nomination process, regardless of their political party affiliation.

In other words, the ballot language does not define certain key terms—“primary elections,” “primaries,” and “party nominated candidates”—that appear in the ballot title and summary, and its use of those terms departs from ordinary understanding, as reflected in current election law and longstanding historical practice. As a result, the ballot language is likely to mislead voters as to the measure’s true effect.

Second, Florida law currently establishes a state-operated primary election process in which every qualified member of the electorate may cast a direct vote to nominate his party’s candidate. The true effect of the proposed amendment would

be to abolish that system and put control of the party nomination process in the exclusive hands of the parties themselves, unless and until the Legislature restricts parties' discretion. *See* Art. VI, § 1, Fla. Const. ("Registration and elections shall, and political party functions may, be regulated by law."). In the absence of legislation to the contrary, parties would be free to adopt processes that, like the existing primary election system, restrict participation to the parties' respective members. Parties would be free to adopt even nomination processes in which it may be difficult or impossible for party members to participate, such as a nominating convention in which only delegates may cast a vote. The amendment therefore eliminates the guaranteed vote to which individual party members are currently entitled, and the ballot language simply does not disclose that sea change.

ARGUMENT

I. LEGAL BACKGROUND

"The citizen initiative constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy." *In re Advisory Op. to Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 653 (Fla. 2004). Because voters "never see the actual text of the proposed amendment" and "vote based only on the ballot title and the summary," the accuracy of the title and summary are paramount. *Id.* In fact, "an accurate, objective, and neutral summary of the proposed amendment is the sine qua non of the citizen-driven process of amending our

constitution. Without it, the constitution becomes not a safe harbor for protecting all the residents of Florida, but the den of special interest groups seeking to impose their own narrow agendas.” *Id.* at 653-54.

Section 101.161(1), Florida Statutes codifies the standard for reviewing ballot titles and summaries of proposed constitutional amendments. Any measure “submitted to the vote of the people” must include a ballot title “not exceeding 15 words in length, by which the measure is commonly referred to or spoken of,” and a ballot summary, “not exceeding 75 words in length,” explaining “the chief purpose of the measure.” § 101.161(1), Fla. Stat. “Implicit in this provision is the requirement that the proposed amendment be accurately represented on the ballot; otherwise, voter approval would be a nullity.” *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000).

The purpose of the ballot title and summary is “to provide fair notice of the content of the proposed amendment.” *Advisory Op. to the Att’y Gen.-Fee on the Everglades Sugar Prod.*, 681 So. 2d 1124, 1127 (Fla. 1996). To satisfy section 101.161, Florida Statutes, the title and summary must “state in clear and unambiguous language the chief purpose of the measure,” *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982), so that the proposed amendment does not “fly under false colors” or “hide the ball” as to its legal effect, *Armstrong*, 773 So. 2d at 16 (internal quotation marks omitted).

In assessing a proposed amendment's ballot title and summary, this Court asks two questions: "First, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.'" *Fla. Educ. Ass'n v. Fla. Dep't of State*, 48 So. 3d 694, 701 (Fla. 2010).

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.

Applying the principles set out above, the Court should deny ballot placement 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). Specifically, the ballot language misleads voters by suggesting that, if the amendment is approved, it will guarantee them participation in the process by which political parties select their candidates, regardless of their political party affiliation.

The amendment establishes the following "top two" election process: The Governor, cabinet officers, and Legislature would be selected via general election with just two candidates for each office. The two candidates would be those "receiving the highest number of votes cast" in the "single primary election" established by the amendment. In that primary election, for each office, all candidates who meet the constitutional and statutory qualifications for the office "shall be placed on the same ballot for the primary election regardless of any

candidate's political party affiliation or lack of same." And all electors registered to vote for that office "shall be allowed to vote in the primary election for said office regardless of the voter's, or any candidate's, political party affiliation or lack of same."

The amendment clarifies that "[n]othing in this subsection shall prohibit a political party from nominating a candidate to run for office" or "from endorsing or otherwise supporting a candidate as provided by law," and that "[a] candidate's affiliation with a political party may appear on the ballot as provided by law." In other words, for the affected offices, the primary election ballot required by the amendment would, in key respects, be much the same as the general election ballot with which Florida voters are familiar: To appear on either ballot, candidates must meet all applicable qualifications for the office they seek but need not be members of a political party or participate in a nomination process. Nevertheless, political parties may nominate candidates, and those candidates' party affiliation may appear on the ballot.

The amendment would effect two key changes: (1) regardless of their political affiliation, the two candidates receiving the greatest number of votes would advance to a second election, and (2) while political parties would retain the exclusive right to nominate candidates of their members' choosing, each party would be responsible for establishing and operating its own nomination process, such as a statewide

convention or caucus, in lieu of the party primary system with which Florida voters are familiar. The ballot language at issue misleads voters as to the latter effect by suggesting that the amendment would give them the right to participate in the processes by which parties nominate their candidates, regardless of the voter's political party affiliation.

The proposed ballot title is: "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet." The ballot summary then begins by saying: "Allows all registered voters to vote in primaries for state legislature, governor, and cabinet regardless of political party affiliation." Thus far, the ballot language has told voters (twice, in slightly different language) that "all" voters will vote in "primaries" for the affected offices, "regardless of political party affiliation." The ballot summary then says: "All candidates for an office, including party nominated candidates, appear on the same primary ballot."

The problem is that the ballot language does not define the terms "primary" and "party nominated candidate," while using those terms in a way that is contrary to the ordinary understanding of those terms that Florida voters will bring to the ballot box. In the experience of Florida voters, the terms are synonymous, as a "party nominated candidate" is the winner of that party's "primary election." That is how the Elections Code defines the term "primary election;"³ it is the "practical

³ See § 97.021(30), Fla. Stat. ("Primary election" means an election held

experience” of every living member of Florida’s electorate;⁴ and nothing in the ballot language dispels that understanding. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 598 (2000) (Stevens, J., dissenting in part) (explaining that a nonpartisan “top two” primary election is “not actually a ‘primary’” in the common, partisan sense of that term at all. Rather, it is a general election with a runoff that has few of the benefits of democratizing the party nominating process. . . .”). The ballot language therefore conveys to the electorate that, if the amendment is approved, “party nominated candidates” will continue to be selected through some form of primary election process and that the right of “all” voters to vote in “primaries” “regardless of political party affiliation” will extend to that process as well.

To the contrary, the language added by the amendment expressly says that “[n]othing in this subsection shall prohibit a political party from nominating a candidate to run for office,” and nothing in the amendment limits the means by which a political party may nominate a candidate, much less gives members of the electorate a role in that process “regardless of political party affiliation,” as the ballot language suggests.

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.”).

⁴ *See Advisory Op. to Att’y Gen. re Protect People from the Health Hazards of Second-Hand Smoke*, 814 So. 2d 415, 419 (Fla. 2002) (explaining that this Court’s precedent “presumes that the average voter has a certain amount of common understanding and knowledge” based on his practical experience).

III. THE BALLOT LANGUAGE FAILS TO DISCLOSE THE PROPOSED AMENDMENT'S CHIEF PURPOSE.

The Court should deny ballot placement because the sole reference to “party nominated candidates” (the statement that “[a]ll candidates for an office, including party nominated candidates, [would] appear on the same primary ballot”) is insufficient to disclose that the amendment would eliminate important rights that party members currently enjoy. The State of Florida deploys a state-operated primary election process in which every qualified member of the electorate may cast a direct vote to nominate his party’s candidate. *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.”). As the U.S. Supreme Court has explained, the purpose of a direct primary system is “to assure that intraparty competition is resolved in a democratic fashion.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000).

If approved, the proposed amendment would strip party members of that protection by eliminating the state-operated nomination process entirely and vesting exclusive control of the nomination process in the parties themselves. As discussed above, the amendment expressly says that “[n]othing in this subsection shall prohibit a political party from nominating a candidate to run for office,” and nothing in the amendment limits the means by which a political party may nominate a candidate. Thus, absent legislative intervention, *see* Art. VI, § 1, Fla. Const. (“Registration and

elections shall, and political party functions may, be regulated by law.”), which is speculative at best, parties would be free to adopt nomination processes that make it difficult or impossible for party members to participate, such as a nominating convention in which only delegates or other representatives may cast a meaningful vote. Party members would no longer be guaranteed a direct vote in the nomination process, and the ballot language fails to disclose that paradigm shift.

* * *

In sum, the ballot language does not “state in clear and unambiguous language the chief purpose of the measure,” *Firestone*, 421 So. 2d at 155, and instead “fl[ies] under false colors,” *Armstrong*, 773 So. 2d at 16. Because the ballot language does not tell voters that it is using the terms “primary” and “party nominated candidate” in a way that departs from ordinary usage, longstanding practice, and the current statutory definition of the term “primary election,” the proposed amendment “will not deliver to the voters of Florida what it says it will,” and the Court should deny ballot placement. *Advisory Op. to Atty. Gen.*, 642 So. 2d 724, 727 (Fla. 1994).

Even if the use of the terms “primary” and “primary election” were not also misleading, the ballot language is fatally defective for the independent reason that the term “party nominated candidates” is insufficient to convey that the amendment would diminish party members’ existing right to cast a direct vote to select their candidates.

CONCLUSION

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

Respectfully submitted.

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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.

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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 1st day of October, 2019, to the following:

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