UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 12-cv-22432-ZLOCH

VINCENT J. MAZZILLI and
ARMANDO LACASA,

Plaintiffs,

v.

PENELOPE TOWNSLEY,
As the Miami-Dade County
Supervisor of Elections,
KEN DETZNER, as the Florida
Secretary of State, and the
ELECTIONS CANVASSING
COMMISSION,

Defendants.
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THE SECRETARY AND COMMISSION'S RESPONSE IN OPPOSITION TO PLAINTIFFS' AMENDED EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Defendants, Florida Secretary of State Kenneth W. Detzner ("Secretary") and the Florida Elections Canvassing Commission ("Commission"), hereby respond in opposition to Plaintiffs' Amended Emergency Motion for Preliminary Injunction.

INTRODUCTION

The Florida Election Code generally provides for "closed" primary elections—that is, elections in which only registered members of a political party may participate in the nomination of that party's candidate for the general election ballot. The actual election of candidates to office occurs at the general election, in which all duly-registered electors may vote.

In 1998, the Florida Constitution was amended to require "open" primary elections to be held under narrow and carefully limited circumstances. In any contest in which: (1) "all

candidates for an office have the same party affiliation"; and (2) "the winner will have no opposition in the general election," the Florida Constitution provides that the primary election for that office is open to "all qualified electors, regardless of party affiliation." Fla. Const. Art. VI, § 5(b). For more than a dozen years, in primary elections at the state, district, county, and municipal level, the plain language of this provision of the Florida Constitution has been applied consistently by the Secretary of State and county Supervisors of Elections.

Between April 16 and April 20, 2012, four candidates qualified to seek election to the office of State Attorney for Florida's Eleventh Judicial Circuit (the "Miami-Dade County State Attorney") by filing legally-sufficient qualifying papers with the Florida Department of State. Two of these candidates filed qualifying papers to seek the primary nomination of the Democratic Party: Katherine Fernandez Rundle and Rod Vereen. Two candidates filed qualifying papers as write-in candidates: Democrat Michelle Samaroo and Republican Omar Malone.

Both because the Miami-Dade County State Attorney's contest includes candidates of different party affiliations, and because the winner of the Democratic Party's primary in this contest would be opposed in the general election by both Ms. Samaroo and Mr. Malone, the Florida Constitution does not call for the primary election to be "open to all qualified electors." Instead, the Florida Election Code provides that the Democratic Party's primary election for Miami-Dade County State Attorney will remain open only to registered members of the Democratic Party.

On June 29, 2012—seventy days after the close of qualifying on April 20—Plaintiffs filed suit against Miami-Dade County Supervisor of Elections Penelope Townsley (the "Supervisor") seeking to "open" the Democratic Party's primary election for Miami-Dade

County State Attorney. Specifically, Plaintiffs asserted that both the Florida Constitution and United States Constitution provide "all registered Miami-Dade County voters . . . the right to vote in the 2012 Democratic Primary for the State Attorney for Miami-Dade County . . . notwithstanding any contrary provision of Florida law." (DE 24 ¶¶ 31, 38).

Plaintiffs promptly moved for a preliminary injunction. After a preliminary injunction hearing on July 12, this Court ordered Plaintiffs to join the Secretary and Commission as Defendants. (DE 23). Plaintiffs timely filed a Second Amended Complaint and Amended Emergency Motion for Preliminary Injunction against all Defendants. This response follows in accordance with the Court's order.

ARGUMENT

Plaintiffs' request for the extraordinary relief of a mandatory preliminary injunction is patently unjustified and should be denied. As explained below, the injunctive relief requested by the Plaintiffs would impose a tremendous burden on elections officials and would harm the public interest by disrupting the orderly conduct of a primary election that has already begun. Plaintiffs are also unlikely to succeed on the merits.

A. A Mandatory Preliminary Injunction is an Extraordinary and Drastic Remedy to be Granted Only in Rare Instances.

A preliminary injunction is "an extraordinary and drastic remedy not to be granted unless the movant clearly carries the burden of persuasion." *Zardui–Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985) (internal quotation marks omitted); *Calvary Chapel Church, Inc. v. Broward County*, 299 F. Supp. 2d 1295, 1299 (S.D. Fla. 2003). The party seeking a preliminary injunction must show that: (1) it has a substantial likelihood of success on the merits; (2) there is a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to it outweighs the harm the injunction may do to Defendants; and (4) granting

the injunction will not disserve the public interest. *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001).

When the moving party is seeking to have the opposing party perform an affirmative act, as Plaintiffs are here, the burden is even higher: “A mandatory injunction . . . especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party.” *Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958).

B. The Balance of Harms and Public Interest Weigh Heavily in Favor of Defendants; Plaintiffs Have Not Established Any Irreparable Injury.

In her opposition to Plaintiffs’ original motion for preliminary injunction, the Supervisor convincingly illustrates the immense disruption to election administration that the Plaintiffs’ belated request for injunctive relief would have if granted by this Court. The Supervisor’s sworn affidavit indicates that approximately 134,000 absentee ballots for the August 14 primary have already been mailed in compliance with statutory deadlines; and that some have already been voted and returned. (DE 18-2, ¶¶ 22, 23). The master ballots have been fully prepared and the races programmed in the County’s optical scan ballot readers. *Id.* at ¶ 13. There is insufficient time to retrain poll workers to account for the new “supplemental” ballot procedure suggested by the Plaintiffs. *Id.* at ¶ 18. Ultimately, the Supervisor concluded that “the relief requested by the Plaintiffs in this matter will significantly harm the accuracy and reliability of the entire election,” would cause “severe voter confusion,” and would “erode voter confidence in the electoral process.” *Id.* at ¶¶ 20, 24, 27.

The Secretary and Commission accept the Supervisor’s account of the potential for severe disruption to the electoral process in Miami-Dade County from the Plaintiffs’ requested relief, share her concerns, and adopt her conclusions as their own. But the potential for disruption

extends beyond Miami-Dade County. The Supervisor notes that the circumstances present in the Miami-Dade County State Attorney's contest appear to be present in at least nine State Legislative contests. *Id.* at ¶ 29. A mandatory preliminary injunction granted in this action would likely trigger follow-on lawsuits across the state, creating chaos and uncertainty for elections officials in the lead-up to a statewide primary and disrupting the settled expectations of other candidates and the general public.

A "court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws," to "avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Here, the public interest in the smooth and orderly administration of the primary election and the balance of harms that would result from the Plaintiffs' requested relief each weighs heavily in favor of Defendants. Any minimal inconvenience or harm to Plaintiffs as a result of their inability to participate in the primary election of a party to which they do not belong is a result of their own decisions: (1) to file their Complaint 70 days after the close of qualifying and after election preparations were well underway; and (2) not to change their party registrations to "Democrat" on or before July 16, which would have allowed Plaintiffs to vote in the 2012 Democratic Party primary for Miami-Dade County State Attorney.

Based on any one of these factors alone, this Court should deny Plaintiffs' Amended Motion for Preliminary Injunction. Plaintiffs have not even met their ordinary burden of persuasion on all three of these requisites, much less the elevated showing that "the facts and law are **clearly** in favor of the moving party," *Miami Beach Fed. Sav. & Loan Ass'n*, 256 F.2d at 415,

that is required to justify the mandatory preliminary injunction they have requested.

C. Plaintiffs Are Unlikely to Succeed on the Merits

More significantly, however, Plaintiffs are unlikely to succeed on the merits of either Count of their Second Amended Complaint. The Supervisor's opposition to Plaintiffs' original motion for preliminary injunction thoroughly demonstrates the Plaintiffs' lack of factual and legal support for their claims under both the Florida Constitution and the United States Constitution. The Secretary and Commission hereby adopt the Supervisor's well-reasoned arguments as their own and add the following additional points.

Plaintiffs' argument that Article VI, section 5(b) of the Florida Constitution requires the Democratic Party's primary election for Miami-Dade County State Attorney to be open to all electors is contrary to the Constitution's plain language for two independent reasons. *First*, all candidates in the contest **do not** "share the same party affiliation." Mr. Malone is a registered Republican, while the remaining three candidates are registered Democrats. *Second*, the winner of the Democratic Party's primary election **will** have "opposition in the general election." Mr. Malone and Ms. Samaroo are each duly-qualified candidates for the general election.

The response of the Plaintiffs to each of these undisputed facts is to analyze broad comments made by individual members of the 1998 Constitution Revision Commission (none of which appear to address write-in candidates) and a decade-old bill introduced in the Florida Senate but never enacted into law. These sources are plainly insufficient to overcome the plain and unambiguous terms of the Florida Constitution.

Plaintiffs are also unlikely to succeed on the merits of their claim that the First and Fourteenth Amendments to the United States Constitution prohibit Florida from operating a closed party-primary system in circumstances such as those present in the Miami-Dade County

State Attorney contest. The Supreme Court has squarely held that "requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights." *Clingman v. Beaver*, 544 U.S. 581, 592 (2005).

These "minor barriers between voter and party do not compel strict scrutiny" and can be justified by "a State's important regulatory interests." *Id.* at 593 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. at 358). The "important regulatory interests" justifying Florida's closed primary system were specifically approved in *Clingman*: preservation of political parties as viable and identifiable interest groups, enhancing parties' electioneering and party-building efforts, and guarding against party raiding – the "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Id.* at 593-97. Florida's interests, which the Supreme Court has concluded are sufficient to support a closed primary system in general, are no less important in the specific circumstances challenged by Plaintiffs.

As set forth in more detail below, Plaintiffs have failed to "clearly" establish "a substantial likelihood of succeed on the merits" on either of their constitutional claims. Their amended emergency motion for preliminary injunction should be denied.

1. The Florida Constitution does not require an open primary for the Miami-Dade County State Attorney contest.

In the First Count of their Second Amended Complaint, Plaintiffs argue that their right to vote will be abridged in violation of the Florida Constitution if they and all other registered voters in Miami-Dade County are not permitted to vote in the Democratic Party's primary election for Miami-Dade County State Attorney. (DE 25 at 12-16); *see also* (DE 24 ¶¶ 30-36). This argument is based entirely on Article VI, Section 5(b) of the Florida Constitution, which by its terms requires an "open" primary election in any contest where: (1) "all candidates for an

office have the same party affiliation"; and (2) "the winner will have no opposition in the general election." *Id*. **Neither** of these conditions is present in the Miami-Dade County State Attorney contest. Accordingly, neither the Florida Constitution nor any other Florida law grants Plaintiffs—who are not registered Democrats—any right to participate in the Democratic Party's primary election.

To the contrary, the Florida Constitution states that "[r]egistration and elections shall, and political party functions may, be regulated by law." Fla. Const. Art. VI, § 1. The Florida Legislature has implemented this provision by adopting a comprehensive Election Code. *See* Fla. Stat. Chap. 97 through 106. The Florida Election Code expressly provides for a closed primary system: "[i]n 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**." Fla. Stat. § 101.021 (emphasis added).

Plaintiffs acknowledge that Florida's political party primary elections are closed. *See* (DE 25 at 2) (stating that "[u]nder Florida law, such primary elections are 'closed' to all voters except members of the particular party holding the election"). Plaintiffs further concede the legal and policy basis for such a system: "[t]his restriction on the right to vote in the primary is justified by the fact that, at the end of the day, all Florida voters will have the right to make a meaningful choice among candidates by casting a ballot in the general election." (DE 25 at 2).

a. Plaintiffs' claim under the Florida Constitution fails because all candidates for Miami-Dade State Attorney do not have the same party affiliation.

As noted above, the Florida Constitution requires a political party primary election to be open to all registered voters if each of two separate conditions is satisfied. The first of these constitutional conditions is for "all candidates for an office [to] have the same party affiliation." Fla. Const. Art. VI, § 5(b).

Plaintiffs do not contend that "all candidates" for the office of Miami-Dade County State Attorney "have the same party affiliation." *See* (DE 25); (DE 24). Nor could they. Of the four candidates who qualified to seek the office, one is a registered Republican and the other three are registered Democrats. *See* (DE 18-2 at 3, ¶¶ 6, 8, Ex. A); *see also* Candidate Listing for the 2012 General Election, State Attorney, Circuit 11, available at: http://election.dos.state.fl.us/candidate/CanList.asp.

As used in the Florida Election Code, the term "candidate" expressly includes "any person who seeks to qualify for election as a write-in candidate." Fla. Stat. § 97.021(5)(b). The Election Code's definition of "candidate" is unchanged from the time Article VI, section 5(b) was adopted in 1998. There is no reason to believe that either the framers of the constitutional provision or the public understood the term "candidate" as used in the Florida Constitution to have a different, narrower meaning than the meaning prescribed by the Florida Election Code.

The uncontested fact that the four candidates for Miami-Dade County State Attorney do not "have the same party affiliation" is fatal to Plaintiffs' claim under the Florida Constitution. Plaintiffs' motion for preliminary injunction as to Count I of their Second Amended Complaint should be denied for this reason alone.

b. Plaintiffs' claim under the Florida Constitution also fails because the winner of the Democratic Party's primary election for Miami-Dade County State Attorney will have opposition in the general election.

Despite its clear implications for their case, Plaintiffs largely ignore the party affiliations of the four candidates for Miami-Dade State Attorney. Instead, Plaintiffs' argument under the Florida Constitution is almost entirely devoted to the secondary question: whether the winner of the primary election "will have opposition in the general election." Fla. Const. Art. VI, § 5(b). Plaintiffs fail on the merits of this argument as well. It is undisputed that the winner of the

Democratic Party's primary election for Miami-Dade County State Attorney will be opposed in the general election by both Ms. Samaroo and Mr. Malone. The primary election therefore remains closed in accordance with Florida law.

For a political party primary to be opened to all registered voters under Article VI of the Florida Constitution "the winner [of the primary election]" must have "no opposition in the general election." Fla. Const. Art. VI, § 5(b). Plaintiffs appropriately concede that a person "can qualify" as a write-in candidate. (DE 24, ¶ 16); *see* Fla. Stat. § 99.061(4). Moreover, the definition of "candidate" expressly includes write-in candidates, Fla. Stat. § 97.021(5)(b), and the names of "**all** duly-qualified candidates" are certified for nomination or election, Fla. Stat. § 99.061(6) (emphasis added), whether their names appear on the ballot or not. Plaintiffs cannot and do not contest that if either of the two write-in candidates for the office of Miami-Dade County State Attorney "receiv[es] the highest number of votes cast in [the] general…election," then that write-in candidate will be "elected to the office." Fla. Stat. § 100.181; (DE 25 at 16) (acknowledging that "a write-in candidate is technically capable of winning an election").

Plaintiffs properly point out that "Florida law requires such write-in candidates to register in advance of the election" by submitting all of the same qualifying paperwork, to the same filing officer, in the same qualifying period as other candidates seeking to qualify for the same office. (DE 25 at 7-8) (citing Fla. Stat. § 99.061) *see also Pasco v. Heggen*, 314 So. 2d 1 (Fla. 1975). Because they do not pay the same fees and assessments required of their opposition, however, write-in candidates do not have the right to have their names printed on the ballot. *Id.*; *see e.g. Beller v. Adams*, 235 So. 2d 502 (Fla. 1970); *Bodner v. Gray*, 129 So. 2d 419 (Fla. 1961). The line provided for duly-qualified write-in candidates is provided for the purpose of writing in a

candidate's name, not writing in the name of "Santa Claus" or "Mickey Mouse." (DE 25 at 15); Fla. Stat. § 101.151(2)(b).

These acknowledgments should end the inquiry of "whether the presence of a write-in candidate…constitutes 'opposition' " under Article VI, section 5(b). (DE 25 at 13). But Plaintiffs nevertheless contend that the term "opposition" means something more than being an actual, duly-qualified candidate who would be elected to office if he or she received the highest number of votes cast in the general election. Plaintiffs argue that the opponent must also "appear[] on the general-election ballot and offer[] voters a meaningful choice for whom to vote" to avoid opening-up the primary. (DE 25 at 15). But Article VI, section 5(b) merely states that there be "no opposition in the general election." The Florida Constitution does not address whether the opposition is "meaningful" in some subjective sense, or whether the name of the opponent is printed on the ballot.

When "called on to construe the terms [of] the people" in the Florida Constitution, courts "are to effectuate their purpose **from the words employed in the document**." *Ervin v. Collins*, 85 So. 2d 852, 855 (Fla. 1956) (emphasis added). Courts "are not permitted to color [Florida constitutional provisions] by the addition of words or the engrafting of [the court's] views as to how it should have been written." *Id.* Moreover, the Court is "obligated to give effect to this language according to its meaning and what the people must have understood it to mean when they approved it." *City of St. Petersburg v. Briley, Wild & Associates, Inc.*, 239 So. 2d 817, 822 (Fla. 1970).

At the time Article VI, section 5(b) of the Florida Constitution was adopted, the Florida Election Code defined the term "unopposed candidate" to mean "a candidate…who, after the last day on which any person, **including a write-in candidate**, may qualify, is without opposition in

the election at which the office is to be filled…" Fla. Stat. § 106.011(15) (1998) (emphasis added). This statutory definition has remained unchanged to the present. *Id.* (2012).

In attempting to determine the original public meaning of the constitutional phrase "candidate [who] will have no opposition," it appears eminently reasonable to give the term the same meaning as the statutory term "unopposed candidate." If the latter term includes write-in candidates as "opposition," which it does, the former term should as well. And a standard dictionary definition confirms a broad understanding of the term "opposition": "something that opposes; *specifically*: a body of persons opposing something." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/opposition (last visited July 19, 2012).

Nothing in these definitions suggests the sort of limiting gloss on "opposition" that the Plaintiffs seek to employ. Plaintiff's proposed interpretation of "no opposition in the general election" would improperly "color" the unambiguous terms in the Florida Constitution "by the addition of words." *Ervin*, 85 So. 2d at 855. In effect, Plaintiffs ask this Court to construe the constitutional term "opposition" either by adding the word "meaningful" before it or the phrase "other than a write-in candidate" after it. But the addition of words is "beyond the power of [the Florida Supreme Court] or any court to do," even if that is how the provision "should have been written." *Ervin*, 85 So. 2d at 858.

Even if Article VI, section 5(b) were ambiguous,[1] the Court should turn next to the ballot statement presented to the electorate who actually adopted the provision to determine its

[1] None of the cases Plaintiffs cite turned to the drafter's "intent" or "purpose" unless the text of the provision was ambiguous. *See Florida Soc. Of Opthalmology v. Florida Optometric Association*, 489 So. 2d 1118, 1119 (Fla. 1986) (stating that "If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written. The provision in question, however, does not explicitly address the situation before us…") (citation omitted); *Lewis v. Leon County*, 73 So. 3d 151 (Fla. 2011) (finding that the "plain language of article V, section 14 and the intent expressed by the CRC" was unambiguous); *City of St.*

meaning. *See Bernie v. State*, 524 So. 2d 988, 993 (Fla. 1988); *West Florida Regional Medical Center, Inc. v. See*, 79 So. 3d 1, 12 (Fla. 2012); *Florida Hospital Waterman v. Buster*, 984 So. 2d 478, 489 (Fla. 2008). Under Florida law in 1998, a constitutional amendment proposed by the constitutional revision commission appeared on the ballot as a ballot statement, which provided a title and a summary of the proposed amendment's substance. Fla. Stat. § 101.161 (1998). The full text of the proposed amendment did not appear on the ballot. *Id.* The statement that appeared on the ballot in 1998 stated in pertinent part that the purpose of the provision was to "allow[] all voters, regardless of party, to vote in any party's primary election if the winner will have no general election opposition." Florida Constitution Revision Commission, *Ballot Access; Public Campaign Financing; Election Process Revisions*, General Election November 3, 1998, available at: http://www.law.fsu.edu/crc/conhist/1998amen.html. The purpose disclosed to the electorate in the ballot statement does not exclude write-in candidates from "general election opposition."

Plaintiffs rely heavily on statements by individual members of the Florida Constitution Revision Commission involved in drafting Article VI, section 5(b). Even their statements do not conclusively establish Plaintiffs' preferred interpretation of the term "opposition." To the contrary, the statements Plaintiffs cite indicate that the purpose was to open up the primary only where "[t]hat person who is elected at that primary becomes the public official;" *i.e.*, "[t]hat's where the public officials are selected." (DE 25 at 4); (DE 25 at 5) ("if the primary election is

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Petersburg, 239 So. 2d at 822 ("If the language is clear and not entirely unreasonable or illogical in its operation we have no power to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to words used therein"); *Metro-Dade Fire Rescue Service District v. Metropolitan Dade County*, 616 So. 2d 966, 969 (Fla. 1993) (holding that "the trial court correctly ruled that the term "governing body" must be given its usual and obvious meaning").

going to determine who the officeholder is"); (DE 25 at 6) ("the primary has the effect of a general election, because the winner will become the officeholder"). Plaintiffs' general argument that Article VI, section 5(b) should be open because it will not be a primary election at all, but rather, a "*de facto*" general election also fails under the purpose set forth in the Commission's record. (DE 25 at 12, 15, 18).

The salience of the "write-in" issue to the Florida Constitution Revision Commission is perhaps best illustrated by the comments of then-Florida Supreme Court Justice Gerald Kogan that are included in the newspaper article at Exhibit K to Plaintiffs' Motion for Emergency Preliminary Injunction. (DE 25-12 at 2-3). According to the Associated Press, Justice Kogan "who chaired the committee of the Constitution Revision Commission that drafted the measure, said he could not remember the write-in issue even being discussed. 'This was not a big deal at that time,' [Justice] Kogan said." (DE 25-12 at 3).

Finally, the presumption at the center of Plaintiffs' entire Complaint—that the primary will be "in effect, the general election," or a "*de facto*" general election—is demonstrably false. (DE 25 at 12, 15, 18). The general election to actually fill the office of the Miami-Dade County State Attorney in November 2012 will still occur. The primary election in which Plaintiffs wish to participate will merely result in the "nomination" of the Democratic Party's candidate for election to that office on November 6, 2012. *See* Fla. Stat. §§ 100.061; 100.181 (candidates are "elected to the office" if they "receiv[e] the highest number of votes cast in [the] general…election"). Plaintiffs do not allege that there will be no General Election for the office of Miami-Dade County State Attorney. To the contrary, Plaintiffs seek to "vote twice." (DE 21 at 3). The Democratic Primary for that office maintains its status as a "primary election" as defined in Florida Statutes and is therefore not a "*de facto* general" election as Plaintiffs insist.

c. Division of Elections Advisory Opinion DE 00-06 is consistent with the plain meaning of the Florida Constitution and should be accorded deference.

According to Plaintiffs' narrative, the release of an advisory opinion by the Department of State's Division of Elections in May 2000 resulted in "[t]he Downfall of the Universal Primary Amendment." (DE 25 at 7). That Advisory Opinion, DE 00-06 (issued May 11, 2000), concluded that the term "opposition" used in the Article VI, section 5(b) of the Florida Constitution "does not qualify the type of opposition required in a general election to prohibit all qualified electors, regardless of party affiliation, to vote in the primary election, nor does it require that the opposition be viable or have a realistic chance of success." Op. Div. Elections 00-06, p. 2 (May 11, 2000). That conclusion is a reasonable interpretation of the Florida Constitution and should be accorded deference.

"[A]lthough not binding judicial precedent, advisory opinions…are persuasive authority and, if the construction of law in those opinions is reasonable, they are entitled to great weight in construing the law as applied…" *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844-45 (Fla. 1993). "Recognizing the unique nature of the election process, Florida courts have traditionally shown deference to the judgment of election officials." *Cobb v. Thurman*, 957 So. 2d 638, 642 (Fla. 1st DCA 2006). The Florida Legislature has specifically vested the Secretary with the "general supervision and administration of the election laws," and authorized the Division of Elections to render opinions regarding interpretations of the Election Code. Fla. Stat. §§ 15.13, 106.23(2).

The Division exercised this authority in issuing Advisory Opinion 00-06 in response to a request from a supervisor of election on her "election-related duties" that she "propose[d] to take" "relating to any provisions…of Florida election laws." Fla. Stat. § 106.23(2) (2000). Plaintiff's allegation that the Opinion is "plainly unworthy of deference or any persuasive effect

at all" is at odds with Florida Supreme Court precedent. (DE 25 at n.13). "Supervisors of elections are bound by advisory opinions of the Division of Elections until such opinions are amended or revoked." *Krivanek*, 625 So. 2d at 844.

The plain language of Article VI, section 5(b) is unambiguous – "no opposition" means "no opposition." The write-in candidates who filed qualifying papers to seek the office of Miami-Dade County State Attorney are duly-qualified and, in the general election, will oppose the winner of the Democratic Party's primary election.

For the reasons stated herein and in the Supervisor's opposition (DE 18), Plaintiffs are not likely to succeed on the merits of their claims under the Florida Constitution. Their motion should be denied.

2. The United States Constitution does not require an open primary for the Miami-Dade County State Attorney contest.

In the Second Count of their Second Amended Complaint, Plaintiffs claim that the First and Fourteenth Amendments guarantee them, and all other registered voters in Miami-Dade County, a right to vote in the Democratic Party's primary election for Miami-Dade County State Attorney notwithstanding that Plaintiffs are not registered as members of the Democratic Party. (DE 24 at 12). They further allege that conducting a closed primary will "impermissibly burden Plaintiffs' right to vote [and associate with the Party] in violation of the First and Fourteenth Amendments of the United States Constitution." (DE 25 at 17).

These arguments are contrary to controlling precedent of the United States Supreme Court, which has found that a person's interest in "selecting the candidate of a group to which one does not belong" "**falls far short of a constitutional right**." *California Democratic Party v. Jones*, 530 U.S. 567, n.5, 583 (2000) (emphasis added). Instead, the Supreme Court has characterized this interest as a "desire" that is not "'disenfranchisement' if…not fulfilled." *Id.*;

see also State ex. rel. Gandy v. Page, 170 So. 118, 120 (Fla. 1936) (holding that "no one is entitled to vote in a **party** primary absent a declaration…as a member of the particular party whose primary is being held"); *State ex. rel. Hall v. Hildebrand*, 168 So. 531, 532 (Fla. 1936) (holding the same as applied to candidates seeking the party's nomination). "[E]ven if it were accurate to describe the plight of the non-party-member…as 'disenfranchisement,'" which it is not, "[t]he voter who feels himself disenfranchised should simply join the party." *Jones*, 530 U.S. at 584. Plaintiffs' right to vote is not abridged, as they are eligible to vote in the general election at which all duly-registered voters may cast ballots to elect candidates to office.

a. Plaintiffs do not have a federal constitutional right to participate in the primary election of the Democratic Party, to which they do not belong.

The United States Constitution does not require that voters registered as members of a political party be allowed to participate in a different party's primary, even where the second party has invited them. *Clingman v. Beaver*, 544 U.S. 581, 591-97 (2005); *see also id.* at 587-88 (plurality joined by four Justices). And—at least where the party has not adopted a rule to allow voters without party affiliation to participate—the Constitution does not require that they be allowed to participate either. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986)[2]. The Florida Democratic Party is not a party to this action[3], has not requested that its

[2] The Court's decision in *Tashjian* does not require a contrary holding. The Florida Democratic Party does not have a rule permitting **any** non-member to participate in its primary, unlike the Republican Party in *Tashjian*. Moreover, the Court has since retreated from its application of strict scrutiny in that case. *Clingman*, 544 U.S. at 591-92 ("our cases since *Tashjian* have clarified, strict scrutiny is appropriate only if the burden is severe."). Thus, under the level of scrutiny currently applied by the Supreme Court, the reasoning and holding in *Tashjian* would more closely resemble *Clingman,* in which the Court held that the Constitution did not require States to allow the participation of non-members in a party primary, even at the political party's invitation.

[3] Plaintiffs lack standing to raise the constitutional rights of another. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might

primary be open, and does not even have a rule permitting Plaintiffs' request. *See* (DE 24-2). The United States Constitution does not require Florida to permit non-members to participate in the Florida Democratic Party's selection of its "standard bearer." *See Clingman*, 544 U.S. at 587-97; *see also e.g. Cousins v. Wigoda*, 419 U.S. 477 (1975) (recognizing a party's right to choose its own candidate for election who best represents the party's ideologies and preferences).

Plaintiffs err in suggesting that Florida's closed primary system is subject to strict scrutiny. (DE 25 at 18-19). On the contrary, "requiring voters to register with a party prior to participating in the party's primary" is not a severe burden; it "minimally burdens voters' associational rights" and does "not compel strict scrutiny." *Clingman*, 544 U.S. at 592-93. To hold otherwise "would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Clingman*, 544 U.S. at 593.

"Election laws invariably 'affect –at least to some degree – the individual's right to vote and his right to associate with others for political ends'." *Clingman*, 544 U.S. at 593 (alterations omitted) (quoting *Anderson*, 460 U.S. at 788). But "not every electoral law that burdens associational rights is subject to strict scrutiny." *Clingman v. Beaver*, 544 U.S. 581, 592 (2005). "[S]trict scrutiny is appropriate only if the burden is severe." *Id.*

Florida's closed primary, like that at issue in *Clingman*, imposes minimal burdens on the Plaintiffs and does not compel strict scrutiny. Any registered voter in Florida may change his or her party affiliation up to 29 days before a primary election and vote in the new party's primary. Fla. Stat. § 97.055(1)(c). The burden on voters such as Plaintiffs who wish to vote in the primary election of another political party is relatively small and is subject to lesser scrutiny. *Cf. Rosario*

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be unconstitutional." *U.S. v. Raines*, 362 U.S. 17, 21(1960). "Constitutional rights are personal." *Sancho v. Smith*, 830 So. 2d 856 (Fla. 1st DCA 2002).

v. Rockefeller, 410 U.S. 752 (1973) (upholding requirement that voters register as a party-member 11 months prior to participating in that party's primary).

On the day Plaintiffs filed this action, they had over two weeks remaining before the 29-day "book closing" deadline. At any point during this period, they could have changed their party registration to the Democratic Party with minimal effort and voted in that party's primary for Miami-Dade County State Attorney. They were apparently unwilling to take even this minimal step to obtain the relief they now seek from this Court. Plaintiffs' failure to exercise the option to change political parties speaks more to the intensity of their desire to vote in this party contest than it does to the "burden" of switching parties.

b. Maintaining Florida's closed primary system is justified by important and well-recognized state interests.

As noted above, a lower level of scrutiny applies to "minimal" burdens on a voter such as a closed primary system. In these circumstances, a "state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Clingman*, 544 U.S. at 593. The United States Supreme Court has recognized at least three categories of interests "as important" and that justify preventing non-members from participating in a party's primary, even at the party's behest. *Clingman*, 544 U.S. at 593-94. These state interests justify Florida's closed primary system in general and the closed primary in the Miami-Dade County State Attorney Democratic Party contest in particular.

First, keeping a political party's primary election closed will preserve the party "as [a] viable and identifiable interest group[], insuring that the results of [its] primary election, in a broad sense, accurately reflect the voting of the party members." *Clingman*, 544 U.S. at 594-95 (alteration omitted). For the purposes of this state interest, it does "not matter" if the Chairman

of the Florida Democratic Party is “willing to risk the surrender of its identity in exchange for electoral success.” *Clingman*, 544 U.S. at 594. Florida’s interest, like Oklahoma’s interest in *Clingman*, “is independent [from the party’s] and concerns the integrity of its primary system.” *Clingman,* 544 U.S. at 594. Florida, like Oklahoma and other states, wants to “avoid primary election outcomes which would tend to confuse or mislead the general voting population to the extent it relies on party labels as representative of certain ideologies.” *Clingman,* 544 U.S. at 594 (alterations omitted) (citing cases).

Maintaining a closed primary system avoids the risk of “undermin[ing] the crucial role of political parties in the primary process,” *Clingman v. Beaver*, 544 U.S. 581, 595 (2005), to winnow the field of candidates and prevent the “frustration of the democratic process at the general election,” *American Party of Texas v. White*, 415 U.S. 767, n.14 (1974). *Jones*, 530 U.S. at 571 (reiterating the Court’s recognition in *White* that it is “too plain for argument” that a state may require use of party primaries). “[P]reservation of the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion, are compelling.” *White*, 415 U.S. at n.14. “[T]he State may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process.” *White*, 415 U.S. at 786.

Here, the Florida Democratic Party has had access to the entire electorate and an opportunity to persuade Plaintiffs and other non-members to join up to one month before the primary election. *See White*, 415 U.S. at 786. Likewise, Plaintiffs, along with the rest of the electorate, had the opportunity to timely affiliate and participate in the primary with minimal

effort by filing a simple form[4] changing their party affiliation. Fla. Stat. § 97.1031; *Clingman*, 544 U.S. at 591 (calling such effort "nominal") (plurality joined by four Justices). Indeed, the "plight" of those in *Rosario* who were required to affiliate with a political party **eleven months** prior to participating in a party's primary was caused "by their own failure to take timely steps to effect their enrollment." *Rosario*, 410 U.S. at 758, 763 (holding that the restriction "imposed a legitimate time limitation on their enrollment, which they chose to disregard"). Requiring that Plaintiffs join the Florida Democratic Party may be a "hard choice," "but it is not a state-sponsored restriction upon *his* freedom of association." *Jones*, 530 U.S. at 584.

In comparison to the affiliation law upheld in *Rosario*, the burden on Plaintiffs and the rest of the electorate is truly minimal. Plaintiffs could have registered as members of the Democratic Party at any time up to twenty-nine days before the primary election and participated in the Party's primary for Miami-Dade County State Attorney. *See* Fla. Stat. § 97.055. Florida has a legitimate interest and "must be allowed to limit voters' ability to roam among parties' primaries" for party affiliation to "mean much." *Clingman*, 544 U.S. at 594-95.

Second, maintaining a closed primary system ensures that Florida's registration rolls remain an accurate reflection of voters' political preferences, which generally enhances all "parties' electioneering and party-building efforts." *Clingman*, 544 U.S. at 595-96. Encouraging citizens to vote is an important, if not "essential" state objective. *Jones*, 530 U.S. at 587 (Kennedy, J., concurring). Florida should therefore be "entitled to protect parties' ability to plan their primaries for a stable group of voters." *Clingman*, 544 U.S. at 596. Indeed, the emergence

[4] The uniform voter registration application used to change party affiliation is available at: http://election.dos.state.fl.us/pdf/webappform.pdf.

of new political parties requires accurate information about voters' preferences and a state cannot impermissibly burden their party-building efforts. *See Williams v. Rhodes*, 393 U.S. 23 (1968).

Third, maintaining a closed primary system is justified by Florida's, and all states', important interest in preventing "party raiding" and the "destabilizing effects" such "party splintering and excessive factionalism" may cause. *Clingman*, 544 U.S. at 596-97; *Rosario*, 410 U.S. 752, 761 (explaining the harm caused by party raiding and upholding a restriction to prevent it as "legitimate and valid"). Florida's system of closed primaries discourages voters' temporary defection to influence and perhaps dampen the chosen candidate's ideology, if not a party's ideology as a whole, without impermissibly restricting voters' ability to move between parties as their ideology changes. *See Kusper v. Pontikes*, 414 U.S. 51, 60-61 (1973) (holding that a requirement of 23-month disaffiliation to participate in a different party's primary infringed upon voters' right of free political association).

c. The cases Plaintiffs cite do not stand for the proposition Plaintiffs must support in order to prevail on the merits of their challenge.

The cases upon which Plaintiffs rely do not support their assertion that they have a constitutional right to vote in the primary of a political party they are not members of. (DE 25 at 17). The decision in *United States v. Classic*, 313 U.S. 299 (1941), did not resolve the issue Plaintiff seeks to have resolved by this Court. *Classic* does not stand for the proposition that the Constitution grants the right to vote in a party's primary to non-members. *See id*. Rather, *Classic* stands for the general proposition that primary elections are part of the election machinery. The Court did not consider, and neither party to that case raised, the question of which party members should be allowed to vote in a state's primary.

Plaintiffs' reliance on *Terry v. Adams*, 345 U.S. 461 (1953), and *Gray v. Sanders*, 372 U.S. 368 (1963), is similarly unavailing. Neither of these cases resolved the issue before this

Court. *Terry* simply stands for the proposition that voters cannot be excluded from a primary election where the exclusion would violate the Fifteenth Amendment's guarantee that the right to vote not be abridged on the basis of race or color. *Terry*, 345 U.S. at 470. Similarly, *Gray* stands for the proposition that votes cannot be weighted differently. *Gray*, 372 U.S. at 380-81. Neither *Terry* nor *Gray* in any way addressed the question of whether a non-member has a constitutional right to participate in a political party's primary election.

Plaintiffs' remaining arguments rely on extracting isolated statements from the dissenting and concurring opinions in *Clingman v. Beaver*, 544 U.S. 581 (2005). As previously discussed, the opinion of the Court in *Clingman* establishes that "requiring voters to register with a party prior to participating in the party's primary" is not a severe burden; it "minimally burdens voters' associational rights," does "not compel strict scrutiny" and is easily justified by a state's "important regulatory interests." *Id.* at 592-94.

d. Florida state court precedent is in accord with the United States Supreme Court precedent.

Finally, precedent from Florida courts is in accord with that of the federal courts on these questions. The Florida Supreme Court has concluded that "[t]hose who will not maintain their party through pride or loyalty may be restrained by law from destroying the system they have utilized to advance their political fortunes." *Mairs v. Peters*, 52 So. 2d 793, 795 (Fla. 1951). The "necessity of party regulations in the democratic society in which we live" are "definite conclusions" that the Florida Supreme Court has refused to recede from. *Driver v. Adams*, 196 So. 2d 916 (Fla. 1967); *see also, e.g.*, *Bodner v. Gray*, 129 So. 2d 419, 420-21 (Fla. 1961) (extending the conclusions to other restrictions on political participation).

Florida courts have also expressly acknowledged the United States Supreme Court's recognition of "the state's interest in guarding against splintered parties and factionalism and in

avoiding chaotic elections," *Boudreau v. Winchester*, 642 So. 2d 1, 3 (Fla. 4th DCA 1994) (citing *Burdick,* 504 U.S. 428), and "maintaining the integrity of different routes to the ballot," *Polly v. Navarro*, 457 So. 2d 1140, 1143 (Fla. 4th DCA 1984) (citing *Storer*, 415 U.S. 724). The recognition of write-in candidacies is particularly significant given this last interest, as it provides an alternative route to the general election ballot that is genuine and not "merely theoretical." *Jenness v. Fortson*, 403 U.S. 431, 439 (1971); *Wetherington v. Adams*, 309 F. Supp. 318, 322 (Fla. N.D. 1970) (noting that write-in candidacy "does provide a means whereby any citizen, regardless of his political support or his individual wealth, can present himself to the voters for their consideration").

The Supreme Court has concluded that "further[ing] the State's interest in the stability of its political system" is "not only permissible, but compelling" and "outweigh[s]" any interest of the candidate or his or her supporters in making late decisions. *Storer v. Brown*, 415 U.S. 724, 736 (1974). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id*. at 730.

For the reasons stated herein and in the Supervisor's opposition (DE 18), Plaintiffs are not likely to succeed on the merits of their claims under the United States Constitution. Their motion should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' amended emergency motion for preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by filing in the CM/ECF system this 19th day of July 2012 on all attorneys of record in this matter.

/s/ Ashley E. Davis
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