IN THE SUPREME COURT OF FLORIDA

CASE NO.

GLENTON GILZEAN, JR.,

Petitioner,

vs.

LAUREL M. LEE, in her official capacity as Secretary of State, State of Florida, and ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA,

Respondents.

An original proceeding seeking an emergency writ of mandamus

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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EMERGENCY PETITION FOR WRIT OF MANDAMUS

Pursuant to Article V, §3(b)(8) of the Florida Constitution and Rules 9.030(a)(3) and 9.100 of the Florida Rules of Appellate Procedure, Glenton Gilzean, Jr. petitions this Court for an emergency writ of mandamus to direct Florida Secretary of State Laurel M. Lee, as respondent, to perform the ministerial duties to ensure the ballots for Proposed Amendment 3 are not canvassed and/or reported to her office under sections 97.012(14) and (16), Florida Statutes, or any other applicable rule or law. In the alternative, petitioner requests that this Court direct the Elections Canvassing Commission not to certify the election results as to Proposed Amendment 3, or any other such relief as this Court deems proper. Further, petitioner requests the Court to consider this petition on an expedited basis because the date of the election on the Proposed Amendment is November 3, 2020.

As discussed below, when this Court issued its Advisory Opinion to the Attorney General concluding that the Proposed Amendment met the criteria necessary for it to appear on the ballot, significant facts exploring the effect of the amendment, should it pass, were unavailable. We discuss below the research establishing the harmful effect of the Proposed Amendment on Black voters in Florida, and the fatal inconsistencies between other provisions of the Florida Constitution that are designed to ensure fair elections and fair representation. Now that the information has been revealed, this Court should revisit its analysis of the

Proposed Amendment and hold that — whether or not it remains on the ballot, and despite any votes in favor — those results may not be given effect because the Proposed Amendment is defective for purposes of the ballot.

BASIS FOR INVOKING THE JURISDICTION OF THE COURT

I. THE COURT HAS ORIGINAL JURISDICTION.

Pursuant to Article V, Section 3(b)(8) of the Florida Constitution, this Court has original jurisdiction to hear this Emergency Petition for Writ of Mandamus. This Court's "precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution." *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (citing *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982); *Wadhams v. Board of Cnty. Comm'rs*, 567 So. 2d 414, 416-17 (Fla. 1990)).

II. THE COURT HAS EXCLUSIVE SUBJECT MATTER JURISDICTION TO HEAR PRE-ELECTION CHALLENGES TO PROPOSED CONSTITUTIONAL INITIATIVES.

This Court has exclusive subject matter jurisdiction as to pre-election constitutional challenges to citizen initiatives. *See Florida League of Cities v. Smith*, 607 So. 2d 397); *Roberts v. Brown*, 43 So. 3d 673, 679 (Fla. 2010) ("The Florida Constitution expressly authorizes judicial review of constitutional amendments that

are proposed by citizen initiative only in this Court.") ("We conclude that, based upon the history of the advisory opinion amendments to the Florida Constitution and case precedent, our jurisdiction with regard to such pre-election matters is indeed exclusive, and therefore, use of our all writs and prohibition jurisdiction is both necessary and appropriate." *Id.* at 678.); *see also Ray v. Mortham*, 742 So. 2d 1276, 1284 (Fla. 1999).

III. THIS EXCLUSIVE SUBJECT MATTER JURISDICTION INCLUDES RENEWED LITIGATION THAT PERTAINS TO A "VITAL ISSUE" AND DOES NOT RELITIGATE ISSUES FROM THE EARLIER PROCEEDING.

This Court previously issued an Advisory Opinion to the Attorney General on Proposed Amendment 3, as permitted by Article V, Section 3(b)(10) of the Florida Constitution, concluding that the Initiative complies with technical requirements of the amendment process. *Advisory Opinion to the Atty. Gen. re All Voters Vote in Primary Elections for State Leg., Gov., and Cabinet*, 291 So. 3d 901 (Fla. 2020). That decision does not bar the relief requested here. A previous advisory opinion regarding an initiative's approval for the ballot does not preclude this Court from exercising jurisdiction over a case filed later, as "[t]he Court still can entertain a later petition for mandamus provided that it does not attempt to relitigate issues already addressed in the advisory opinion." Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court*

of Florida, 29 Nova L. Rev. 431, 493 (2005) (referencing *Fla. League of Cities v. Smith*, 607 So. 2d 397, 398 (Fla. 1992)).

In *Smith*, the Court had issued an advisory opinion approving a constitutional initiative for the ballot. After the issuance of that opinion, a public interest group petitioned for a writ of mandamus in order to have it stricken from the ballot. The Court stated that the parties "now call to our attention an issue not addressed in our prior opinion" and proceeded to consider the issue raised of potential constitutional conflict. *Smith*, 607 So. 2d at 398. In discussing its decision to consider the case, the Court held that "relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored" and "[r]enewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion." *Id* at 399.

Ray v. Mortham, 742 So. 2d 1276, 1285 (Fla. 1999), cited *Smith* for the proposition that advisory opinions are not "strictly binding precedent" and "under extraordinary circumstances" can be revisited. While re-litigation of issues is "strongly disfavored," "renewed litigation" will be allowed in "extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion." *Id.* (citing *Smith,* 607 So. 2d at 399).

In *Brown v. Roberts*, 43 So. 3d 673, 684 (Fla. 2010), this Court also discussed the standard for reopening a proceeding related to a citizen initiative after an

advisory opinion has been issued. There, the Court concluded that it would not reopen the proceedings because the arguments advanced in *Brown v. Roberts* did not establish a substantial constitutional problem:

> [R]espondents have not demonstrated that the present matter is a 'truly extraordinary case' as required by our cases or that they have raised a "vital issue" that was not addressed in the prior advisory opinion. *Smith*, 607 So. 2d at 399. The respondents do not contend that adoption of the amendments will negate or vitiate a portion of the Florida Constitution. The challenges asserted in the amended complaint do not present a significant, undiscovered issue of potential internal constitutional conflict such as was asserted in Smith, so the high standard we have established for reopening citizen-initiative validity proceedings has not been satisfied.

Id. at 684.

Roberts primarily related to the fact that this Court—not a circuit court—has exclusive jurisdiction over pre-election challenges to proposed constitutional initiatives. *Roberts* recognized that the Court can hear cases of "vital issues" after an advisory opinion is issued as quoted above. *Roberts*, 43 So. 3d at 684 (citing *Smith*, 607 So. 2d at 399.) The above authorities establish that this Court has jurisdiction to reopen citizen-initiative proceedings if the case does not relitigate issues raised during the initial advisory opinion proceedings and if the issues relate to a "vital issue."

STATEMENT OF FACTS

I. BACKGROUND ON PROPOSED AMENDMENT 3.

A. All Voters Vote, Inc.

All Voters Vote, Inc. was formed to support the effort to place Proposed Amendment 3 on the ballot as a citizen-initiative. Opened in March 2015, All Voters Vote made little headway toward this goal until the first half of 2019, when billionaire Miguel "Mike" Fernandez donated over $6 million in less than nine months, starting on November 14, 2018, and ending July 29, 2019.[1] Petitions were then quickly gathered, with All Voters Vote paying approximately $6.2 million between March 21, 2019, and October 4, 2019, to an out-of-state company that specialized in professional petition-gathering.[2] On December 6, 2019, a little over a year from the time of Mr. Fernandez' first donation, the Proposed Amendment was approved for the ballot.[3]

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[1] Florida Department of State, "Campaign finance database" (last visited Oct. 8, 2020.) Fernandez donated personally, as well as from family and trust accounts.

[2] *Id.*

[3] Florida Department of State, "Constitutional Amendments" (last visited Oct. 10, 2020).

B. Text, title, and summary of Proposed Amendment

1. Ballot title

The ballot title for the Proposed Amendment is "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet."

2. Ballot summary

The ballot summary provides as follows.

> 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.

3. Text of the Proposed Amendment

The Proposed Amendment states that it "Amends Article VI Section 5 by adding subsection (c)[.]"

The text of the proposed amendment provides as follows:

> Article VI, Section 5. Primary, general, and special elections.--
> * * * * *
> (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.

C. <u>This Court's advisory opinion on the proposed amendment</u>

On June 26, 2019, the Attorney General petitioned this Court for an Advisory Opinion as to the validity of the Initiative petition entitled "All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet." None of the briefs in support or opposition addressed the issues that are highlighted in the studies that prompt this petition, discussed below, because those studies were released in July 2020, after the briefs in the case were submitted. *See discussion, infra.* On March 19, 2020, this Court issued its Advisory Opinion, approving the All Voters Vote Initiative for placement on the November 2020 ballot, concluding that it met the constitutional threshold. *Advisory Op. to Att'y Gen. re All Voters Vote in Primary Elections for State Leg., Gov., and Cabinet*, 291 So. 3d 901 (Fla. 2020).

II. NEW STUDIES RELEASED FOLLOWING THE ISSUANCE OF ADVISORY OPINION.

In July 2020, two studies were released regarding the anticipated effects of this Initiative, should it become part of the organic law of Florida. (Matthew Isbell, *"Top-Two" Will Bleach Minority-Districts in Florida*, mcimaps.com (July 16, 2020).[4] [hereinafter Isbell] Sean Shaw, Esq., *Memo to Democratic Leaders and Progressive Partners Re: Open Primaries and Its Negative Impact on Black Communities*, People Over Profits study (July 27, 2020).[5] [hereinafter Shaw])

The findings led to concern by many, as will be shown. The studies were done by Matthew Isbell, an election data consultant, and Sean Shaw, a former state House representative. Each conducted a separate deep-dive into voter data using different methodologies to analyze publicly available election data from previous years.

Both studies show that more than half of districts which currently have a majority of Black voters in the Democratic primary will lose that electoral advantage if the Proposed Amendment's "top-two" primary system is put in place. Each of these districts has a Democratic majority, and, in a "top-two" primary, white

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[4] https://mcimaps.com/top-two-will-bleach-minority-districts-in-florida/

[5] https://thepeopleoverprofits.org/amendment-3

Republicans and non-party affiliated (NPA) voters will be part of the electorate choosing between Democratic candidates, resulting in Black voters no longer having a majority in the primary and decreasing the chance of having minority representation.[6] Isbell, *supra.* According to Isbell, the "consequence of this plan is not that NPA [non-party affiliated] voters will have a say, it is that a flood of white GOP voters in safe Democratic districts will 'bleach' seats and seriously erode the voting power of African-Americans."

While released in July, these studies did not become generally known in the public sphere until September 8, 2020, when the Florida Legislative Black Caucus held a press conference announcing its opposition to Proposed Amendment 3 based on the results of the studies, prompting newspaper coverage state-wide.[7]

Isbell first published his findings on his website on July 16, 2020. He analyzed past voter data with functional analysis, a method used in redistricting in Florida. Isbell, *supra.* Shaw, who serves as the chairman of the non-profit The People Over Profits in Florida, Inc., reviewed Isbell's data and decided to have his team perform a separate study. Shaw, *supra.* Rather than functional analysis,

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[6] Under the Initiative, the first election includes all candidates regardless of party and all voters regardless of party. In the second election, the top two candidates receiving votes run against each other, even if one received over 50%.

[7] https://thefloridachannel.org/videos/9-8-20-press-conference-on-impacts-of-open-primaries-on-black-representation-in-elected-office/

Shaw's team used voter turn-out data from 2016 and 2018. While the findings of Shaw's team were distributed July 27, 2020, in a memorandum to "Democratic leaders and progressive partners," the results did not reach the public sphere until the September 8 press conference of the Florida Legislative Black Caucus.

A. Findings of new studies regarding legislative districts

1. Matthew Isbell's study of voter data on state legislative districts

Isbell's analysis showed the Initiative would have the "unforeseen outcome" of diminishing the number of districts in which Black voters are a majority of the electorate in the primary election. Isbell found that, in a "top-two" primary, fourteen districts would no longer have a majority of Black voters in the primary election -- four in the state Senate and ten in the state House. Isbell, *supra.* The state House districts that Isbell found would no longer have a majority of Black voters in a primary election were 13, 45, 46, 61, 70, 88, 94, 102, 109, and 117, and the state Senate districts were 6, 11, 33, and 35. Isbell, *supra.*

Isbell only included in his published research districts that would no longer have a majority of Black voters in a primary election. People Over Profits included in its later research an additional five House districts that Isbell did not discuss. These five districts would continue to have a majority of Black voters under either system in the primary -- 8, 14, 95, 107, and 108. If those five districts are added to

the fourteen districts Isbell analyzed that would lose a majority of Black voters in a "top-two" primary, nineteen districts currently have a majority of Black voters in a Democratic primary (five that will continue to have a majority of Black voters under the "top-two" system and the fourteen Isbell found will not). Therefore, according to the functional analysis method, fourteen of nineteen districts would no longer have a Black majority in the primary if the current primary system changes to a "top-two" system – a loss of 74% of these districts.

Isbell noted that the "data shows the consequence of this plan is not that NPA [non-party affiliated] voters will have a say, it is that a flood of white GOP voters in safe Democratic districts will 'bleach' seats and seriously erode the voting power of African-Americans." According to Isbell, "the results will be a sharp reduction in lawmakers of color or a return to bizarre and snake-like district lines." He predicts the voter composition of the districts make it likely that the districts would elect "white, moderate democrats." Isbell, *supra.*

2. People Over Profit's research on state legislative districts

Similarly, although using a different analytical method, Shaw's team found twelve districts that currently have a majority of Black voters under the current primary election system (i.e. the Democratic primary) would no longer have a majority of Black voters under the "top-two" election system of the Proposed

Amendment – four in the state Senate and eight in the state House. Shaw's team also did research that included the current total of all districts in which Black voters comprise the majority of the electorate in a primary. He found that there are twenty-one such districts currently in the legislature—-four in the Senate and seventeen in the House. He found that twelve of the twenty-one districts would no longer have a majority of Black voters in the primary election under the "top-two" election system – a reduction of 57%. Shaw, *supra.*

3. Data analysis: Shaw utilized 2016 and 2018 voter turn-out data while Isbell used functional analysis.

People Over Profits found districts in which Black voters comprised the majority in the current primary system would decrease by 57% (or 12 of 21) if the top-two election system was implemented, and Isbell found these districts would decrease by 74% (or 14 of 19). The reason for the difference in numbers is that Isbell used the functional analysis profile to build his political performance profile. functional analysis is a principle used in Florida's redistricting process. *Id.* People Over Profits used the "racial and ethnic composition of districts based on an average of turnout form 2016 and 2018." *Shaw* at 3.

In six of the districts that were "on the bubble", this change in predicting voter behavior tilted those districts into a different category. For example, Isbell found four districts would no longer have a majority of Black voters in a "top-two" primary election that People Over Profits found would continue to be by a slight margin (46,

88, 102, and 109),[8] and People Over Profits found two districts to currently have a majority of Black voters in a primary that Isbell found to be just under the threshold (92 and 101).[9]

B. Findings of new studies on statewide races

1. People Over Profits findings on 2018 gubernatorial race

Shaw's team reviewed the votes for the 2018 gubernatorial race and found that if Proposed Amendment 3 had been in place, the top-two candidates – out of the 21 candidates on the ballot -- would have been Republican Adam Putnam and Republican Ron Desantis. During the Florida Legislative Black Caucus press conference on September 8, Shaw said that if voters with no party affiliation (NPAs) had been allowed to vote in the 2018 gubernatorial race, they would have had to vote

[8] For District 88, Isbell found under the "top-two" system it would have 47.9% of Black voters, and People Over Profits found it would have 50%. For District 109, Isbell found under the "top-two" system it would have 49.7% Black voters, and People Over Profits founds it would have 51%. For 46, Isbell found it would have 49.4%, and People Over Profits found that in the "top-two" system, it would have 52% Black voters. For 102, Isbell found it would have 49% Black Voters, and People Over Profits found it would have 53% of Black voters.

[9] For District 92, Isbell found it to currently have 49.9% of Black voters, and People Over Profits found it to have 50%. For District 101, Isbell found it to currently have 48.7% of Black voters, and People Over Profits found it to have 56%.

for Gillum by a percentage that would have been difficult to meet given the number of candidates.[10]

2. Isbell's findings on the 2018 gubernatorial race

On October 3, 2020, Matthew Isbell released the results of additional research on voter data, this time relating to the 2018 gubernatorial race.[11] Isbell found that Adam Putnam and Ron Desantis would have been the two candidates to be in a run-off under a "top-two" system. Isbell found that if voters with no party affiliation were included it was "very unlikely" they would "have swung the election and put someone else" such as Gillum in second place. Isbell found Gillum would have needed an additional 70,000 votes to overtake second-place Putnam to be in a runoff. Therefore, given the number of candidates on the Democratic ticket, that would have been unlikely.

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[10] https://thefloridachannel.org/videos/9-8-20-press-conference-on-impacts-of-open-primaries-on-black-representation-in-elected-office/

[11] Matthew Isbell. *Yes, the math says Amendment 3 would have led to an ALL-GOP 2018 FL Governor Election.* Mcimaps.com (October 3, 2020). https://mcimaps.com/yes-the-math-says-amendment-3-would-have-led-to-an-all-gop-2018-fl-governor-election/

C. A "top-two" system has never been used in a state like Florida with an electorate that is split evenly in party registration.

Florida is a state in which the parties are split almost evenly in voting representation: 35.69% of voters are registered Republican and 36.99% are registered Democratic.[12] Currently, only four states have implemented a "top-two" election process at all – California, Washington, Louisiana, and Nebraska.[13] These four states differ from Florida in that voter registration strongly favors one party in those states. (California: Democrat 46%, Republican 24%;[14] Louisiana: Democrat 41%; Republican 33%;[15] Nebraska: Democrat 29%; Republican 49%;[16] Washington: no party registration but in the 2016 presidential general, 54% voted

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[12] Florida Department of State, "Data & Statistics", "Voter Registration by Party" (Data as of August 31, 2020).

[13] Nat'l Conference of State Legislatures, *State Primary Election Types*, (last visited October 8, 2020).

[14] California Secretary of State, "Report of Registration" as of September 4, 2020 https://elections.cdn.sos.ca.gov/ror/60day-gen-2020/historical-reg-stats.pdf

[15] Louisiana Secretary of State, "Registration Statistics" as of October 1, 2020. Another difference between the Florida electorate and the Louisiana electorate is that in Louisiana 31% of voters are Black. In Florida, 13% of voters are Black. https://electionstatistics.sos.la.gov/Data/Registration_Statistics/Statewide/2020_1001_sta_comb.pdf

[16] Nebraska Secretary of State; "Voter Registration Statistics" as of October 2020. https://sos.nebraska.gov/elections/voter-registration-statistics

for the Democratic candidate; 38% voted for the Republican candidate).[17] The other 46 states utilize a party primary in some form, whether open or closed.[18]

D. Response to the studies

As word spread about the new studies, primarily as a result of the September 8 press conference, the response was great concern. The League of Women Voters pulled its initial support.[19] The Florida Legislative Black Caucus met the first week of September and decided to oppose the Initiative and then held its press conference to voice its opposition on September 8.[20] Finally, Dr. Susan MacManus, a well-respected University of South Florida retired professor of government, was

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[17] Washington Secretary of State, "November 8, 2016, Presidential Election Results"https://results.vote.wa.gov/results/20161108/President-Vice-President.html

[18] Nat'l Conference of State Legislatures, *State Primary Election Types* (last visited Oct. 8, 2020). Currently, of the 46 states that have any type of "primary", 16 states, including Florida, hold some version of "closed" primaries, in which typically only registered members of a party may help select its nominees, and 29 states hold some form of "open" primaries, in which any voter may vote in any party's primary.

[19] Mitch Perry, *Black Democratic Lawmakers Denounce Open Primary Constitutional Amendment*, Spectrum News (Sept. 8, 2020).

[20] *Id.*

interviewed about her own research related to the Proposed Amendment and echoed finding similar results as to the exclusionary effect of the "top-two" system.[21]

1. Florida League of Women Voters

Florida League of Women Voters President Patricia Brigham stated that the group "definitely supports open primaries." However, she said "we do not feel that the top-two primary is the best way to go….We firmly believe that the top-two would very likely disenfranchise representation in communities of color….After taking a look at the current drawing of Florida's Senate and state House districts, it's become clear that we cannot support a change to our state Constitution that would likely further silence minority communities or candidates within these districts." [22]

2. Florida Legislative Black Caucus

On September 8, the Florida Legislative Black Caucus held a press conference at which several members spoke critically about the Initiative's impact, including state Sen. Bobby Powell, state Sen. Randolph Bracy III, state Sen. Audrey Gibson,

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[21] James Call, *Are the 'Parties' Over? How All Voters Vote Amendment Would Have Changed Florida Politics*, *Tallahassee Democrat* (September 25, 2020). https://www.tallahassee.com/story/news/politics/2020/09/25/how-all-voters-vote-would-have-changed-florida-politics/3504388001/

[22] Rachael, Krause. *Amendment 3 Would Advance Top Two Vote-Getters in Florida Primaries,* Spectrum News 13 (September 14, 2020). https://www.mynews13.com/fl/orlando/news/2020/09/14/amendment-3-would-advance-top-2-vote-getters-in-florida-primaries

state Rep. Dotie Johnson, state Rep. Bobby DuBose, and former state Rep. Sean Shaw.[23] (Video of the press conference is on The Florida Channel's website at https://thefloridachannel.org/videos/9-8-20-press-conference-on-impacts-of-open-primaries-on-black-representation-in-elected-office/) All five of the elected representatives who attended the press conference are in districts which the studies show will be negatively affected if the Proposed Amendment is enacted.

The Florida Legislative Black Caucus expressed concern that the "top-two" system places Black voters into a pool of all voters in its "primary" election, diluting impact. As Sen. Powell, D-Palm Beach, stated, "No longer do you have a Democratic and Republican primary. You have the top two vote-getters in any election." *See*, *supra* n. 29. This is concerning because the four other states that have this type of system are dominated by one party. "This isn't California because of the partisan make-up of the two respective states," former Rep. Shaw said. *Id.*

According to Sen. Bracy, D-Ocoee, this will result in a "redistribution of the electorate… impacting greatly minority representation in Tallahassee." *Id.* Sen. Gibson, D-Jacksonville, added that the Proposed Amendment will "undermine the Florida Constitution" because "electoral access of people of color would be all but

[23] https://thefloridachannel.org/videos/9-8-20-press-conference-on-impacts-of-open-primaries-on-black-representation-in-elected-office/

erased…If you're for Amendment 3, you're not for the minority community. Period." *Id.*

Finally, Rep. Dotie Joseph, D-Miami, emphasized the critical nature of these two studies and what they reveal about this Initiative's effect on minority representation in the state of Florida.

> [W]hen we think about [the Proposed Amendment] with what's going on in the context of everything throughout the United States right now, the ability to elect a true representative of our community means something. It means you are seen and heard and your voice matters. And just over 50 years ago representation in Florida for Black Floridians did not exist. We cannot erase the progress we made in our nation and our state.

3. *Dr. Susan MacManus*

Dr. Susan MacManus, a political scientist well-known for her expertise on politics in Florida, analyzed the Initiative from a perspective of democratic theory – a branch of political theory that looks at what democracy really means. Interviewed on September 25 after the new studies were released, Dr. MacManus said her own research based on democratic theory found the Initiative to be exclusionary as well: the Initiative "would suppress ideas from bubbling up into a public discussion." (James Call, *Are the 'Parties' Over? How All Voters Vote Amendment Would Have Changed Florida Politics*, *Tallahassee Democrat* (September 25, 2020).) According to Dr. MacManus, the proposed Initiative does not create a primary at all – even an "open primary" as it is often understood to do. *Id.* Labelling it an "open

primary" in which a non-member can vote in a primary election is incorrect. According to Dr. MacManus, Proposed Amendment 3 authorizes an "at-large election" which "reduces the chance of new ideas and minority opinions getting any political oxygen…Democracy is all about choices, and this [initiative] is counter to the idea of choice." *Id.*

III. THIS PETITION

A. Petitioner

Petitioner, Glenton Gilzean, Jr., is a registered voter in the state of Florida. Mr. Gilzean's Senate district is Senate District 11, one of the districts included in the studies that has a majority of Black voters in the current primary system but that would no longer have a majority of Black voters in the proposed "top-two" system. His House district is District 45, one of the House districts included in the studies that has a majority of Black voters in the current primary system but that would no longer have a majority if the amendment is enacted. Mr. Gilzean is active in his community and has served as CEO of the Central Florida Urban League since 2016.

B. Timing of petition

This petition is filed approximately three weeks before the election. Petitioner acknowledges that ballots have been printed, and some votes have already been cast.

But since the two studies referenced became known in the public sphere as a result of the press conference held by the Florida Legislative Black Caucus on September 8, the bases for this legal challenge have been researched and prepared for submission in the most expeditious manner possible. Thus, the need for this request for emergency relief was unavoidable.

NATURE OF RELIEF SOUGHT

This petition seeks an expedited review and emergency writ of mandamus to direct the Secretary of State to perform ministerial duties to ensure the ballots for Proposed Amendment 3 are not canvassed and/or reported to her office or, in the alternative, to direct the Elections Canvassing Commission not to certify the election results, or any other such relief as the Court deems proper, including deeming the votes void. *Smith v. American Airlines*, 606 So. 2d 618, 622, n. 3 (Fla. 1992) ("[B]ecause of the shortness of time, it may be that it will be impossible to remove Proposition 7 from all of the ballots. In that event, any votes on Proposition 7 shall be deemed void.").

This Court's s "precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution." *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992)

(citing *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982); *Wadhams v. Board of County Comm'rs*, 567 So. 2d 414, 416-17 (Fla. 1990)).

"To be entitled to mandamus relief, 'the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available.' *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000)." *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). Petitioner, as a citizen and a voter, has a clear legal right to ask state officials and agencies to carry out their duties as to elections. *Id.* The Secretary of State, under section 97.012, Florida Statutes, is the chief election officer in the state of Florida and has a duty to oversee state election laws, including ensuring county supervisors or any other election officials are complying with the law under section 97.102(14). In addition, the Election Canvassing Commission under section 102.111, Florida Statutes, is charged with the duty of certifying election returns. Ballots have already been printed and voting has begun; therefore, there is no other adequate remedy at law to prevent the canvassing, reporting, and/or certifying of the election results.

ARGUMENT

This petition requests that this Court find that the "All Voters Vote" Initiative is constitutionally defective and prevent ballots cast relating to it from being canvassed, reported, or certified. To do this, the Court must go through two levels of inquiry.

First, the Court must consider whether it will accept jurisdiction and reopen the citizen-initiative validity proceeding. To do this, the Court must find that a "vital issue" is raised and that issues are not relitigated that were addressed in the prior Advisory Opinion proceeding. Second, if the Court accepts jurisdiction, it must then consider if the "vital issue" raised rises to the level of holding the Initiative defective for purposes of being on the ballot.

Since the issuance of the Court's Advisory Opinion in March 2020, new information relating to "vital issues" has been discovered: the Initiative would have the "unforeseen outcome" of diminishing the number of districts in which Black voters are a majority of the electorate in the primary election system. *Fla. League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992). Currently, Black voters in these districts comprise a majority of the electorate in these districts in the Democratic primary; however, under the "top-two" election proposed by the Initiative, the influx of white voters from all parties into the preliminary election would result in Black voters losing their majority in the primary.

This information raises three vital issues as to the Initiative: (1) whether the Initiative would create an internal constitutional conflict with the redistricting sections of the Florida Constitution; (2) whether the ballot summary and title clarity requirements are met; and (3) whether the single-subject requirement is met. All three "vital issues" raised reveal that the Proposed Amendment—when viewed through the prism of the recently-published data discussed above—does not meet the requirements to be on the ballot. Neither this Court nor the electorate of Florida was told what the impact of the proposed Initiative would be. That is the essence of misleading.

I. THE NEW STUDIES MEET THE STANDARD NEEDED FOR THE COURT TO REOPEN CITIZEN-VALIDITY PROCEEDINGS AFTER AN ADVISORY OPINION IS ISSUED.

This Court approved the "All Voters Vote" initiative for placement on the ballot on March 19, 2020, based on the information the Court had at the time. The new studies meet the standard for reopening citizen-validity proceedings after an Advisory Opinion is issued. First, they raise completely new issues that were not litigated in the Advisory Opinion. Second, the issues are raised are "vital" to the constitutional questions of whether the Proposed Amendment should be approved for the ballot.

A. <u>This case does not relitigate issues in the Advisory Opinion.</u>

This Court has held that when an Advisory Opinion is issued on the validity of a Proposed Amendment "relitigation of issues expressly addressed in an advisory opinion on a proposed amendment is strongly disfavored and almost always will result in this Court refusing to exercise its discretionary jurisdiction." *Fla. League of Cities v. Smith*, 607 So.2d at 399. The Court went on to state that "[r]enewed litigation will be entertained only in truly extraordinary cases, such as in the present case where a vital issue was not addressed in the earlier opinion." *Id. See also Ray v. Mortham*, 742 So. 2d at 1285.

In the earlier briefs on Proposed Amendment 3, as well as in the Advisory Opinion, the issue of the diminishing of districts in which Black voters comprise the majority of voters in the current preliminary election (i.e. the Democratic primary) was not raised or recognized. Indeed, the data that exposed the adverse impact that Proposed Amendment 3 would have on Black voters' representation was not available until *after* the Court issued its Advisory Opinion. The new studies raise "vital issues" that were only revealed by the studies that were first widely publicized at the September 8 press conference. Therefore, this case meets one part of the high bar set by the court: the new issue was not addressed in the earlier Advisory Opinion. *Smith,* 607 So. 2d at 398; *Mortham*, 742 So. 3d at 1285.

B. The issues raised in this case relate to "vital issues."

Procedurally, *Smith* controls this case and supports the relief requested. In *Smith*, the Court issued an Advisory Opinion that held the proposed amendment did not violate the single-subject rule and did not violate section 101.161, Florida Statues. *Smith,* 607 So. 2d at 399. However, after the Advisory Opinion was issued, but before the election, a group challenged the amendment based on a new issue relating to whether the proposed amendment conflicted with another section of the Florida Constitution. *Id.* at 398. Although the Court eventually maintained its Advisory Opinion holding, the Court considered whether the proposed amendment was valid because the new issue raised related to a "vital issue" as to whether there was constitutional conflict, which would have included the need to reconsider the ballot title and summary as well as the single-subject requirement. *Id*. at 399.

Therefore, the finding of potential internal constitutional conflict meets the high standard for reopening the review of a proposed amendment, providing it has not been previously litigated. In *Smith*, the internal constitutional conflict the Court analyzed related to whether a limitation on homestead valuation contained in a proposed amendment could repeal part of the Constitution relating to the homestead tax exemption. *Smith,* 607 So. 2d at 398. Looking at the proposed amendment as well as the applicable constitutional section, the Court found the proposed amendment had a variable cap that would not apply to all homestead property and

thus would not conflict with the homestead exemption in the Constitution. *Id*. at 400. Therefore, no constitutional conflict would exist, and there was no "vital issue." *Id.* at 401. ("[T]he proposed amendment will not trigger the repealer contained" in another section of the Constitution.") However, the new issue of potential constitutional conflict met the high bar for the Court to initially consider if the new issue was truly "vital."

In this case, the new studies give rise to three issues, all of which are "vital" (i.e., relate directly to whether the Proposed Amendment meets the requirements to be on the ballot). The new studies reveal that the Initiative would have the "unforeseen outcome" of cutting by more than half the number of districts in which Black voters are a majority of the electorate in a primary. This would occur because, in these districts, under the current primary election system, Black voters comprise a majority of voters in a Democratic primary; however, under the "top-two" system of the Initiative, Black voters will no longer be a majority in the primary. This critical information raises the issues of whether the Proposed Amendment meets the technical requirements to be on the ballot related to (1) the single-subject requirements, (2) the ballot summary and title, and (3) internal constitutional conflict. Therefore, as well as the fact that these issues were not litigated during the Advisory Opinion proceeding, the new studies go directly to these "vital issues."

Therefore, the high bar is met for the Court to revisit its holding in the Advisory Opinion.

II. THE "VITAL ISSUES" REVEALED BY THE NEW STUDIES ARE SUCH THAT THE PROPOSED AMENDMENT NO LONGER SHOULD BE APPROVED FOR THE BALLOT.

In *Smith*, the Court held that it can reopen citizen-initiative validity proceedings as to issues that have not previously been addressed by the Court and that relate to a potential "vital issue". *Smith,* 607 So. 3d at 399. In *Smith*, the specific "vital issue" was a potential constitutional conflict. *Id.* However, after the Court examined the facts, the Court in *Smith* held that a "vital issue" did not exist, because, in that case, no constitutional conflict existed. The instant case not only pertains to previously unaddressed potential "vital issues", it also, unlike the case in *Smith,* meets the hurdle needed for the Court to withdraw its approval of the Initiative: the facts, when examined, reveal the "vital issues" result in the Proposed Amendment not meeting the threshold to be on the ballot.

A. The new information pertains to a "vital issue" because it reveals "internal constitutional conflict."

The Proposed Amendment conflicts with the following three sections of the Florida Constitution, separately and taken as a whole.

- Article I, Section 2 provides that "[a]ll natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. *No person shall be deprived of any right because of race, religion, national origin, or physical disability.*" (emphasis added).
- Article III, Section 16 requires that the state legislature reapportion the legislative districts every ten years. The goal of engaging in the complex process of redrawing districts every 10 years is to "ensur[e] that citizens choose their elected officials in an equitable manner." *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 604 (Fla. 2012) ("[A]chieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment.").
- Article III, Section 21 lays out additional requirements for ensuring fairness in the redistricting process. In *Senate Joint Resolution of Legislative Apportionment 1176*, based on Article III, Section 21, this Court stated the Legislature "cannot eliminate majority-minority districts or weaken other historically performing minority districts

where doing so would actually diminish a minority group's ability to elect its preferred candidate." 83 So. 3d 597, 624 (Fla. 2012).

The Florida Constitution, in Article III, Section 2, protects against this exact type of amendment when it provides that "[n]o person shall be deprived of any right because of race, religion, national origin, or physical disability." The Florida Constitution codifies the apportionment process for the Legislature in Article III, sections 16 and 21. The parameters are to ensure each person's vote has equal weight. These sections work together to ensure minorities have a voice in elections, while the Proposed Amendment would result in cutting by more than half the number of districts in which Black voters currently comprise a majority of the electorate in a primary.

The Proposed Amendment would enshrine structural discrimination in our state's supreme legal document, directly contradicting other sections of the Constitution. Therefore, the Proposed Amendment does not meet the threshold to be on the ballot.

B. The new studies reveal a "vital issue" because, based on the new information, the ballot title and summary no longer meet the clarity requirements to be on the ballot.

First, the ballot title and summary fail to inform voters of the "true meaning and ramifications of the amendment." Second, the ballot title and summary mislead the public.

1. *The ballot title and summary do not tell voters about the effect on many of the districts that currently have a majority of Black voters in the current primary system.*

The language of the summary and title does not inform the public of the significant effect the Proposed Amendment would have on minority voters, specifically Black voters. This is an important but undisclosed ramification of the Proposed Amendment, and voters should be aware of the consequences if it passes.

A proposed amendment "need only draft a ballot title and summary that is straightforward, direct, accurate and does not fail to disclose significant effects of the amendment merely because they may not be perceived by some voters as advantageous." *Slough*, 992 So. 2d at 149. Proposed Amendment 3 does not "disclose [the] significant effects of the amendment" (i.e., that the effect of the amendment will be to take away the voting power). Isbell's study found that fourteen districts in the Florida Legislature that currently have a majority of Black voters in a Democratic primary would no longer have the same level of representation under the proposed "top-two" system – four in the state Senate and

ten in the state House. According to Isbell, the "data shows the consequence of this plan is not that NPA's [non-affiliated voters] will have say, it is that a flood of white GOP voters in safe Democratic districts will 'bleach' seats and seriously erode the voting power of African-Americans." Furthermore, according to Isbell, "the result will be a sharp reduction in lawmakers of color or a return of bizarre and snake-like district lines."

The impact of this is so significant that it should not be left to other sources to tell voters. This Court has said that the "burden of informing the public should not fall only on the press and opponents of the measure—the ballot title and summary must do this." *Fla. Dept. of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

It is correct that, given the word limit, the "statute does not lend itself to an explanation of all of the proposed amendment's details. *Advisory Op. to Att'y Gen. re Treating People Differently Based on Race in Pub. Educ*., 778 So. 2d 888, 899 (Fla. 2000). Further, it is also correct that "the [ballot] title and summary need not explain *every* detail or ramification of the proposed amendment." *Advisory Op. to Att'y Gen. re Prohibiting Pub. Funding of Political Candidates' Campaigns*, 693 So. 2d 972, 975-76 (Fla. 1997) (emphasis added).

For the ballot to be fair, the electorate must be informed that other constitutional provisions are affected.

> [D]rafters of proposed amendments cannot circumvent the requirements of section 101.161, Florida statutes by cursorily contending that the summary need not be exhaustive. Although significant detail regarding implementation and speculative scenarios may be omitted, this Court has repeatedly held that ballot summaries which do not adequately define terms, use inconsistent terminology, *fail to mention constitutional provisions that are affected*, and do not adequately describe the general operation of the proposed amendment must be invalidated.

Advisory Opinion to Atty Gen. ex rel. Amendment to Bar Government from Treating People Differently Based on Race in Public Educ., 778 So. 2d at 899 (emphasis added). Further, , the effect on minority voters needs to be disclosed to the voting public. The amendment at issue in *Treating People Differently Based on Race in Public Education* violated, among other things, article I, Section 2 of the Florida Constitution, which provides:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Art. I, § n 2, Fla. Const. The Court und that article I, section 2 "was substantially affected, yet nowhere in the petitions is the voter apprised of its new operation. Accordingly, the petitions' failure to acknowledge the proposed amendments' effect

on article I, section 2, violates the single-subject requirement." *Treating People Differently Based on Race in Public Educ*., 778 So. 2d at 894. The same is true here.

As previously stated by Justice Kogan in *Restricts Laws Related to Discrimination*:

> I reach this conclusion only because of the present initiative's overbroad and *unstated effects*. I do not believe the Constitution forbids the people to propose limited initiatives that either broaden or restrict civil rights. What the Constitution does require is that all such civil rights initiatives must be narrowly framed, must not involve *undisclosed collateral effects*, *and must not have the potential to disrupt other aspects of Florida law or government beyond the subject of the amendment itself***.** When such overbreadth exists, the single-subject requirement necessarily is violated, and the ballot summary requirement is violated to the extent the initiative does not or cannot explain its own domino effect.

In re Advisory Opinion to the Att'y Gen. Restricts Laws Related to Discrimination, 632 So. 2d at 1024 (Kogan, J., concurring) (emphasis added).

Here the summary fails to explain the significant impact on Black voters in certain districts if the Proposed Amendment is enacted. By this failure, Proposed Amendment 3 fails to comply with section 101.161, Florida Statutes, for purposes of placement on the ballot.

2. <u>The ballot title and summary mislead voters as to its effects.</u>

According to the new studies, the Proposed Amendment would cut by more than half the number of districts in which Black voters comprise the majority of the electorate in a primary. However, when one reads the Proposed Amendment, a

reasonable voter would think the Proposed Amendment would have the *opposite* effect. Proposed Amendment 3, "All Voters Vote" as it is colloquially referred to, holds itself out to be an amendment which allows all voters to vote in each primary. As discussed in depth above, the effect that this Proposed Amendment has on the minority vote is the opposite. All the while, there is not even a passing reference to the effect on the minority population in the summary.

The basic purpose of section 101.161, Florida Statutes, is "to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose and can cast an intelligent and informed ballot." *Advisory Op. to Att'y Gen. re Fee on Everglades Sugar Prod*., 681 So. 2d 1124, 1127 (Fla. 1996). Thus, as written (i.e., by precluding the effect it will have on the minority votes), the amendment fails to "fairly inform the voters" and is "affirmatively misleading to voters." *Advisory Op. to Att'y Gen. re Voter Control of Gambling*, 215 So. 3d 1209 (Fla. 2017) (citing *Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d at 816; *Advisory Op. re Right to Treatment and Rehab. For Non-Violent Drug Offenses*; 818 So. 2d 491, 494 (Fla. 2012)). Furthermore, the Proposed Amendment gives the "appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence." *Smith*, 607 So. 2d at 399.

As in *Askew*, "[t]he problem, therefore, lies not with what the summary says, but, rather with what it does not say." *Askew*, 421 So. 2d at 156. "[P]roposal of amendments to the Constitution is a highly important function of government, that should be performed with the greatest certainty, efficiency, care and deliberation." *Id*. at 155 (citing *Crawford v. Gilchrist*, 59 So. 963 (Fla. 1912)). The voters "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." *Id*. (citing *Smathers v. Smith*, 338 So. 2d 825, 829 (Fla. 1976)).

Proposed Amendment 3 has undisclosed collateral effects that have the potential to disrupt other aspects of Florida law beyond the subject of the Proposed Amendment itself. In other words, *the problem lies in what the amendment does not say. Askew*, 421 So. 2d at 156. Amendments to the Constitution should be performed with "the greatest certainty, efficiency, care and deliberation." *Id*. at 155. Here, the necessary deliberation unfortunately came after the Advisory Opinion, but this Court has the power and duty to preclude an amendment that is the product of subterfuge, this adversely affects on an already underrepresented group within Florida. While the Proposed Amendment is one thing on its face, the effects on minorities are completely different. Thus, the Proposed Amendment does not allow the public to glean its sweep. *Id*.

"A proposed amendment must be removed from the ballot when the title and summary do not accurately describe the scope of the text of the amendment, because it has failed in its purpose." *Term Limits Pledge*, 718 So. 2d at 804. For example, in *Detzner*, "although the ballot summary faithfully tracked the text of the proposed amendment, *the summary failed to explain that the amendment would supersede an already existing constitutional provision*." *Detzner v. League of Women Voters of Florida*, 256 So. 3d 803, 807 (Fla. 2018) (citing *Armstrong*, 773 So. 2d at 15) (emphasis added). Furthermore, as described in *Smith*, a summary can be clearly and conclusively defective "if the ballot summary is defective for 'failing to specify exactly what was being changed, thereby confusing voters' or for 'giving the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.'" *Smith*, 607 So. 2d at 399 (citing *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1376 (Fla. 1991)).

Therefore, Proposed Amendment 3 fails to comply with section 101.161, Florida Statutes, for purposes of placement on the ballot.

C. The new information reveals a "vital issue" because the ballot summary no longer meets the single-subject requirement.

Given that this is a citizen initiative, the considerations of the single-subject rule are vital. "The single-subject requirement is at its base a 'rule of restraint'

designed to protect Florida's organic law from 'precipitous and cataclysmic change.'" *Id.* (citing *Save Our Everglades*, 636 So. 2d at 1339). It was "placed in the constitution by the people to allow the citizens, by initiative petition, to proposed and vote on *singular changes* in the functions of our governmental structure." *Save Our Everglades,* 636 So. 2d at 1339 (citing *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984)) (emphasis added).

In addition, the "single-subject rule also prevents a single amendment from substantially altering or preforming the functions of multiple branches of government and thereby causing multiple precipitous and cataclysmic changes in state government. *In re Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 649 (Fla. 2004). Thus, the single-subject rule's goal is to "insulate Florida's organic law from precipitous and cataclysmic change" and to prevent an amendment from appearing, on its face, to do one thing, when, in actuality, the amendment does something different. *Save Our Everglades*, 636 So. 2d at 1339.

The single-subject rule prevents an amendment from engaging in logrolling and "substantially altering or performing the functions of multiple branches of state government." *In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 649 (Fla. 2004). Proposed Amendment 3 is a prime example of why the law forbids logrolling. *Id*. ("Logrolling is a practice wherein

several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue.")

Here, while the Proposed Amendment contains provisions which some voters *may* approve of, such as elimination of primaries and allowing non-party affiliates to participate in the voting process, it also has the ultimate effect of diminishing minorities' rights to select leaders of their choosing. *See Fine v. Firestone,* 448 So. 2d 984, 993 (Fla. 1984) ("The purpose of the single-subject requirement is to . . . avoid voters having to accept part of a proposal which they oppose in order to obtain a change which they support."). This Proposed Amendment is phrased in a manner to obtain votes to eliminate primary elections in Florida (a "favored" result), when, in effect, it will vastly decrease the number districts in which Black voters comprise the majority of the electorate in the primary election, curtailing minorities' rights to elect officials of their choosing. This is a prime example of logrolling wherein some voters may vote for Proposed Amendment 3 because they accept part of the proposal but do not fully appreciate that it will disenfranchise minorities.

Proposed Amendment 3 leaves some voters who want to vote "yes" on Proposed Amendment 3 with the impossible choice of whether to vote "yes" for Proposed Amendment 3 (to eliminate primaries) and disenfranchise minorities (when this is a necessary consequence of the Proposed Amendment that the voter does not favor) in order to eliminate primaries altogether. This is exactly what the

single-subject rule is designed to prevent. Therefore, the Proposed Amendment should not go forward because it does not meet the technical requirements to be on the ballot.

III. THE FACTS OF THIS EXTRAORDINARY CASE CREATE A "PERFECT STORM" FOR WHICH THE "EXTRAORDINARY RELIEF" OF MANDAMUS EXISTS.

This case has a "perfect storm" of facts – rarely occurring but resulting in a critical scenario. This extraordinary case is the type of case for which the "extraordinary relief" of mandamus was created. Mandamus is a remedy crafted for when there is no other adequate remedy at law. In this instance, the ballots are printed, and this Proposed Amendment is being presented to the voters without critical information that has only recently been discovered. Only this Court can act to prevent this injustice.

A. This case is extraordinary because the information raises a "vital issue" that was discovered on the eve of an election.

The facts of this case are truly unique: the Court entered an Advisory Opinion on March 19, 2020; ballots were printed sometime in August; and two studies with new information became known widely in the public sphere as a result of a press conference on September 8, 2020. Part of the cause for this "perfect storm" was that the Proposed Amendment was rushed to the ballot as a result of a windfall from

a billionaire. This windfall then paid for out-of-state petition-gathering companies to compile a trove of signatures in relatively little time.

B. This case is extraordinary because the Initiative was rushed to the ballot through a windfall from a billionaire – and the law that allowed the rush to the ballot has now been revised by the Legislature to resolve some of the problem.

The rush to the ballot was in part caused by the hiring of an out-of-state company specializing in the practice of petition-gathering for citizen-initiatives. During the 2019 legislative Session, the law relating to citizen-initiatives and the practices surrounding the big-business of petition-gathering was amended to more closely regulate this practice. *See* § 100.371, Fla. Stat. (2019).

Out-of-state petition-gathering companies are now effectively banned under the revised law, and petition-gatherers are no longer compensated by the petition but by the hour, curtailing abuse of the system. *Id.*

C. This case is extraordinary because the "top-two" system was easy to confuse with an "open primary." The Sponsor was in the best position to discover the information earlier.

The rush to the ballot took away the time and space needed for members of the public to examine Proposed Amendment 3 more closely. In addition, there was a confusion between a "top-two" system and an "open primary" system. This confusion was acknowledged as an issue in helping the public understand its

ramifications by Sean Shaw, Matthew Isbell, and Dr. MacManus.[24] Shaw, *supra* at 3; Isbell, *supra*.

The party most able to have discovered this information earlier -- and avoided putting voters and the Court in this difficult position -- was the Sponsor. It had money, time and, most importantly, information -- such as that the "top-two" system was *not* an open primary and had never been used in a state like Florida with an electorate split evenly by party. These facts should have alerted the Sponsor that some basic analysis as to the Proposed Amendment's effects should have been done. Allowing this Initiative to go forward merely because the information was not known earlier rewards the Sponsor for this reckless behavior. It would encourage reckless behavior on the part of future sponsors to not make some effort to find out information on the impacts of their initiatives, in the hopes that negative information would not come out until too late.

[24] James Call, *Are the 'Parties' Over? How All Voters Vote Amendment Would Have Changed Florida Politics*, *Tallahassee Democrat* (Sept. 25, 2020).

CONCLUSION

Petitioner respectfully requests that the Court reconsider its approval of this Initiative based on the two new studies. The new information was unknown at the time the Court rendered its initial Advisory Opinion, and its late discovery is part of a "perfect storm" of facts that makes the extraordinary remedy of mandamus appropriate.

The new studies raise three "vital issues" that reveal the Proposed Amendment does not meet the requirements to be on the ballot. First, the Proposed Amendment causes internal constitutional conflict with equal protection and redistricting sections of the Florida Constitution. Second, the title and summary do not inform voters of important ramifications and mislead the public as to these. Third, the new studies reveal information that results in the Proposed Amendment violating the single-subject requirement to be on the ballot.

The extraordinary remedy of mandamus is needed in this case to protect against the casting of uninformed ballots and the enshrining of the diminishment of minority voting rights within the Constitution. For these reasons, the Court should reopen the citizen-initiative validity proceedings and grant this writ of mandamus or any other relief the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Emergency Petition for Writ of Mandamus was filed with the Court through the Florida e-filing Portal, which will serve counsel named below, by e-mail service, and that counsel below will also receive service by paper, pursuant to Florida Rule of Appellate Procedure, 9.420(c), this 13th day of October, 2020:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Emergency Petition for Writ of Mandamus complies with the font requirements of Fla. R. App. P. 9.100(l) because it is prepared in Times New Roman 14-point font.

/s/ Todd K. Norman
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