

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Ethics and Elections Committee

BILL: SB 2726

INTRODUCER: Senators Dockery, Jones, and others

SUBJECT: Presidential Preference Primary

DATE: March 26, 2008

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Rubinas	EE	Favorable
2.			JU	
3.			TA	
4.				
5.				
6.				

I. Summary:

Senate Bill 2726 provides that voters with no party affiliation, or “NPAs,” may vote for a candidate in either the Democratic or Republican presidential preference primary.

This bill substantially amends section 103.101 of the Florida Statutes.

II. Present Situation:

Florida is one of about 15 states that held or will hold a traditional, “closed” presidential preference primary during the 2008 election cycle --- one where the voter must be registered with a political party days prior to the election in order to vote in that party’s primary.¹

Proponents of opening the party’s primary process argue that the current closed primary system disenfranchises approximately 2 million Floridians who are registered as NPAs --- almost 20% of the state’s registered voters.

Opponents argue that:

- Selecting the standard-bearer that will carry the party into the November general election is the private business of the party, and it can choose to associate or not associate with whom it wishes for that purpose;²

¹ In Florida, a voter must be registered with a party at least 29 days before the election --- the so-called “book-closing deadline” --- after which new registrations and party registration changes will only be accepted for the purpose of *subsequent* elections and not the upcoming one. Section 97.055, F.S.

- Allowing voters with no allegiance to the party to have a voice in the nominating process dilutes the votes of the party faithful, and can result in a nominee that does not reflect the core values of the party.

III. Effect of Proposed Changes:

Senate Bill 2726 establishes a “modified” or “semi” open primary for the presidential preference election, permitting registered Florida NPAs to vote in either the Republican or Democratic presidential preference primary.

Specifically, the bill provides that NPA ballots contain the names of all presidential candidates in contested primaries, arranged alphabetically as to surname with a three-letter abbreviation of the affiliated political party, under the heading “PRESIDENT (Vote for One).” For purposes of tabulating and reporting the results of both the Republican and Democratic Primary, each race is treated like a universal primary contest in order to incorporate the NPA votes in the tally.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Closed or open primary statutes are not unconstitutional, *per se*.³

In practice, however, the constitutionality of a state’s primary format will likely depend on whether the political parties approve of the process: courts have stricken both closed primary and open primary statutes, *as applied*, in deference to a party’s constitutional right to either associate or not associate with voters who are not affiliated with the party.⁴

² See *infra*, Section IV.D. Other Constitutional Issues.

³ See, e.g., *Ferency v. Sec’y of State*, 476 N.W2d 417, 424, 427 (Mich. App. 1991), *vacated in part on other grounds*, *Ferency v. Austin*, 486 N.W.2d 664 (Mich. 1992) (upholding Michigan’s closed primary statute from facial attack by a voter).

⁴ See, *Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544 (1986) (closed primary statute held unconstitutional as applied to political party that wished to permit unaffiliated voters to vote in its primary elections); *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) (open primary statute held unconstitutional as applied to political party that wanted to limit participation in state senate primary exclusively to voters expressing an affiliated interest with the party); see also, *California Democratic Party v. Jones*, 120 S.Ct.2402, 2414 (2000) (holding that California’s blanket primary, in which voters could vote for any candidate regardless of voter’s or candidate’s party affiliation, unconstitutionally forced parties to associate with those who did not share their beliefs at the “crucial juncture” where party members traditionally find their collective voice and select their spokesperson).

Some of the policy reasons underlying these decisions were summarized by the Court of Appeals of Michigan in defeating a facial challenge to the constitutionality of Michigan's closed presidential primary statute brought by a Michigan voter:

Although primary elections are run by the state and are regulated by the state election law, they nevertheless remain *primarily party functions*.

* * *

On several occasions, this court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions – thus impairing the party's essential functions – and that political parties may accordingly protect themselves “from intrusion by those with adverse political principles.” (citation omitted)

Thus, the freedom of political association supports the use of a closed primary *where a political party desires a closed primary* in order to protect the associational rights of the party and its members. Rather than the principles of the freedom of association compelling an open primary, regardless of party wishes, it *is the party's choice to determine with whom it wishes to associate* and, therefore, whether its interests require a closed or open primary, or a *semi-open primary*⁵

(emphasis added).

Thus, the constitutionality of the modified open primary system in SB 2726 will likely turn on whether the state Republican and Democratic parties acquiesce in allowing NPAs to vote in their presidential preference primary.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Where the presidential preference primary is the only race on the ballot for which NPAs would be eligible to vote (no other referenda or nonpartisan candidate races), supervisors in counties not using the ballot-on-demand method of ballot production would incur the costs of printing and distributing NPA ballots. These costs have not yet been determined.

⁵ *Ferency v. Sec'y of State*, 476 N.W.2d 417, 424, 427 (Mich. App. 1991), *vacated in part on other grounds, Ferency v. Austin*, 486 N.W.2d 664 (Mich. 1992).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
