

The Honorable Betsy Bayless
Arizona Secretary of State

December 3 , 1999
Nº 199-025 (R99-049)

Question Presented

You have asked whether the provisions of Arizona's open primary law, Ariz. Const. art. VII, § 10 and Arizona Revised Statutes ("A.R.S.") § 16-467, extend to a presidential preference election conducted pursuant to A.R.S. §§ 16-241 through -250.⁽¹⁾

Summary Answer

Based on the specific language of the open primary provision of the Arizona Constitution and the statutes that implement it, as well as standard rules of statutory construction, the open primary provision does not extend to presidential preference elections.

Background

History of Primary Elections in Arizona.

Article VII, §10 of the Arizona Constitution requires the Legislature to enact "a direct primary election law. . . for the nomination of candidates for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress." A primary election determines which candidates will appear on the general election ballot as the nominee of a political party. See A.R.S. §§ 16-301, -501. This direct primary election requirement in article VII, § 10 replaced "the old convention practice of the political parties prior to statehood." *Board of Supervisors v. Harrington*, 85 Ariz. 163, 167, 333 P.2d 971, 974 (1958).

Until recently, the statutes governing Arizona's primary election established a "closed" primary in which only members of political parties that qualified for representation on the ballot could vote.⁽²⁾ See former A.R.S. § 16-467 (amended by 1999 Ariz. Sess. Laws ch. 30). In 1998, the Legislature referred to the voters a proposed constitutional amendment -- Proposition 103 -- to allow a person registered "as no party preference" or as an independent or as a member of a political party that is not qualified for representation on the ballot to vote in "the primary."⁽³⁾ Arizona Secretary of State, 1998 Publicity Pamphlet, Proposition 103 (hereinafter "1998 Publicity Pamphlet"). The voters approved Proposition 103 in the 1998 general election, and article VII, § 10 now reads:

The Legislature shall enact a direct primary election law, which shall provide for the nomination of candidates for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress. Any person who is registered as no party preference or independent as the party preference or who is registered with a political party that is not qualified for representation on the ballot may vote in the primary election of any one of the political parties that is qualified for the ballot.

The Legislature then amended the statutes governing primary elections to comply with the new constitutional requirement. See 1999 Ariz. Sess. Laws ch. 30. Consistent with the new constitutional provision, the statutes now allow any Proposition 103 voter to designate, at the time of voting or requesting an early ballot, one of the political parties that will be on the ballot and to receive the ballot for that party. A.R.S. §§ 16-467, -542.

History of Presidential Preference Elections in Arizona.

In 1992, the Legislature established a "presidential preference primary election." 1992 Ariz. Sess. Laws ch. 255 (codified as A.R.S. §§ 16-241 to -243). This election is to "give qualified electors the opportunity to express their preference for the presidential candidate of the political party indicated as their preference by the record of their registration."

A.R.S. § 16-241(A). In 1995, the Legislature substantially amended the laws governing this new election, changing the date, adding many procedures, and dropping the word "primary" from the title, thus renaming the election the "presidential preference election." 1995 Ariz. Sess. Laws ch. 248.

The presidential preference election is not denominated a "primary" election and, in fact, it differs significantly from a primary election. Unlike a primary election, the presidential preference election does not determine which candidate is placed on the general election ballot, nor do all parties that will have candidates on the general election ballot participate in Arizona's presidential preference election. Indeed, in 1996, Arizona's first presidential preference election, only one eligible party participated.⁽⁴⁾ In addition, the presidential preference election is on a different date, *compare* A.R.S. § 16-241(A) *with* A.R.S. § 16-201, and no other election may appear on the same ballot as the presidential preference election. A.R.S. § 16-241(A). The Legislature has also established specific procedures for a presidential preference election regarding such matters as candidate qualifications for the ballot, party eligibility, early voting, ballot format, and polling places. *See* A.R.S. §§ 16-241 through-250. Other laws governing elections apply if they are not in conflict with the statutory provisions for the presidential preference election. A.R.S. § 16-241(C).

While the statutory provisions for the presidential preference election allow voters to express a preference for their party's presidential candidate, the presidential preference election does not actually select delegates to the parties' national presidential nomination conventions. Instead, each party selects convention delegates as provided by its bylaws. A.R.S. § 16-243(A). The delegates of parties participating in Arizona's presidential preference election are directed by the statute to use "best efforts" at the convention for their party's presidential candidate who received the greatest number of votes in Arizona's presidential preference election. A.R.S. § 16-243(B).⁽⁵⁾

Analysis

- **The Arizona Constitution's Open Primary Requirement Does Not Apply to Elections for the Office of President.**

Arizona's constitution requires a primary election for the nomination of candidates "for all elective State, county, and city offices, including candidates for United States Senator and for Representative in Congress." Ariz. Const. art. VII, § 10. While the primary election requirement specifies most political offices in Arizona, it makes no mention of, and therefore excludes, the Office of President of the United States. *See Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982) (the expression of one or more items in a class indicates an intent to exclude items of the same class that are not expressed).

Proposition 103 added another sentence to this constitutional requirement for direct primaries, specifying that Proposition 103 voters "may vote in the primary election of any one of the political parties that is qualified for the ballot." 1998 Publicity Pamphlet, Proposition 103. When article VII, § 10 of the constitution is read as a whole, the "primary" identified in the second sentence (added by Proposition 103) logically refers to those primary elections specified in the first sentence. Since the first sentence of § 10 does not include presidential preference elections, it follows that the second reference to "primary" does not either.

The conclusion that presidential preference elections are not within the ambit of Proposition 103 is supported by contrasting the Legislature's Proposition 103 language with the broader language in Proposition 106, a simultaneously proposed initiative that never made it to the ballot. 1998 Publicity Pamphlet, Proposition 106; *see also Open Primary Elections Now v. Bayless*, 193 Ariz. 43, 969 P.2d 649 (1998). If passed, Proposition 106 would have applied to "any primary election held pursuant to the constitution or laws of the State of Arizona or in which public funds are spent." *See* 1998 Publicity Pamphlet, Proposition 106. The Legislature was aware of Proposition 106 when

it considered the language of Proposition 103, chose not to follow it, and adopted a narrower provision. See Hearing on SCR 1014: House of Representatives: Committee on Government Reform & States' Rights, 43rd Legis. 2-4 (May 18, 1998).

Thus, the language of this constitutional provision and its history support the conclusion that Proposition 103 applies only to those primary elections specified in article VII, § 10 and not to presidential preference elections.

B. The Statutes That Implement the Open Primary Provision Do Not Apply to a Presidential Preference Election. Even though the open primary amendment to the Arizona Constitution did not extend to presidential preference elections, the Legislature could have enacted an open presidential preference election by statute. To date, it has not done so. Instead, the Legislature retained the statutory language that says that the presidential preference election is for the purpose of giving voters the opportunity to express their preference "for the presidential candidate of the political party indicated as their preference by the record of their registration." A.R.S. § 16-241(A) (emphasis added). Extending the open primary provisions to the presidential preference election would be contrary to this clear legislative statement that voters participate in the presidential preference election based on party registration.

After the 1998 election, the Legislature changed the procedures for primaries to allow Proposition 103 voters to vote in the primaries for the offices specified in article VII, § 10. See 1999 Ariz. Sess. Laws ch. 30 (codified at A.R.S. §§ 16-467, -542) (the "open primary legislation"). It might be argued that the open primary legislation went beyond what the constitution required and opened the presidential preference election to Proposition 103 voters. Indeed, because the presidential preference election is to be "conducted and canvassed" according to the laws governing primary elections unless "otherwise provided" by the statutes governing the presidential preference election, A.R.S. § 16-241(C), the 1999 amendments arguably created some ambiguity on this issue.

When interpreting statutes, courts begin with the statutory language and may also consider the statute's "context, subject matter, historical background, effects, consequences, spirit and purpose." *Mail Boxes, Etc. v. Indus. Comm'n*, 181 Ariz. 119, 122, 888 P.2d 777, 780 (1995). Based on these factors, any argument that the open primary legislation went beyond Proposition 103 and extended the open primary requirements to the presidential preference election must be rejected for several reasons.

First, such an interpretation of the open primary legislation would conflict with the express language in A.R.S. § 16-241(A) regarding the purpose of the presidential preference election. Second, the open primary legislation did not amend any of the laws in the article governing the presidential preference election. For example, the open primary legislation amended the procedure for requesting early ballots in primary elections described in A.R.S. § 16-542(A)(6) to comply with Proposition 103, but it did not change the early ballot procedure for the presidential preference election set forth in A.R.S. § 16-246.

Third, extending the open primary legislation to the presidential preference election would ignore the many distinctions the Legislature has maintained differentiating presidential preference elections from primaries. For example, these elections have different dates, different procedures for qualifying for the ballot, and different ballot requirements. Compare A.R.S. § 16-241(A) with A.R.S. § 16-201 (dates); A.R.S. § 16-242 with A.R.S. § 16-311 (qualifying for ballot); A.R.S. § 16-245 with A.R.S. §§ 16-462, -464 (ballots). When the Legislature has wanted to make changes to the presidential preference statutes, it has expressly done so. See 1995 Ariz. Sess. Laws ch. 248. It did not do so in the open primary legislation.

Finally, nothing in the legislative history of the measure implementing Proposition 103 suggests that the Legislature intended to extend the open primary provision to the presidential preference election. To the contrary, the legislative record indicates an effort to comply with the new constitutional requirement, nothing more. See Hearing on HB

2184: House Committee On Federal Mandates & States Rights, 44th Legis., 1st Reg.Sess. 2-3 (January 21, 1999) (testimony that HB 2184 is to comply with and implement Proposition 103); Hearing on HB 2184: Senate Committee On Judiciary, 44th Legis., 1st Reg.Sess. 12 (March 9, 1999) (staff testimony that HB2184 implements Proposition 103); Staff on Arizona House of Representatives, 44th Legis., 1st Reg.Sess., Abstract for HB 2184 (1999) (describes HB 2184 as making changes to comply with Proposition 103).

The primary purpose of statutory construction is to determine the Legislature's intent. Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., Inc., 177 Ariz. 527, 529, 869 P.2d 500, 503 (1994). In this case, the statutory language and legislative history indicate that the open primary provisions do not apply to the presidential preference election.

Conclusion

Based on the specific language of the open primary provision of the Arizona Constitution and the statutes that implement it, as well as standard rules of statutory construction, the open primary provision does not extend to presidential preference elections.

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- 1. Your Opinion request and this Opinion refer to Arizona's new "open primary" requirement. The label "open" primary describes a variety of election formats. See *California Democratic Party v. Jones*, 169 F.3d 646, 650 (9th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3154 (U.S. Sept. 2, 1999) (No. 99-401). Closed primaries limit participation to party members. *Id.* Open primaries generally allow any registered voter to vote any party's ballot. This is not true of Arizona's "open primary law." Some States, such as Arizona, have systems characterized as "semi-open" or "semi-closed." See *id.* Yet other States have "blanket" primaries in which all voters receive the same ballot, and voters are not limited to candidates from any single party. *Id.***
- 2. The Legislature has also established a nomination process for general election candidates that does not involve the primary election. See A.R.S. § 16-341 (nominations "otherwise than by primary"). There are also non-partisan primary elections for some local offices, such as city council. See A.R.S. § 9-821.01 (city and town elections).**
- 3. In this Opinion, people registered as "no party preference," as independents, or as members of parties that have not qualified for the ballot will be collectively referred to as "Proposition 103 voters."**
- 4. Parties eligible under State law to appear on the presidential preference ballot include those eligible for continued representation on the ballot under A.R.S. § 16-804 and new political parties eligible to appear on the ballot under A.R.S. § 16-801(A)(2). See A.R.S. § 16-244(A). In *Arizona State Democratic Committee v. Hull*, No. CV96-00909 (Maricopa County Super. Ct., February 1, 1996), the court held that presidential preference elections are different from primary elections and that political parties can choose whether or not to participate in them.**
- 5. There are limits to a State's ability to impose requirements on party delegates that would violate party rules. In *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981), the Supreme Court held that Wisconsin could not bind party delegates to honor the results of an open presidential primary when doing so violated national party rules.**
- 6. Section 16-542, A.R.S., now specifically permits Proposition 103 voters to designate the ballot of one of the political parties when requesting an early primary ballot. However, the early ballot provision governing the presidential preference election reads as it has since its enactment, permitting "any elector who is eligible to vote in the presidential preference election" to request an early ballot. This language does not link**

eligibility to vote in the presidential preference election to eligibility to vote in the primary. The clearest statement in the article governing the presidential preference election regarding who is eligible to vote is the statement of purpose in A.R.S. § 16-241(A), which is based on party registration.

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