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December 9, 2019

**Via U.S. Mail & E-Mail**

Secretary Laurel Lee  
Florida Department of State  
R.A. Gray Building  
500 South Bronough Street  
Tallahassee, Florida 32399-0250  
[SecretaryofState@DOS.MyFlorida.com](mailto:SecretaryofState@DOS.MyFlorida.com)

Re: Ranked Choice Voting for City Commissioners in the City of Sarasota

Dear Secretary Lee:

My law firm represents Rank My Vote Florida, a nonpartisan, not for profit, volunteer organization engaged in political activity and dedicated to expanding the use of ranked choice voting in Florida's elections. Rank My Vote Florida mailing address is 355 West Tropical Trace, Jacksonville, Florida 32259. In 2007 the City of Sarasota voters passed, by an overwhelming majority, a charter amendment authorizing the use of ranked choice voting for city commission elections. However, to date, the ranked choice voting election procedures have yet to be implemented. Rank My Vote Florida seeks to help the City of Sarasota implement ranked choice voting for city commissioner elections.

Pursuant to section 106.23(2), Florida Statutes, this letter seeks a formal opinion as to whether ranked choice voting is permissible in Florida for the election of municipal officers. Based on our legal analysis below, the City of Sarasota is entitled to broad home rule powers and may adopt any election procedures that are not preempted or in conflict with the Florida Election Code. Further, ranked choice voting is not preempted or in conflict with the Florida Election Code. Accordingly, we respectfully request an opinion that affirms the City of Sarasota's right to implement ranked choice voting for the election of city commissioners. We also respectfully request that the Department of State certify a ranked choice voting tabulation module, as well as authorize the City of Sarasota's use of Sarasota county's voting equipment and the respective Supervisor of Elections to conduct and preside over these ranked choice voting elections.

The statutory provision of Florida election law on which this advisory opinion is sought is section 100.3605, Florida Statutes. This statutory provision affects Rank My Vote Florida because it is determinative of whether municipalities, such as the City of Sarasota, may implement ranked choice voting in Florida—the expansion of which is a core mission of Rank My Vote Florida.

An expeditious determination by the Division of Elections is necessary so that the City of Sarasota may finalize implementation of ranked choice voting in time for upcoming elections.

### **Summary of Ranked Choice Voting**

Ranked choice voting (“RCV”) is a voting system that allows voters to rank candidates in order of preference, using those rankings to elect candidates able to combine strong first choice support with the ability to earn second and third choice support. *See* Andrew Spencer et. al., *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, 46 Cumb. L. Rev. 377, 392 (2016). Instead of indicating support for only one candidate, voters in RCV elections can rank the candidates in order of preference. If a candidate has more than half of the vote based on first-choices, that candidate wins. *Id.* If not, then the candidate with the fewest votes is eliminated. *Id.* The voters who selected the defeated candidate as a first choice then have their votes added to the totals of their next choice. *Id.* This process continues until a candidate has more than half of the votes. *Id.* When the field is reduced to two, it has become an “instant runoff” that allows a comparison of the top two candidates head-to-head. *Id.* Ranked choice voting is also known as Instant Runoff Voting (“IRV”). *Id.*

The benefits of RCV include: eliminating the need for costly runoff procedures, preventing polarized election campaigns and reducing negative political campaigns, and decreasing the likelihood of vote-splitting. *See* Sacha D. Urbach, *Reclaiming Electoral Home Rule: Instant-Runoff Voting, New York City's Primary Elections, and the Constitutionality of Election Law S 6-162*, 46 Fordham Urb. L.J. 1295, 1311 (2019).

### **Sarasota Charter Amendment**

In 2007, voters in Sarasota, Florida, passed a ballot initiative approving the implementation of RCV for the election of city commissioners. The approved ballot initiative amended the City of Sarasota’s charter to require the use of RCV as the method by which all city commissioners are elected. The text of the amendment provides:

(c) District seats.

(1) When two (2) or more persons qualifies as candidates for one (1) of the three (3) district seats on the city commission, the qualifiers shall have their names placed on the ballot for the city election to be held on the second Tuesday in March. The initial round of counting shall be a count of the first choices marked on each ballot.

(2) If no candidate receives a majority of first choices, there shall be a second round of counting. The candidate with the fewest number of votes shall be eliminated, and all the continuing ballots shall be recounted. Each continuing ballot shall be counted as one vote for that ballot's highest ranked advancing candidate.

(3) If no candidate receives a majority of votes of continuing ballots at the second round of counting there shall be a third round of counting. The candidate with the fewest number of votes shall be eliminated. and all the continuing ballots shall be recounted. Each continuing ballot shall be counted as one vote for that ballot's highest ranked advancing candidate.

(4) The process of eliminating the candidates with the fewest number of votes and recounting all the continuing ballots shall continue until one candidate receives a majority of the votes of continuing ballots in a round. The candidate who receives a majority of the votes of continuing ballots in a round shall be deemed and declared to be elected.

(5) When a ballot becomes an exhausted ballot it shall not be counted in that round or any subsequent round.

(6) When only one (1) person qualifies as a candidate for a district seat on the city commission, the name of such person shall not appear on the ballot, and such person shall be declared elected and shall assume office at the same time and in the same manner as if elected in the regular city election.

(d) At-large seats.

(1) When three (3) or more persons qualify as a candidate for the office of city commissioner for the two (2) at-large seats on the city commission the qualifies shall have their names placed on the ballot for the city election held on the second Tuesday in March. The initial round of counting shall be a count of the first choices marked on each ballot.

(2) If no candidate receives a majority of first choices, there shall be a second round of counting. The candidate with the fewest number of votes shall be eliminated, and all the continuing ballots shall be recounted. Each continuing ballot shall be counted as one vote for that ballot's highest ranked advancing candidate.

(3) If no candidate receives a majority of votes of continuing ballots at the second round of counting, there shall be a third round of counting. The candidate with the fewest number of votes shall be eliminated. and all the continuing ballots shall be recounted. Each continuing ballot shall be counted as one vote for that ballot's highest ranked advancing candidate.

(4) The process of eliminating the candidates with the fewest number of votes and recounting all the continuing ballots shall continue until one candidate receives a majority of the votes of continuing ballots in a round. The candidate who receives a majority of the votes of continuing ballots in a round shall be deemed and declared to be elected to the first at-large seat.

Although the initiative passed with over 77% of the vote, the initiative was not immediately implemented because Sarasota County, which is responsible for providing voting equipment under Florida law, did not own compatible voting machines. In 2015, Sarasota County purchased new machines which are compatible for ranked choice voting, although additional software needed to be developed. Moreover, to date, the Florida Secretary of State Division of Elections has not certified the tabulation equipment for automatic counting of the ballots in a ranked-choice voting election. Thus, RCV has yet to be implemented in Sarasota.

### **Legal Analysis re: Ranked Choice Voting for City Commission Elections in Florida**

In order to understand the legality of RCV for municipalities in Florida, several key concepts must be explained: Florida's home rule power, Florida's election laws, and the intersection of the two as it relates to RCV.

#### **Florida Home Rule Power**

In 1968, the Florida Constitution was amended to authorize local home-rule powers for both cities and charter counties. Specifically, the current Florida Constitution at Art. VIII, § 6(e) provides for home rule when it states in relevant part:

Article VIII, Sections 9, 10, 11 and 24, of the Constitution of 1885, as amended, shall remain in full force and effect as to each county affected, as if this article had not been adopted, until that county shall expressly adopt a charter or home rule plan pursuant to this article. All provisions of the Metropolitan Dade County Home Rule Charter, heretofore or hereafter adopted by the electors of Dade County pursuant to Article VIII, Section 11, of the Constitution of 1885, as amended, shall be valid, and any amendments to such charter shall be valid; provided that the said provisions of such charter and the said amendments thereto are authorized under said Article VIII, Section 11, of the Constitution of 1885, as amended.

However, in 1972 the Florida Supreme Court, significantly narrowed the scope of the 1968 amendment, suggesting that unless a city's action was clearly reasonable, any dispute regarding the action should be resolved against the local government. *See City of Miami Beach v. Fleetwood Hotel*, 261 So. 2d 801, 803 (Fla. 1972). In response to that decision, in 1973 the Florida Legislature passed the Municipal Home Rules Power Act ("Home Rule Act"). *See Fla. Stat. § 166.021(1)*. The Home Rule Act specifically states that local governments should be able to act unless otherwise provided by law. In Florida, courts have interpreted this provision to mean that local government action should only be prohibited if the action is either 1) preempted by state law or 2) in conflict with state law. *See generally Tallahassee Mem'l Reg. Med. Ctr. v. Tallahassee Med. Ctr.*, 681 So.

2d 826 (Fla. 1st DCA 1996); *see also Orange Cty. v. Singh*, 268 So. 3d 668, 674 (Fla. 2019) (describing home rule powers in context of Florida election code).

With respect to preemption, a local action may be expressly or impliedly preempted by state law. Express preemption generally exists when a state statute demonstrates an intent to completely occupy the field of regulation. *See, e.g., Florida Power Corp. v. Seminole County*, 579 So. 2d 105 (Fla. 1991) (holding statute expressly preempted the area of utility rate regulation). Implied preemption can be found in instances in which the state has regulated “pervasively,” however this is limited to a very narrow class of cases. *Tallahassee Mem’l Reg’l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996) (“Implied preemption should be found to exist only in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.”).

Notably, section 97.0115, Florida Statutes, was enacted in 2010 in response to the Florida Supreme Court’s decision in *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 2010), which held that the Florida Election Code does not impliedly or expressly preempt the field of election law. Through the enactment of section 97.0115, the Legislature expressly stated that “all matters” *set forth* in the Florida Election Code are preempted to the state. *See* § 97.0115, Fla. Stat. (emphasis added). Section 97.0115 further provides that the conduct of municipal elections shall be governed by section 100.3605, Florida Statutes, which states:

The Florida Election Code, chapters 97-106, shall govern the conduct of a municipality's election in the absence of an applicable special act, charter, or ordinance provision. No charter or ordinance provision shall be adopted which conflicts with or exempts a municipality from any provision in the Florida Election Code that expressly applies to municipalities.

§ 100.3605(1), Fla. Stat.

With respect to conflicts, local action must be able to coexist with the state legislation without frustrating its purpose. *See City of Jacksonville v. Am. Env’tl. Servs., Inc.*, 699 So. 2d 255, 256 (Fla. 1st DCA 1997); *see also Lowe v. Broward County*, 766 So. 2d 1199 (Fla. 4th DCA 2000) (“[A] conflict is whether one must violate one provision in order to comply with the other. Putting it another way, a conflict exists when two legislative enactments ‘cannot coexist.’”). A local action cannot 1) provide for more stringent regulation than the state legislation in violation of the express wording of the statute; 2) provide for a more stringent penalty than that allowed by state statute; 3) prohibit behavior otherwise allowed by state legislation; 4) allow behavior otherwise prohibited by state statute; or 5) provide for a different method for doing a particular act than the method proscribed by state legislation. Judge James R. Wolf & Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, Fla. B.J., June 2009, at 92, 93.

### **Florida Election Law**

The dichotomy between general elections and municipal elections in Florida is essential for evaluating whether RCV is permissible for city commissioner elections. Article VI, section 1, of the Florida Constitution states “[a]ll elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast.” In contrast, Article VI, section 6, of the Florida Constitution states that “[r]egistration and elections in municipalities shall, and in other governmental entities created by statute may, be provided by law.” Thus, even the text of the Florida Constitution recognizes a distinction between general elections and municipal elections. This is critical as it is apparent that election procedures applicable to general elections are not equally applicable to municipal elections, unless stated otherwise.

Although “general elections” is a term used colloquially for a variety of types of elections, the Florida election code ascribes it a particular meaning which is distinct from municipal elections. Section 97.021, Florida Statutes, defines a “general election” as “an election held on the first Tuesday after the first Monday in November in the even-numbered years, for the purpose of filling national, state, county, and district offices and for voting on constitutional amendments not otherwise provided for by law.” § 97.021(16), Fla. Stat.

Similarly, section 100.031 provides that “A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective federal, state, county, and district officer whose term will expire before the next general election. . . .” § 100.031, Fla. Stat. Moreover, section 100.041 provides a list of the officers that must be chosen at a general election which includes: state senators, members of the House of Representatives, the Governor, administrative officers of the executive branch, county commissioners, school board members, and superintendents of schools. Importantly, city commissioners or other municipal officers are absent from this list.

As described above, section 100.3605 governs the conduct of municipal elections and expressly permits municipalities from establishing election procedures, so long as they are not in conflict with any provision in the Florida Election Code that “expressly applies to municipalities.” § 100.3605(1), Fla. Stat.. Again, provisions applicable to general elections, unless expressly stated otherwise, are not applicable to municipal elections.

### **Analysis RCV in the City of Sarasota**

At issue, then, is whether something in the Florida Election Code expressly or impliedly preempts RCV, or, whether RCV conflicts with a provision of the Florida Election Code that is applicable to municipalities, such that the City of Sarasota’s home rule powers would be limited. As described above, section 100.3605(1) expressly permits municipalities to adopt election procedures. Thus, preemption is not at issue. Instead, the question is whether RCV conflicts with a provision of the Florida Election Code applicable to municipalities.

In December 1977, the Division of Elections issued an opinion as to which provisions of the Florida Election Code was applicable to municipalities. See FL Division of Elections Opinion,

DE 77-37 (December 20, 1977). The opinion noted that “[t]he primary application of the code is to elections for county, state, and national officers,” but that Chapter 106 (related to campaign financing), voter registration provisions, resign-to-run laws, certain provisions related to bond referendums and recall, and Chapter 101 provisions related to instructions to electors, secret voting, official ballots, distribution of ballots, and municipal elections change of dates for cause are all applicable to municipalities. None of these provisions are in express conflict with RCV.

Moreover, to the extent there is a suggestion that elections must be determined by a plurality, the plain text of both the Constitution and relevant statutes make clear that the plurality provision exclusively applies to general elections *and* that the election of city commissioners is not properly categorized as a general election. As such, RCV is not in conflict with the plurality provision.

In sum, municipalities are granted broad home rule powers to establish election procedures, so long as those procedures are not preempted or in conflict by the Florida Election Code. Here, there is nothing in the Florida Election Code that preempts or conflict with RCV. Accordingly, the City of Sarasota is permitted to adopt RCV election procedures.

#### **Other Governmental Entities Using Ranked Choice Voting**

The following cities currently utilize some form of RCV: Basalt, Colorado (mayor); Berkeley, California (mayor, city council and city auditor); Cambridge, Massachusetts (city council and school board), Carbondale, Colorado (mayor); Eastpointe, Michigan (city council); Las Cruces, New Mexico (all municipal elections); Minneapolis, Minnesota (mayor and city council); Oakland, California (various municipal offices); Payson, Utah (city council); Portland, Maine (mayor); San Francisco, California (various municipal offices); San Leandro, California (mayor and city council); Santa Fe, New Mexico (mayor, city council, and municipal judge); St. Louis Park, Minnesota (municipal offices); St. Paul, Minnesota (mayor and city council); Takoma Park, Maryland (mayor and city council); Telluride, Colorado (mayor); Vineyard, Utah (city council). *See* FairVote, *Ranked Choice Voting / Instant Runoff* (last accessed Dec. 3, 2019), [https://www.fairvote.org/rcv#where\\_is\\_ranked\\_choice\\_voting\\_used](https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used). Recently, New York City voters approved RCV for all city primary and special elections starting in 2021. *Id.*

In 2016, Maine became the first (and only) state to approve RCV for all state and federal primary elections, as well as all general elections for Congress, president, and presidential primaries. *Id.* On November 6, 2018 Maine voters elected two House members and a US Senator using ranked ballots. *See* FairVote, *Spotlight: Maine* (last accessed Dec. 3, 2019), [https://www.fairvote.org/spotlight\\_maine#november\\_2018\\_maine\\_elections](https://www.fairvote.org/spotlight_maine#november_2018_maine_elections). Notably, the RCV system cannot be used for gubernatorial or state races in Maine because a provision in Maine’s state constitution mandates that these elections be determined by a plurality of votes, however RCV can be used for state primaries and federal elections. *See Opinion of the Justices*, 162 A.3d 188, 209, as revised (Me. Sept. 19, 2017).

With respect to federal constitutional challenges to RCV, a majority of courts have upheld RCV as consistent with federal constitutional requirements. *See e.g., Dudum v. Arntz*, 640 F.3d

1098, 1100 (9th Cir. 2011); *Baber v. Dunlap*, 376 F. Supp. 3d 125, 128 (D. Me. 2018), appeal dismissed, No. 18-2250, 2018 WL 8583796 (1st Cir. Dec. 28, 2018); *Minnesota Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 685 (Minn. 2009).

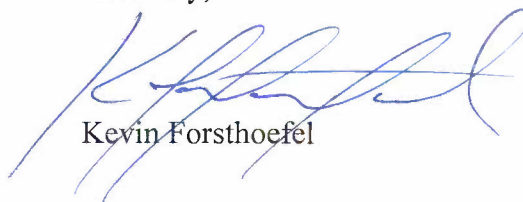
With respect to other Florida cities, Jacksonville is currently attempting to implement RCV. Importantly, although not directly related to RCV, many municipalities currently use some form of a run-off, such as the City of Jacksonville, City of Miami Beach, the City of Lakeland, the City of Fernandina Beach, the City of Orlando, and the City of Winter Park, to name a few. In each of these instances, a majority vote is required. Thus, there is nothing inherently problematic with using RCV (which is a form of a majority vote) in Florida municipal elections.

### Conclusion

For the reasons discussed above, we respectfully request that the Secretary of State affirm the City of Sarasota's right to conduct its own elections in a manner that does not conflict with the Florida Election Code and permit ranked voting choice procedures for the election of city commissioners. We also respectfully request that the Department of State certify a ranked choice voting tabulation module, as well as authorize the City of Sarasota's use of Sarasota county's voting equipment and the respective Supervisor of Elections to conduct and preside over these ranked choice voting elections.

Myself and representatives of Rank My Vote Florida would appreciate the opportunity to meet with you, or your designee, and any other representatives of the Division of Elections to further these discussions. Please let me know when you would be available for a meeting. I look forward to hearing from the Department.

Sincerely,



Kevin Forsthoefer

cc (via email):

Senator Joe Gruters  
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