IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2505

FLORIDIANS FOR A LEVEL PLAYING FIELD, ET AL.,

Petitioner,

vs.

FLORIDIANS AGAINST EXPANDED GAMBLING, THE HUMANE SOCIETY OF THE UNITED STATES, and GREY2K USA, INC.,

Respondents.

PETITIONER'S INITIAL BRIEF IN SUPPORT OF JURISDICTION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL FOR THE FIRST DISTRICT OF FLORIDA (LIMITED TO CONFLICT AND CLASS OF STATE OFFICERS JURISDICTION)

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STATEMENT OF THE CASE AND FACTS

On November 2, 2004, Florida voters approved a constitutional amendment that "Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facility." The Amendment is now Article X, § 23 of the Florida Constitution. In subsequent elections in Dade and Broward Counties, the voters in Broward approved the placement of slot machines in Broward County parimutuel facilities; Miami-Dade voters did not approve such placement. Prior to the November 4, 2004 general election, the Respondents filed suit in Leon County Florida against the organizers of the constitutional initiative, Floridians for a Level Playing Field, and also sued the Secretary of State and the Supervisors of Elections of Broward, Duval, Escambia, Flagler, Hillsborough, Leon, Miami-Dade, Nassau, Okaloosa, Orange, Pasco, Palm Beach, Pinellas, Santa Rosa, St. Johns, and Volusia Counties. The Complaint alleged that "the Slots Initiative petition did not satisfy the requirements of Article XI, section 3 of the Florida Constitution because paid petition gatherers committed fraud to obtain signatures, and the names and addresses of the paid petition gatherers were not included, in violation of section 100.371, Florida Statutes, as amended by Chapter 97-13, section 22, Laws of Florida." *Floridians Against Expanded Gambling, et al v. Floridians for a Level*

Playing Field, et al., 31 Fla. L.Weekly D3008, 2006 WL 3438404 (Fla. 1st DCA 2006); Appendix A, p. 3.

The Circuit Court viewed the allegations as "serious, warrant[ing] discovery and record development," but found that the issues "are not suitable for expedited final hearing before the November 2, 2004, election." *Id.*, p. 7. The Respondents did not seek any expedited or emergency review of that order. After the election, the court entered summary judgment, holding that the general election passage of the proposed amendment cured any alleged failure to obtain the necessary signatures and that "the doctrine of separation of powers dictated courts should not interfere with the method used by the Supervisors of Elections to verify signatures." *Id.*

A panel of the First District reversed, holding that fraud in obtaining signatures, if proven, would not be cured by a subsequent election. Rehearing en banc was granted upon the motion of Floridians for a Level Playing Field and the en banc court held that because "the [alleged] defect was challenged before the election, it could not be cured by the election" (*id.* at 11) and that an election would not cure fraud "purposely designed to thwart the constitutional requirements that a proposed initiative must demonstrate sufficient public support *before* voters decide whether to revise the state's organic law." *Id.* at 12 (emphasis in original).

The First District reversed the summary judgment and remanded for a trial to determine whether there was non-compliance with the signature gathering requirements. It also rejected the trial court's view that the separation of powers doctrine precluded review of the certification procedures used by election officials. App. A, p. 7, n.3. The court then certified two questions to this Court:

> I. WHETHER VALIDATIONS OF SIGNATURES BY SUPERVISORS OF ELECTIONS CAN BE CHALLENGED BASED UPON ALLEGATIONS OF FRAUD AFTER CERTIFICATIONS OF SIGNATURES HAVE BEEN ACCEPTED BY THE SECRETARY OF STATE AND THE BALLOT PRINTED AND ABSENTEE VOTING COMMENCED IN ACCORD WITH FLORIDA LAW?
>
> II. WHETHER AN AMENDMENT TO THE FLORIDA CONSTITUTION THAT IS APPROVED BY VOTE OF THE ELECTORS MAY BE SUBSEQUENTLY INVALIDATED IF, IN AN ACTION FILED BEFORE THE ELECTION, THERE IS A SHOWING MADE AFTER THE ELECTION THAT NECESSARY SIGNATURES ON THE PETITION PROPOSING THE AMENDMENT WERE FRAUDULENTLY OBTAINED?

Id. at 16-17.

Judges Kahn, Ervin and Wolf concurred with the certification, but dissented

from "both the approach and the result reached by the majority as to the merits," with Judge Kahn writing that "the majority decision. . . will stand completely alone in the body of Florida jurisprudence" and that "decades of supreme court precedent" were contrary to the majority decision. *Id.* at 18.

Floridians for a Level Playing Field then filed its Notice to Invoke Discretionary Review based on the certified questions and two other bases: express and direct conflict and that the decision affected a class of state officers. Accompanying this Brief is a Motion to Permit the Filing of a Brief on Jurisdiction addressed to those two bases for jurisdiction.

SUMMARY OF THE ARGUMENT

For over ninety-years, Florida law has been that an election cures any procedural defect in the process leading to the ballot placement for an initiative Amendment. The "voice of the people" trumps allegations of error and irregularities in accessing ballot placement. Only if the defect is substantive – misleading voters about the meaning and effect of the initiative proposal – can the doctrine of curability be overridden by a court. The decision below expressly conflicted with the "voice of the people" election cure doctrine and expressly affected a class of state officers. Therefore this Court should exercise its jurisdiction on those bases in addition to the certified question basis.

ARGUMENT

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND EXPRESSLY AFFECTS A CLASS OF STATE OFFICERS

A. Conflict

The law of Florida (and the majority of American courts) is that "the popular voice is the paramount act, and that mere formal or procedural irregularities in the framing, manner or, form of submission or balloting, will not be held fatal to the validity of such amendment after it has been actually agreed to." *State ex rel Landis v. Thompson*, 163 So. 270, 276 (Fla. 1935). The principle is that elections are not set aside based on allegations of pre-election misconduct. The maxim *vox populi vox Dei* (the voice of the people is the voice of God) (WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, Random House Publishing 1996)) provides the foundation for the *Landis* principle – a principle first articulated in *West v. State*, 39 So. 412 (Fla. 1905). This principle was later confirmed in *Collier v.* Gray, 157 So. 40, 45 (Fla. 1934) and *Pearson v.*

Taylor, 32 So. 2d 826 (Fla. 1947), which cited *Landis, West* and *Crawford v. Gilchrist*, 59 So. 963 (Fla. 1912) in rejecting a challenge to election results based on alleged defects in the process leading to the ballot: "[M]ore than once we have said, in substance, . . . the defect [in proposing an amendment] was cured by the election itself." *Pearson*, 32 So. 2d at 827.

The court below misused *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000) to support its view. The court said that " based on *Armstrong*, a subsequent election can act as a cure *only* when a challenge has not been raised prior to the election *and* the challenge involves only a defect in the form of the submission." App. A, p. 10 (emphasis supplied).[1] The First District also stated: "As *Armstrong* held, '[a] proposed amendment cannot fly under false colors.' Although *Armstrong* used this metaphor to represent the constitutional requirement that the true effect of a constitutional amendment must be accurately summarized for the voters, it is equally applicable where a party uses fraud to create the illusion of compliance with mandatory constitutional provisions." App. A, p. 11.

But that is not what *Armstrong* held. *Armstrong's* statement that "it is impossible to say with certainty what the vote of the electorate would have been 'if

[1] The court went one step further when it wrote (using *Armstrong*) that "even if the proposed amendment had not been timely challenged," fraud could not

the voting public had been given the whole truth'" (773 So. 2d at 21) addressed ballot language that failed to disclose that the proposed amendment eliminated the state constitutional prohibition against cruel or unusual punishment. It in no way addressed alleged defects in the process leading to ballot placement. *Armstrong* involved a defect which went "to the very heart of the amendment." *Id.* It was substantive because voters might not have known the true effect of their vote. That is not the case here. The dissent below correctly distinguished *Armstrong* from the "long line of cases" in which this Court established that procedural irregularities are cured when an electorate approves a measure. *See* App. A, p. 26, *citing Landis, Collier, West* and *Pearson*.

Because there is conflict with those cases this Court should exercise its jurisdiction on that basis as well as the certified question basis.

B. Class of State Officers

The Respondent sued 16 Supervisors of Elections. The Supervisors of Elections represent a class of state officers. *See Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840 (Fla. 1993) (reviewing a writ of mandamus compelling the Hillsborough County Supervisor of Elections "to count and validate petition signatures.") In *Krivanek*, this Court stated: "We find that the district

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be cured by an election. App. A, p. 11.

court's decision in this case expressly affects a class of constitutional officers, specifically, how supervisors of elections are to determine the validity of signatures on initiative petitions." *Id.* at 841.

The same rule applies here. The respective Supervisors' certification and validity determination process is implicated by the decision below. Therefore the decision expressly affects a class of state officers, giving rise to jurisdiction in this Court.

CONCLUSION

For the foregoing reasons this Court should accept jurisdiction on the basis of conflict and express affect upon a class of state officers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

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