IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC06-2505

FLORIDIANS FOR A LEVEL PLAYING FIELD, et. al.,

Petitioners,

vs.

FLORIDIANS AGAINST EXPANDED GAMBLING,
THE HUMANE SOCIETY OF THE UNITED STATES,
GREY2K USA, INC., KURT S. BROWNING, in his
official capacity as Secretary of State, and the FLORIDA
DEPARTMENT OF STATE,

Respondents.

On Discretionary Review from a Decision of the
First District Court of Appeal

ANSWER BRIEF OF RESPONDENTS SECRETARY OF STATE KURT S. BROWNING AND FLORIDA DEPARTMENT OF STATE

Lynn C. Hearn (FBN 0123633)
General Counsel
Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399
(850) 245-6536
(850) 245-6127 (fax)

BILL MCCOLLUM
ATTORNEY GENERAL
Scott D. Makar (FBN 709697)
Solicitor General
Timothy D. Osterhaus (FBN 133728)
Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681/(850) 410-2672 (fax)

Counsel for Respondents Secretary of State Kurt S. Browning

and Florida Department of State

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STATEMENT OF THE CASE AND FACTS

Respondents, Secretary of State Kurt S. Browning and the Florida Department of State ("State Respondents") adopt the statements of case and facts set forth in the First District's en banc decision. *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field ("FAEG")*, 945 So. 2d 553, 557 (Fla. 1st DCA 2006) (en banc). The following matters are briefly emphasized because they relate to the State Respondents' argument that this Court should dismiss this action for prudential reasons.

At issue is a challenge to a citizens' initiative proposing a constitutional amendment authorizing slot machines in pari-mutuel facilities in Miami-Dade and Broward Counties (the "Slots Initiative"), which was ultimately approved in the November 2, 2004 general election.

Prior to the election, Floridians Against Expanded Gambling ("FAEG") filed suit against the initiative sponsor, Floridians for a Level Playing Field ("FLPF"), claiming that the signature requirements for petitions under article XI, section 3 of the Florida Constitution had not been met and that the initiative reached the ballot through FLPF's fraudulent practices. [R1-1, R1-71] The allegations involved many types of fraud, which are described and discussed below in section I.B.

The case was not expedited and the initiative was passed by the voters before the trial court resolved the pending claims. [R2-33] FLPF thereafter moved for summary judgment, asserting that the election cured any of the deficiencies arising from the alleged fraud and the initiative's placement on the ballot. [R2-262] The trial court granted the motion on January 6, 2005. [R3-415]

On appeal, a panel of the First District and subsequently the court en banc in a dividend vote reversed. *FAEG*, 945 So. 2d at 562. The court held that the allegations, including those of fraud, accepted as true for purposes of summary judgment, supported the claim that the constitution's signature requirements for a proposed constitutional amendment were violated. *Id.* at 560-61. The court concluded by:

> remand[ing] for a trial to determine whether [FLPF] failed to obtain the constitutionally required signatures for submission to the voters. If the trial court determines such failure occurred, and no remaining defenses apply, the trial court should declare the Slots Initiative invalid.

Id. at 562. The court was split 7-5 on whether to certify the questions presented by motion of FLPF to this Court – accepting verbatim the first certified question framed by FLPF and the second with a minor alteration. *Id.* at 562, 567 (Padovano, J., concurring in part and dissenting in part). This Court by a 4-1 vote accepted jurisdiction of the certified questions in its March 27, 2007 order.

The questions addressed in the First District's actual decision are somewhat different from the certified questions. The questions addressed in the First District's en banc decision were stated as follows:

> [W]e are confronted with two questions, each of which is based upon Appellants' factual assertions, which are presumed to be true for purposes of final summary judgment. First, is a failure to comply with mandatory constitutional prerequisites automatically cured, as a matter of law, once an election is held, when a lawsuit challenging compliance is brought prior to the election? Second, is a party who seeks to amend the Florida Constitution and those employed by that party exempt, as a matter of law, from actual compliance with mandatory constitutional prerequisites for amending the Constitution if they create the illusion of compliance through fraudulent activities, and the amendment is subsequently approved by the voters?

Id. at 556. In contrast, the certified questions are framed as follows:

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 562.

SUMMARY OF ARGUMENT

This Court should not pass upon the certified questions and, instead, should dismiss this action as improvidently granted. No compelling reason exists for this Court to exercise its jurisdiction and use its scarce judicial resources to pronounce advisory standards on important legal issues given the total absence of factual development below. The First District's decision is based on a specific set of alleged facts, accepted for purposes of summary judgment, which may or may not prove accurate following discovery and a trial. Because the alleged facts are unsupported by record evidence at this point, this Court should dismiss the action, decline to issue an advisory opinion, and allow for the orderly development of ultimate facts at trial. *See State v. Schebel*, 723 So. 2d 830 (Fla. 1999).

Given that the types and degree of fraudulent conduct ultimately proved may differ from that alleged in the complaint, the prudential course for this Court is to allow the First District's ruling to stand and await full factual development prior to an appeal to this Court. Any pronouncement of legal principles at this point is necessarily an academic exercise given the need for a clearer demonstration of the facts and analysis of what remedy, if any, is appropriate for any proven fraudulent conduct. Discussion of legal principles that apply to the *alleged* facts will likely

shed little light on how these principles will apply to whatever fraud *actually existed*. Moreover, the Court must have a factual basis for determining whether the proven fraud affected the constitutional requirements for placement of the proposed amendment on the ballot. In short, the appropriate legal principles and remedy cannot be established with certainty until the facts themselves are established with certainty.

As it stands, the First District's ruling only reversed an order granting summary judgment based on factual allegations deemed true. It did not decide the case, but merely allowed the trial court to make factual findings as to whether FLPF failed to meet the constitutionally mandated signature requirements. The certified questions, however, do not directly address this precise issue, instead they focus on the alleged fraud and its possible effects on the validation of signatures and the potential remedies. In the past, this Court has generally declined to review questions different than those passed upon by the district court. *Pirelli Armstrong Tire Corp. v. Jensen*, 777 So. 2d 973, 974 (Fla. 2001). Additionally, the alleged fraud here could turn out to be non-existent, or, conversely, far more pervasive than alleged. A rule fashioned by this Court at this time in response to the certified questions ultimately might not have any meaningful application to this case and might not assist in bringing it to final resolution.

Finally, this case involves potentially conflicting legal principles that do not lend themselves to full and meaningful resolution at this time. The long-standing principle that an election cures irregularities in the process and thereby promotes finality and administrative efficiency is a weighty one; similarly, the ability of citizens to amend the state constitution through the initiative process without fraud is extremely important. This Court should avoid making rulings affecting the application of these principles until the specific allegations of fraud are adjudicated. A fully-developed record with a set of proven facts will allow this Court to carefully consider and balance the competing legal principles; that cannot properly be done based on speculative, unproven factual allegations.

For all these reasons, the Court should dismiss this action due to review having been improvidently granted and remand for trial on the merits.

ARGUMENT[1]

I. This Court Should Not Pass Upon The Certified Questions And, Instead, Should Dismiss This Action As Improvidently Granted.

Discretionary review of the two certified questions is unwarranted for a number of prudential reasons, each of which is discussed below.

A. Discretionary review is unwarranted because the First District's decision is based entirely on allegations, presumed true for purposes of summary judgment only, that may prove to be inaccurate thereby making this Court's decision advisory in nature.

A compelling reason to decline review is that the First District's decision is based entirely on allegations that may ultimately prove to be inaccurate. Absent concrete facts, this Court will be basing its decision on unproven allegations and thereby be issuing what amounts to an advisory opinion.

In similar situations involving certified questions and speculative facts, this Court has had little hesitation to dismiss review as improvidently granted. For example, in *State v. Schebel*, 723 So. 2d 830 (Fla. 1999) this Court dismissed certified questions as improvidently granted because they were based on speculative, unproven facts. The Court stated: "Were we to base an opinion on the

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[1] ***Standard of Review:*** Whether this Court should dismiss a case as improvidently granted is subject only to this Court's discretion. Art. V, § 3(b)(4), Fla. Const. (2007). The standard of review governing questions of law presented is *de novo*.

speculative facts [one party] alleges, our opinion would necessarily be advisory in nature." *Id.* at 830. This same result should apply here thereby sparing the Court from ruling in the abstract now on untested allegations versus ruling later on proven facts.

Moreover, it is a well-established judicial principle that, absent important reasons, this Court should not engage in the practice of issuing advisory opinions. *See id.* (declining jurisdiction because a decision on speculative facts "would necessarily be advisory in nature"). In short, this Court should decide that now is not the time to decide the questions presented, particularly when the alleged facts may never be proven.

B. Discretionary review is unwarranted because adjudication of the various types of fraud alleged is necessary to determine what remedy, if any, is appropriate.

The First District's decision did not finally decide the case; it merely allowed the case to proceed so that the various types of alleged fraud could be subject to discovery, trial, and an appropriate remedy, if any. *FAEG*, 945 So. 2d at 561 (reversing summary judgment without regard for "whether Appellants may be able to prove their assertions at trial"). Whether the alleged facts will ultimately be proven, and the different types of fraud demonstrated, is entirely uncertain. For this

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Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000).

reason, it is impossible for this Court to determine what remedy, if any, would ultimately be proper in this case making review at this juncture imprudent.

Notably, the allegations of fraud involve many types of conduct that, if ultimately proven, may be either innocuous or pernicious. Some of the allegations are that:

- FLPF "paid collectors committed fraud by forging signatures and fabricating names on a large number of the initiative petitions";
- many individuals "who were identified as signing a petition unequivocally stated they did not sign a petition for the Slots Initiative";
- some individuals were falsely told the nature of the proposed amendment and were tricked into signing a petition;
- some "signatories were deceased at the time they allegedly signed their petitions;" and
- thousands of petitions "were procured by fraud … then used … to deceive the various Supervisors of Elections, … to create the illusion that it had obtained the constitutionally required number and geographic dispersal of signed petitions."

945 So. 2d at 557; [R1-84-89] Some of these allegations may be proven to be the result of intentional, consequential fraud; others may not. Indeed, signatures can be invalid for many reasons. They can be illegible or forged; they can be from unregistered electors or fictitious or deceased persons; they can be from persons

who claim not to have signed them or persons allegedly tricked into signing the petitions; and they can be copied from other petitions.

The allegation of invalid signatures from fictitious persons is a good example. *Id.* While a petition with a fictitious signature and address (*e.g.,* "George Washington, 1600 Pennsylvania Avenue") is invalid, it is not necessarily a result of a sponsor's fraud. Signature collectors are heavily dependent upon a signer's good faith. Through no fault or "fraud" on the part of collectors, some percentage of signatures collected will be invalid. Supervisors know this and take account of it in their review. Likewise initiative sponsors routinely plan for this contingency and collect more signatures than necessary knowing that some portion of signatures will fail verification.[2] For these reasons, allegations of fraud based on the presence of "fictitious," "illegible," or "defective" signatures may prove to be less the result of fraud by the petition's sponsors and more the result of inaccurate information provided by the signers themselves.

In contrast, the claim that the initiative would not have gained ballot access but for outright deception by sponsors submitting intentionally forged signatures

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[2] *See, e.g., Citizens Proposition for Tax Relief v. Firestone,* 386 So. 2d 561, 567 (Fla. 1980) (cautioning that "verification is an element of ballot integrity and … those who seek to place an initiative petition on the ballot are best advised to submit petitions for verifications sufficiently in advance of the last date for filing to afford an adequate time for proper verification of electors").

and fabricated names presents a different scenario. This type of willful misconduct by initiative sponsors bears directly on ballot integrity and, if proven, merits greater leeway for legal challenges and remedies.[3] Because the facts will ultimately show varying degrees of fraud, negligence, or simple mistakes, it is entirely speculative at this juncture to know what remedy, if any, might ultimately be appropriate.

For this reason, the Court should not prematurely review or announce important legal principles based on the existing record. The alleged fraud may ultimately be proven to be more egregious in some respects, minor in other respects, or simply nonexistent. Until the factual "mix" of the types and degrees of alleged fraud are ultimately determined, the question of whether an election cures such deficiencies or whether an election should be overturned need not be answered.

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[3] *See, e.g., Wadhams v. Bd. of County Comm'rs,* 567 So. 2d 414, 418 (Fla. 1990) ("Deception of the voting public is intolerable and should not be countenanced."); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998) (noting the "necessary distinction between an election contest with a judicial determination of fraud and … [one with] substantial noncompliance with statutory election procedures, even if the noncompliance is determined to be the result of gross negligence"); *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975) ("Notably existent in this dispute is the complete absence of any allegation of fraud, gross negligence or even the hint of intentional wrongdoing, … [If we countenance a result] contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained ....").

C. Discretionary review is unwarranted because the certified questions are phrased differently from the actual questions the First District addressed thereby making this Court's review unnecessary and inadvisable.

The First District's actual decision and its certified questions are phrased differently thereby making this Court's review both unnecessary and inadvisable.

The First District's *decision* posed the ultimate question as whether on remand enough valid signatures could be shown irrespective of fraud; its *certified questions*, however, are based solely on issues of fraud. While alleged fraud and its implications were generally discussed below, the First District ultimately omits a reference to fraud in directing the trial court on remand to determine "whether [FLPF] failed to obtain the constitutionally required signatures for submission to the voters." 945 So. 2d at 562. If this failure occurred and no defense applies, the "trial court should declare the Slots Initiative invalid." *Id.*

In contrast, the certified questions present exclusively fraud-related issues. They do not directly address the ultimate question on remand set forth in the First District's decision. This difference is material as this Court generally will not review questions different than those passed upon by the district court. *Pirelli Armstrong Tire Corp. v. Jensen*, 777 So. 2d 973, 974 (Fla. 2001) ("[B]ecause in rendering its decision, the second district did not pass upon the question certified to this court,

we are without jurisdiction to review this case."). Moreover, the certified questions are not of great public importance because they are unnecessary to resolve the case. *See State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999) ("After a more complete review of the certified question and decision of the First District, we conclude that the actual legal question deals with an extremely narrow principle of law, and, as phrased, does not present an issue of 'great public importance.'").

Notably, even if this Court affirmatively answers the certified questions, the following questions will still exist:

- Must a pre-election challenge allege a *consequential* amount of fraud, *i.e.*, but for fraud, the initiative would not have been placed on the ballot?

- Could an election cure defects in *both* the total signature and dispersal requirements or only the total signature required (*i.e.*, because fraud as to the dispersal requirement may assist a populous region of the state to place an amendment on the ballot)?

- Should elections be overturned if *any* proven fraud exists, or only if the fraud directly causes the initiative's placement on the ballot?

- What if fraud is not proven, but the constitutional signature prerequisites ultimately are shown not to have been met?

Given that the alleged "fraud" may fall anywhere on a wide and legally-meaningful continuum, this Court should avoid formulating abstract answers to the certified questions in the absence of a more developed record.

D. Discretionary review is unwarranted based on other prudential considerations.

Finally, this Court should decline review of the certified questions for additional prudential reasons. First, by withholding disposition the Court will conserve judicial resources and spare itself from ruling on potentially conflicting legal principles that do not lend themselves to full and meaningful resolution at this time. The long-standing principle that an election cures irregularities in the process and thereby promotes finality and administrative efficiency is a weighty one; similarly, the citizens' ability to amend the state constitution through the initiative process without fraud is extremely important. This Court should avoid making potentially broad rulings affecting the application of these principles until the specific allegations of fraud are adjudicated.

Second, the "decision not to decide" is prudent here because it provides an opportunity for the legislative branch to address statutory reforms in light of whatever facts are demonstrated at trial. An advisory opinion addressing legal issues that may be deemed moot following trial would detract from, rather than enhance, the possibility of a legislative response. *See Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) ("Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the

machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.").

Finally, this Court's reticence to rule on certified questions when unnecessary is a long-recognized form of judicial restraint and self-governance that should be exercised in this case. The Court has the power to decide not to decide ultimate issues in this case, a so-called "passive virtue" that serves the orderly adjudication of important constitutional issues one case at a time at the appropriate time. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 46-60 (1999) (discussing virtues of minimalist approach); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111-98 (2d ed. 1962) (discussing "passive virtues" of deferring cases based on ripeness, standing and similar doctrines). In light of the foregoing, it is respectfully suggested that now is not the time, given the state of the factual record, to invest this Court's judicial resources in the questions presented.

CONCLUSION

For the reasons set forth above, this Court should dismiss this case due to jurisdiction having been improvidently granted and remand it for further proceedings in the trial court consistent with the First District's decision.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

____

Scott D. Makar (FBN 709697)
Solicitor General
Timothy D. Osterhaus (FBN 133728)
Deputy Solicitor General
Office Of The Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3681
(850) 410-2672 (fax)

Lynn C. Hearn (FBN 0123633)
General Counsel
Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399
(850) 245-6536
(850) 245-6127 (fax)

Counsel for Respondents Secretary of State Kurt S. Browning and Florida Department of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by U.S. Mail this 25th day of May, 2007 to:

John H. Pelzer
Scott H. Marder
Ruden McClosky Smith, et al.
200 E. Broward Blvd., 15th Floor
Ft. Lauderdale, FL 33302

John M. Hogan
David Shahoulian
Holland & Knight
P. O. Box 015441
Miami, FL 33101

Ronald L. Book
Ronald L. Book, PA
2999 Northeast 191st Street, PH 6
Aventura, FL 33180

Wilbur E. Brewton
Tana D. Storey
Roetzel & Andress, LPA
225 South Adams Street, Suite 250
Tallahassee, FL 32301

Bruce S. Rogow
Cynthia E. Gunther
Bruce S. Rogow, PA
500 E. Broward Blvd, Suite 1930
Ft. Lauderdale, FL 33394

Mark Herron
Thomas M. Findley
Robert J. Telfer III
Messer Caparello & Self, PA
P. O. Box 1876
Tallahassee, FL 32302

Efrem M. Grail
Kim M. Watterson
Reed Smith, LLP.
435 Sixth Avenue
Pittsburg, PA 15219

Jack M. Skelding, Jr.
Skelding & Cox, PA
318 North Monroe Street
Tallahassee, FL 32301-7622

Marc W. Dunbar
Pennington Law Firm
215 S. Monroe Street, Ste. 200
Tallahassee, FL 32301-1852

Thomas R. Julin
Hunton & Williams
1111 Brickell Avenue, Suite 2500
Miami, FL 33131

Stephen H. Grimes.
Jerome W. Hoffman
Susan L. Kelsey
Holland & Knight, LLP
P. O. Box 810
Tallahassee, FL 32302-0810

/s/ Scott D. Makar
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

/s/ Scott D. Makar
Attorney