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,
and GREY2K USA, INC.,

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

Appeal from the First District Court of Appeal

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PREFACE

The Petitioner, FLORIDIANS FOR A LEVEL PLAYING FIELD, will be referred to as "FLPF."

The Respondents, FLORIDIANS AGAINST EXPANDED GAMBLING, THE HUMANE SOCIETY OF THE UNITED STATES, and GREY2K USA, INC., will be referred to as "Respondents."

The 2004 ballot proposition "Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Paramutual Facility" will be referred to as the "Slots Initiative."

STATEMENT OF THE FACTS AND CASE

The Respondents accept the historical facts and procedural recitations of FLPF, and will address the argument and characterizations in the Argument.

SUMMARY OF ARGUMENT

The essential mandatory provisions of the Florida Constitution for amendment by initiative are not mere formal or procedural requirements that may be ignored with impunity, nor may such violations be effectively obscured by fraud. If the facts reveal that these mandatory provisions have not been met, and especially where the failure to meet them has been obscured by fraud, then the Court should grant relief by setting aside the results of the election.

The questions on which this Court accepted jurisdiction address the relative timing of the challenge and decision thereon when compared to events in the election process. This Court's prior decisions indicate that a pre-election challenge cannot be mooted by the election. FLPF's arguments to the contrary depend upon negative inferences and ignoring language from the cases. Even in the context of a post-election challenge, this Court has consistently applied the principles of *laches* to insure that claims are brought promptly and litigated efficiently.

FLPF assumes that a failure to satisfy the minimum mandatory signature requirements of the Florida Constitution to place an initiative on the ballot are mere procedure or formal irregularities and may be overlooked if the measure passes at the election. However, the "election cure" rule on which FLPF relies cannot be applied unless the amendment has first been "duly proposed." An amendment is not "duly proposed" unless these minimum mandatory thresholds

have been met, and therefore the "election cure" cannot be applied to cure this defect. Even if the rule applicable to statutory referenda were applied to this constitutional referendum, the cure would still not apply, because the passage of the Slots Initiative at the election does not imply that the measure satisfies all of the signature criteria to be placed on the ballot. In addition to the minimum number of signatures, the Florida Constitution also requires a minimum number of signatures in each of half of Florida's congressional districts.

Florida's organic law, and the amendments or changes thereto, should always be free of any taint of fraud. Any fraud in the process of proposing an amendment to the Constitution is not formal or procedural, but goes to the heart of the amendment and constitutes a fatal flaw. This Court has condemned fraudulent practices in amending the Florida Constitution and found such practices to constitute a fatal flaw, albeit under different factual circumstances.

This Court should not be content to address fraud in the amendment of the Constitution by prosecuting the individuals committing the fraud, but leaving the damage done to the Constitution unremedied. While the individuals perpetrating the fraud should be prosecuted, the only effective remedy to the Constitution is to declare the Initiative invalid.

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ARGUMENT

The lines in this case are clearly drawn. On the one hand, this Court has held

> The people of the state have a right to amend their Constitution, and they also have a right to require proposed amendments to be agreed to and submitted for adoption in the manner prescribed by the existing Constitution, which is the fundamental law. If essential mandatory provisions of the organic law are ignored in amending the Constitution of the state, and vital elements of a valid amendment are omitted, it violates the right of all of the people of the state to government regulated by the law.

Smathers v. Smith, 338 So. 2d 825, 831 (Fla. 1976) (quoting *Crawford v. Gilchrist,* 59 So. 963 (Fla. 1912).

On the other hand, this Court has also said "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" an amendment approved at the ballot box. *State ex rel Landis v. Thompson,* 163 So. 270, 276 (Fla. 1935). *See,* Petitioner's Initial Brief, p.7.

The Respondents contend that the requirements of Fla. Const. Art. XI, section 3, that a constitutional amendment initiative petition contain signatures in an amount equal to 8% of the votes cast in the last presidential election, both from the state as a whole and in each one half of the congressional districts of the state, are "essential mandatory provisions of the organic law." *Smathers*, 338 So. 2d at 831. The FLPF, on the other hand, treat these constitutional threshold

requirements as a "mere formal or procedural" aspect of the "framing, manner or form of submission or balloting," *Landis,* 163 So. at 276, and further conclude that using fraud to conceal the failure to meet this requirement is excusable.

The “election cure” doctrine in Florida is applied to cure defects in an election on a proposed constitutional amendment only if two conjunctive elements are met:

> (1): The amendment must be “duly proposed,” *Sylvester v. Tindall,* 154 Fla. 663, 18 So. 2d 892, 895 (1944) and
>
> (2): The "defect in form must be technical and minor," *Armstrong v. Harris,* 773 So. 2d 719 (Fla. 2000) or amount to a “mere formal or procedural irregularit[y].” *Landis,* 163 So. at 276.

See also, Landis, “mere formal or procedural irregularities . . . will not be held fatal to the validity of such amendment after it has been [duly proposed by being] actually agreed to by three-fifths of . . . each House.” *Id.*

In this case, it is the Respondents' position that the Slots Amendment has not been duly proposed because the constitutionally required vote threshold has not been met, and this fundamental defect has been concealed by fraud that is neither technical nor minor.

In the procedural posture before this court, the fraud is admitted. To prevail, FLPF must show that rampant fraud in signature gathering is a "mere formal or

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procedural irregularit[y]," *id,* even if the fraud conceals the failure to meet the minimum signature thresholds and thus that the amendment was not "duly proposed." *Sylvester,* 18 So. 2d at 895.

I. THE "ELECTION CURE" DOCTRINE DOES NOT APPLY ON THE FACTS OF THIS CASE.

A. The Election Cannot Moot A Pre-election Challenge.

The two questions that FLPF requested to be certified to this Court involve the timing of the challenge and the adducement of proofs when compared to the printing of ballots, the commencement of absentee voting and the election. FLPF's brief addresses only one of timing issues, urging that the election cures all defects.

This court has repeatedly limited the "election cure" doctrine to cases in which there was no question raised prior to the election regarding the alleged defect. *See Sylvester v. Tindall,* 18 So. 2d 892, 895 (Fla. 1944) (defects in the form of the submission of an amendment are cured if it is "adopted without any question having been raised prior to the election . . . ."); *Armstrong v. Harris,* 773 So. 2d 7, 18-19 (Fla. 2000) (quoting *Sylvester);* *Pearson v. Taylor,* 32 So. 2d 826, 827 (Fla. 1947) ("the neglect to follow such procedure was fatal if raised before the election . . . .").

Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000) demonstrates that a pre-election challenge can lead to post-election proofs and relief. There, the parties challenging the amendment raised their question prior to the election, albeit

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inartfully and with false starts. Indeed, on the date of the election, all that existed of the claim was an action for mandamus that had been dismissed in the circuit court. *Id.,* p.9, 10. Nevertheless, this Court elected not to apply the election cure doctrine, even in the face of an argument that the challengers had been dilatory in bringing their claims. This Court has even allowed a post-election challenge, where (as in this case) the challenge involved failure to satisfy a mandatory requirement, and elements of fraud. *Wadhams v. Board of County Commissioners of Sarasota County*, 567 So. 2d 414 (Fla. 1990) (involving statutory prerequisites to placement on the ballot).

FLPF relies on a negative inference, claiming that "none of these decisions [*Armstrong, Pearson* or *Sylvester*] hold that when a pre-election challenge to compliance with procedures for placing an amendment on the ballot is filed, but not determined before the election, that the election will *not* moot such a challenge." Petitioner's Brief, p.13, 14 (emphasis in original). This argument ignores the example of *Armstrong* and depends upon reading the quoted language out of the referenced opinions, because that language clearly provides that one of the prerequisites to the application of the election cure doctrine is the absence of a pre-election challenge raising the issue.

The only positive authority that FLPF purports to find is predicated on a misreading of the procedural history of *State ex rel Landis v. Thompson,* 120 Fla.

860, 163 So. 270 (Fla. 1935). Petitioner's Brief, p.11, 12. *Landis* did not involve a pre-election challenge. Rather, the challenge to the Constitutional amendment in *Landis* was only raised in defense of an original *quo warranto* petition in this Court that was commenced after the election. Therefore, *Landis* does not stand for the proposition that a pre-election challenge can be cured or mooted by a subsequent election, as the Petitioner mistakenly suggests.

The Petitioner apparently conflates *Landis* with *Collier v. Gray,* 116 Fla. 845, 157 So. 40 (Fla. 1934). *Collier* and *Landis* both involved challenges to the same constitutional amendment. However, they were not the same lawsuit. The suit in *Collier* was brought prior to the election, and was resolved prior to the election. Indeed, this Court in *Landis* suggested that the *quo warranto* respondent challenging the amendment in that case could and should have intervened in the pre-election suit brought by Collier. *Landis,* 163 So. at 277.

The en banc dissent below, and the Petitioners here, misread *Crawford v. Gilchrist,* 64 Fla. 41, 59 So. 963 (Fla. 1912), as providing some inferential support for applying the election cure doctrine in the face of a pre-election challenge. Petitioner's Brief, p.20, 21; Appendix at 28 (Kahn, J., dissenting). This argument reads far too much into this Court's decision to reach the merits of the *Crawford* case prior to the election. In *Collier v. Gray,* this Court explained for itself the reason that it expedited consideration in *Crawford:* "The court, considering that the

public was vitally interested, decided to hear and determine the case on its merits, questions of law only being involved." *Collier,* 157 So. at 41.

The dissent and the Petitioner apparently misread the statement in *Crawford* that "the granting or denial of a supersedeas will virtually dispose of the merits of the cause" in *Crawford. Crawford,* 59 So. at 966. That statement must be read in light of the procedural posture of *Crawford.* The trial court in *Crawford* had issued a temporary injunction restraining the Secretary of State from publishing the proposed amendment, providing it to the counties for posting or placing it on the official ballots. This temporary injunction was appealed to this Court. The matter was before the court on an application for supersedeas of the temporary injunction, essentially lifting the injunction and permitting the Secretary of State to move forward. Thus, when this Court referred to the "merits of the cause," it was referring to the merits of the temporary injunction. If the temporary injunction were superseded, and the acts enjoined were performed, then certainly the merits of the temporary injunction would have been "virtually dispose[d] of" by the supersedeas. *Id.* Nothing in *Crawford* makes any reference to the election curing the underlying defect raised prior to the election, and this Court's subsequent discussion of *Crawford* in *Collier* makes clear that this Court had another motivation for proceeding quickly. In both *Crawford* and *Collier,* this Court noted that the public was "vitally interested," *Crawford,* 59 So. at 966; *Collier,* 157 So.

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at 41, and the underlying defect in the proposed amendment could be resolved on the undisputed facts as a matter of law.

The fact that this Court chose in *Collier* and *Crawford* to proceed expeditiously to resolve the issues of law prior to the election in order to serve the vital interests of the public does not undermine the clear and subsequent declarations of this Court that the election cure doctrine cannot be applied in the face of a pre-election challenge. *Armstrong v. Harris, supra; Pearson v. Taylor, supra*; *Sylvester v. Tindall, supra*. Indeed, in *Collier,* both the Petitioner and the Respondent joined the request for expedited decision of the dispositive legal issues. 157 So. at 41.

FLPF attempts to make a practical argument for application of the election cure doctrine in the face of a pre-election challenge, asserting that the cost of the election cannot be avoided by a post-election decision. Petitioner's Brief, p.14. This argument is based on the false and small-minded assumption that the only benefit sought or to be gained by a pre-election challenge is to avoid the expense of an election. In fact, defending the integrity of the existing Constitution is the true goal of such a challenge. *Crawford,* 59 So. at 966. Regardless of whether the ballots had been printed, absentee voting had commenced, or the election had been concluded, this element of insuring that there had been compliance "with the mandatory provisions of the existing Constitution" are served. *Id.*

FLPF concedes that the Respondent sought an expedited hearing on the merits in the trial court, which the trial court denied as a way of protecting FLPF's due process rights "to engage in meaningful discovery" and avoid "an unnecessary rush to judgment . . . ." Petitioner's Brief at 15,16. Although FLPF now chides the Respondents for failing to seek a temporary injunction, it stands to reason that an accelerated hearing would also be denied on any such motion for temporary injunction. Such a temporary injunction would have had the same effect as a permanent injunction by preventing the election, and therefore would have entailed the same due process concerns that the trial judge noted in her ruling. It would be anomalous indeed for an amendment proponent to prevent a prompt adjudication because more process was due to it at the trial level, and avoid any adjudication at all because the election had occurred in the interim.

Initially, the Circuit Court had plans in this case to reach the merits after the election, *Id.*, R.1-108, but after it was too late to seek a pre-election decision, she reversed course, leaving the Respondents with an unsolvable problem. Thus, as the en banc majority noted, the trial court's rulings were inconsistent. Appendix, p.9,10. A similar concern may have motivated this Court in *Armstrong,* because it had dismissed Armstrong's petition on the day before the election, but did so "for technical reasons, without prejudice." *Armstrong,* 773 So. 2d at 9. It should also be noted that FLPF did not assert its "election cure" theory when the circuit court

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indicated its desire to reach the merits of the election, but waited until after the election had been held, R.2-262-282.

FLPF further criticizes the Respondents for how they responded to the trial court order denying the emergency hearing on the permanent injunction. Petitioner's Brief, p.17. However, each of the options proposed by FLPF are actually unavailable. First, the order was not immediately appealable under Rule 9.130 because the order did not deny an injunction. Rather, it denied a motion for an expedited hearing on an injunction. Also, the Respondents could not have sought an original writ, because (contrary to FLPF's bootstrapping assumption), the election cure doctrine would not apply and would not moot or doom the Respondents' claims. And again, since the circuit court planned to have a full hearing on the merits after the election and no "election cure" had been posited, there was no reason to pursue extraordinary measures.

In fact, when compared to the plaintiffs in *Armstrong v. Harris,* the Respondents here were at least as diligent and certainly had fewer false starts in their efforts. The better approach is the one actually followed by this Court in *Armstrong.* After recounting the procedural history, and the pre-election notice requirements in the Florida Constitution, this Court applied a test that a challenge must be "filed . . . within a reasonable time after receiving constructive notice of the proposed amendment." *Armstrong,* 772 So. 2d at 11. This test appears to be

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based on principles of *laches* which requires a lack of appropriate diligence under the circumstances and resulting prejudice. *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997). *Laches* has traditionally been used to regulate the timing of election litigation. *See, e.g. State ex rel Clendinen v. Dekle*, 173 So. 2d 452 (Fla. 1965); *Wright v. Frankel*, ___ So. 2d ___, 2006 WL 378067 (Fla. 4th DCA, Dec. 26, 2006) (not released for publication). *See also, Wadhams v. Board of County Commissioners of Sarasota County*, 567 So. 2d 414, 417 (Fla. 1990) ("We agree…that…there would come a time when *laches* would preclude an attack….") In light of *Armstrong,* there can be no bright-line rule that all claims must be raised and adjudicated prior to the election, ballot printing or the commencement of absentee voting.

B. The "Election Cure" Doctrine Does Not Apply If The Amendment Was Never Duly Proposed.

FLPF can cite to only one Florida case in which a failure to obtain a minimum number of signatures on a petition to place a matter on a ballot was cured by a subsequent favorable vote. That case, *Pearson v. Taylor*, 159 Fla. 775, 32 So. 2d 826 (Fla. 1947), does not support FLPF's position in this matter for two reasons.

First, one of the issues in this case is whether the Slots Initiative was ever "duly proposed." The "election cure" doctrine does not even apply to a constitutional amendment unless and until the constitutional amendment is "duly

proposed." *Sylvester v. Tindall*, 18 So. 2d at 895. As the district court noted below, "[e]ssential constitutional prerequisites to the publication and submission of a proposed amendment to the Constitution are not immaterial, technical forms, but vital elements in the adoption of constitutional amendments." Appendix at page 12, 13, citing *Crawford*, 59 So. 2d at 966. As the district court also noted, the signature requirements in this case are analogous to the three-fifths legislative vote requirement that was applied in *Crawford*. Appendix at 13. Both of these are essential prerequisites that must be met before the "election cure" doctrine may even be considered.

Pearson did not involve a citizen's initiative amendment to the Florida Constitution, and therefore it did not implicate any of the concerns for constitutional procedures or the preservation of organic law articulated by this Court in *Smathers v. Smith*, 338 So. 2d 825, 831 (Fla. 1976) ("If essential mandatory provisions of the organic law are ignored in amending the Constitution of the State, and vital elements of a valid amendment are omitted, it violates the right of all of the people of the state to government regulated by law.") (quoting *Crawford*).

Second, *Pearson* only involved one signature threshold, a statutory requirement that a minimum number of signatures be obtained county wide. This is analogous to the requirement to obtain signatures in "the state as a whole" to

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place a proposed constitutional amendment on the ballot by initiative. Fla. Const. Art. XI, section 3. The other requirement is that the initiative proponents show statewide support by obtaining a minimum number of signatures "of electors in each of one half of the congressional districts of the state." *Id*. The two signature requirements can be analogized to the two houses of Congress. Like the House of Representatives, the general signature requirement is sensitive only to the raw numbers of the population. The statewide support requirement, like the Senate, protects regions of the state from the potential tyranny of the majority, without regard to population. The logic of *Pearson* is that if the measure passed at the election, then there must have been sufficient support overall to meet the requirement of the statute. However, that rationale does not apply to the constitutional requirement that the support be demonstrated in "each of one half of the congressional districts of the state." *Id.* A mere election victory (especially a narrow one, as in this case) does not demonstrate such statewide support. Accordingly, the failure to meet the second constitutional requirement of statewide support cannot be cured by a mere election victory.

II. *ARMSTRONG v. HARRIS* SUPPORTS THE DECISION OF THE DISTRICT COURT.

FLPF understates the holding of *Armstrong,* and overstates the district court's reliance on *Armstrong*. According to FLPF, *Armstrong* is limited to the question of whether a fraudulent ballot summary can invalidate an election. Initial

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Brief, p.19. Actually, the district court relied upon *Armstrong* for its broader holding – that the election cure rule "is subject to a caveat; the defect in form must be technical and minor . . . . When the defect goes to the heart of the amendment . . . the flaw may be fatal." 773 So. 2d at 19. The broader holding of this Court in *Armstrong* is that fraud can constitute such a fatal flaw.

The dissenters in *Armstrong* had no quarrel with this caveat to the election cure rule, or the proposition that fraud should be fatal to a proposed amendment. The *Armstrong* dissenters merely disagreed as to whether such a fraud had been shown. 773 So. 2d at 30 ("I agree with respondent that the exception to this would only be if there was evidence of fraud, which is clearly not present in this case.") (Wells, C.J., dissenting); 773 So. 2d at 33 ("Misrepresentations and fraudulent behavior may never be cured by affirmative votes; however, I would not place the asserted ambiguity involved in this case in such category.") (Lewis, J., dissenting); *see also,* 773 So. 2d at 34 ("I agree with that part of Chief Justice Wells' dissent wherein he concludes that the Legislature did not mislead the Florida voters.") (Quince, J., dissenting.)

The Slots Initiative was "fly[ing] under false colors," *Armstrong*, 773 So. 2d at 16, simply by being on the ballot without having met the requirements of the Florida Constitution, and concealing that defect through fraud. As the district court noted, it is impossible to know how the electorate would have voted on the

Slots Initiative if they had known the full truth of how it came to be on the ballot. Appendix pp. 14, 15, par. 6. That being said, the district court's application of *Armstrong* is not among the questions on which this Court has accepted jurisdiction; and while the district court borrowed the "false colors" metaphor, it did so acknowledging the factual distinction between *Armstrong* and this case. Appendix at 11. Harping on this distinction does not undermine the district court's rationale or result.

Nothing in *Armstrong* limits fatal fraud to the form of a ballot summary. To be sure, that technique is extensively discussed because those were the facts presented, but nothing in the language or rationale of *Armstrong* condemns that fraudulent tactic while endorsing all others. Therefore, the Petitioner's effort to limit *Armstrong* to its precise fact pattern should be rejected.

III. PROSECUTING FRAUD DOES NOT PROTECT THE CONSTITUTION.

Criminal prosecution for fraud is a grossly inadequate remedy if, at the same time, the organic law of the state is left infected with the product of that fraud. The Respondents do not disagree that the individuals guilty of fraud should be prosecuted. However, that is not the limit of the courts' authority, nor should a court be content just to stop there.

Merely prosecuting paid signature gatherers will not deter future fraud. Such prosecution only addresses the financial motivation of the individual

gatherers who are paid per the signature. Those numbers pale in comparison to the real impetus for fraud. The far greater financial motivation is with the proponents of the initiative who stand to gain by virtue of the amendment. That financial reward for fraud must be eliminated to deter future fraud.

Rather than accept the limitations proposed by FLPF, Florida courts have consistently been willing to undo the results of an election where there was a taint of fraud. *See, e.g., Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000); *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984); *In Re: The Matter of Protest of Election Returns, etc.*, 707 So. 2d 1170 (Fla. 3d DCA 1998). Preserving the integrity of the Constitution requires no less.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court, and answer both questions in the affirmative.

Respectfully submitted,

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I certify that a copy hereof has been furnished to counsel of record as noted below, by U. S. Mail, on May 25, 2007.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

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