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

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, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394

THOMAS R. JULIN
JAMIE Z. ISANI
HUNTON & WILLIAMS LLP
1111 Brickell Avenue, Suite 2500
Miami, FL 33131

JOHN M. HOGAN
Holland & Knight, LLP
Post Office Box 015441
Miami, FL 33101

Attorneys for Petitioner Floridians
for a Level Playing Field

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STATEMENT OF THE CASE AND FACTS

A. THE DECISION BELOW

On March 27, 2007 the Court accepted jurisdiction to review these two certified questions of great public importance from the First District Court of Appeal:

> 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?

Appendix at 16-17.

The *en banc* decision below assumed that the complaint's allegations of

fraud in petition initiative signature gathering were true, and held that an election approving the initiative did not cure fraud in the pre-election process. The majority primarily relied upon *Armstrong v. Harris*, 773 So. 2d 7, 20 (Fla. 2000), quoting this sentence "'*Deception of the voting public is intolerable and should not be countenanced.*"' Appendix at 15 (emphasis in original). The *en banc* dissenters viewed *Armstrong* as inapposite because the deception there was in the ballot question actually presented to the voters; it was not pre-election deceit. The dissenters pointed to *Armstrong's* focus on the question actually presented to the voters: "'When a defect goes to the *very heart of the amendment*, as it did in both *Wadhams* [*v. Board of County Commissioners*, 567 So. 2d 414 (Fla. 1990)] and the present case [*Armstrong*], it is impossible to say with any certainty what the vote of the electorate would have been 'if the voting public had been given the whole truth."' Appendix at 25 (quoting *Armstrong* quoting *Wadhams*)(emphasis supplied). Simply put, the First District was split on the meaning of *Armstrong*, i.e., the consequences of deception in the actual ballot question presented to the voters as compared to deception in obtaining access to the ballot.

In addition, the *en banc* majority below believed that the fact that the lawsuit alleging fraud in the signature gathering process was filed before the election (the initial complaint was filed 35 days before the election; the amended complaint was

filed 19 days before (R1-1-33, 71-104)), added credence to its view that the subsequent voter approval could not cure fraud in the pre-election process.

Against that background we turn to the allegations of the complaint and the trial court summary judgment which led to the decision below.

B. THE CIRCUIT COURT PROCEEDINGS

On July 23, 2004, the Secretary of State certified that the Supervisors of Elections had determined that petitions favoring the initiative contained the requisite number of valid signatures requiring placement of the initiative on the November 2, 2004 ballot as Amendment 4. R3-416.

More than two months later, on September 28, 2004, Floridians Against Expanded Gambling, the Humane Society of the United States and Grey2K USA, Inc. sued Floridians for a Level Playing Field ("FLPF"), the Secretary of State, and numerous Supervisors of Elections alleging generally that the petition process was fraught with fraud and that the petitions included the signatures of unregistered voters, fictitious persons and deceased persons. R1-1-33. FLPF is a political committee formed pursuant to Florida Statutes and was the sponsor of the initiative to amend the Florida Constitution entitled "Authorizes Miami-Dade and Broward County voters to approve Slot Machines in Parimutuel Facility." R1-5.

On September 30, 2004, the Plaintiffs filed a "Motion for Case Management

Conference." A week later, on October 8, 2004, they filed a "Motion for Emergency Expedited Hearing and *Permanent* Injunction." R1-48-57 (emphasis added). The Plaintiffs filed no motion for a temporary injunction. The trial court set a hearing for October 11, 2004.

After the hearing was held, the Plaintiffs amended their complaint on October 14, 2004, to set forth new allegations. R1-71-104. The amended complaint claimed that a statistical analysis of the database of names and addresses of voters who signed the petitions showed a statistically significant failure rate. R1-96. In addition, they alleged that a telephone survey of 5,278 persons whose names appeared on petitions showed that 68% said that they had not signed any petition for the initiative. R1-85-86.

The amended complaint also alleged that ARNO Political Consultants, which had been hired to gather signatures for the initiative, had been accused of signature gathering improprieties in relation to Amendment 6, the bullet train repeal amendment, and that ARNO employees were alleged to have copied signatures from the minimum wage petitions onto other initiative petitions. R1-87-89.[1]

[1] The amended complaint also complained of missing names and addresses of petition circulators. R1-93. The District Court of Appeal affirmed the summary judgment against the Plaintiffs on that portion of the case and that issue is now resolved and not part of this case. Appendix at 3.

At the October 11, 2004 hearing the trial court, after extended argument, denied the motion for a permanent injunction against placing the amendment on the ballot citing due process as preventing a final determination of the merits of the complex allegations contained in the complaint. The trial court also noted that the Plaintiffs' motion alternatively had requested a post-election declaration of invalidity. The trial court commented on this request: "It seems to me from the very motion itself the Plaintiffs have the knowledge that its not absolutely essential that we have a full hearing on this matter before the election." R2-33. The trial court then entered a written Order on October 19, 2004 declining to expedite consideration of the request for a permanent injunction. R1-108. Plaintiffs sought no review of that order and they made no further attempt to obtain an injunction against placing the proposed amendment on the ballot.

After passage of the initiative on November 2, 2004, the supervisors of elections were dismissed as defendants. R2-346-348. The Plaintiffs did not appeal the dismissal.

FLPF moved for final summary judgment after the election asserting that the election had cured any of the alleged deficiencies in the procedures which led up to placement of the amendment on the ballot. The motion alleged that even if the allegations of fraud in the signature gathering process could be proven, such proof

could not invalidate a constitutional amendment that had been approved by a vote of the people. In January 2005, the trial court granted FLPF's motion finding that any fraud in the petition process "was cured by the election." R3-415-420.

C. THE DISTRICT COURT OF APPEAL PROCEEDINGS

The Plaintiffs appealed to the First District Court of Appeal. A panel of that court reversed, concluding that the election-cure doctrine does not apply to claims of fraud filed prior to the election even though the claims could not be adjudicated until after the election. FLPF's Motion for Rehearing, Rehearing En Banc, and/or Motion for Certification was granted. The *en banc* majority hewed to the panel's view, but the court certified the two questions that FLPF had presented as questions of great public importance, stating those questions exactly as FLPF had presented them:

> A. 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?

B. 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?

The answers to both questions should be "NO."

SUMMARY OF THE ARGUMENT

Florida law 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). In other words, the voice of the people cures pre-election defects. That principle applies to this case – even with its allegations of fraud in the signature gathering process – because the ballot question was clear and not deceptive or misleading and if there were problems at the signature gathering stage, the post-election remedy is to prosecute those who may have violated election laws, not to disturb the electoral outcome.

Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000) does not support the decision below. *Armstrong* addressed a ballot question that deceived voters by not disclosing that the proposed constitutional amendment eliminated the Florida constitutional prohibition against cruel or unusual punishment. *Armstrong* did not address alleged defects in the process leading to ballot placement. The distinction – between defects that go "to the very heart of the amendment" (*Armstrong* at 773 So. 2d 21) and defects that precede ballot placement – is critical. The former cannot be cured by the election because the electorate has been fooled. The latter can be cured by the election because the electorate has not been misled as to the question presented and other remedies exist to punish any pre-election misconduct.

Nor does *Armstrong's* comment regarding the timing of when a challenge is raised alter our argument. Here, the complaint alleging fraud was filed shortly before the election and an expedited trial was denied, but the plaintiffs neither sought expedited review of that denial nor made any attempt to obtain appellate review of that decision or a pre-election resolution of the claims they presented. Therefore, even if a pre-election challenge affects the "election cure" equation, the Plaintiffs' tardy initiation of a lawsuit and failure to fully pursue a pre-election decision requires that this case be judged by the *Landis* principle. The decision below should be reversed with directions to dismiss the complaint.

ARGUMENT

BECAUSE THE BALLOT QUESTION WAS APPROVED BY THIS COURT, WAS CLEAR AND UNAMBIGUOUS, WAS APPROVED BY THE VOTERS, AND THE CHALLENGE TO THE SIGNATURE GATHERING PROCESS WAS TARDY AND ABSENTEE VOTING HAD BEGUN, THE ELECTION RESULTS CANNOT BE INVALIDATED

Two concepts are at the heart of the *en banc* decision below. One is that the "election-cure" principle does not apply where there has been a pre-election challenge to the ballot placement process. *See* Appendix at 8 ("NO CURE BECAUSE LEGAL CHALLENGE PRIOR TO ELECTION"). The second is the District Court's view that there is "NO CURE FOR SIGNIFICANT FRAUD." Appendix at 11. Neither concept supports the decision below.

A. THE GOVERNING LEGAL PRINCIPLES

A constitutional amendment, approved by the people, is entitled to extraordinary deference. In *Askew v. Firestone*, 421 So. 2d 151, 156 (Fla. 1982) the Court wrote that it "must act with extreme care, caution, and restraint before it removes a constitutional amendment from the vote of the people." Here, where the

people have voted and approved a constitutional amendment, the deference and restraint are nearly ironclad. An approved constitutional amendment could be invalidated where the ballot questions misled the voters. *Armstrong v. Harris*, 773 So. 2d 7, 19 (Fla. 2000) ("when a defect goes to the *very heart of the amendment* . . . . , it is impossible to say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth.") (emphasis supplied). A state constitutional amendment could also be invalidated if it violated the United States Constitution. *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed 2d 855 (1996). But where, as here, this Court approved the ballot title and summary of the proposed constitutional amendment and the voters approved adoption of the amendment, there can be no argument that the amendment is infirm or that voters were misled. *See Advisory Opinion to Att'y Gen. Re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So. 2d 522, 524 (Fla. 2004) ("For the reasons stated, we hold that the initiative petition and proposed ballot title and summary meet the requirements of Article XI, section 3 of the Florida Constitution, and section 101.161(1) Florida Statutes (2003). Accordingly, we approve the amendment for placement on the ballot").

1. The Pre-election Challenge Does Not Trump the "Election Cure" Doctrine

The *en banc* majority erred in holding that "since the [assumed] defect was challenged before the election, it could not be cured by the election." Appendix at 11. The cases relied upon, *Pearson v. Taylor*, 32 So. 2d 826 (Fla. 1947), which cites *State ex rel. Landis v. Thompson*, 120 Fla. 860, 163 So. 270 (Fla. 1935); *Sylvester v. Tindall*, 154 Fla. 663, 18 So. 2d 892 (Fla.1944); *West v. State of Florida*, 50 Fla. 154, 39 So. 412 (Fla. 1905); *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963 (Fla. 1912) do not, on the facts of this case, carry the weight assigned to them by the *en banc* majority.

Landis is the leading case and it unanimously applied the *vox populi vox Dei* principle even though there had been a pre-election suit and the plaintiffs had attacked the placement of the proposed constitutional amendment on the theory that procedures governing placement of the amendment on the ballot had been violated. Harkening back to the *West v. State*, 50 Fla. 154, 39 So. 412, 414 (Fla. 1905) holding that "the popular voice is the paramount act" even if there were defects in the amendment process, the Court wrote:

> In upholding the ratified amendment as against the attack so made upon it, this Court in the *West* case, supra, definitely and conclusively aligned itself with the doctrine of a majority of the American courts that in

> ruling upon the validity of constitutional changes after the popular voice has been expressed in favorable voting upon such changes proposed in the form of constitutional amendments agreed to by the Legislature, 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 by three-fifth vote of all the members elected to each House, and such amendment thereafter duly published submitted to and affirmatively approved by the majority vote of the electors cast thereon.

Landis, 163 So. at 276.

In *Landis*, a taxpayer challenged a proposed amendment *before* the amendment was submitted to the voters, and the trial court refused a temporary injunction. The taxpayer immediately appealed to this Court urging the Court to review the matter. The Court obliged, but affirmed the denial of the temporary injunction and the election proceeded. *Collier v. Gray*, 157 So. 2d 40, 46. After passage of the amendment, the Court reaffirmed the principle that violations of constitutional procedures regulating the amendment process could not be used to invalidate a vote of the people. *Landis*, 163 So. at 277. The Court rejected the claim that it could consider allegations of procedural irregularity after the election,

explaining, that it "is immaterial in the light of the accepted rule that the popular voice is the paramount act where the proposed amendment was. . . ratified by a majority of the electors voting thereon." *Id.*

Landis confirms that even if a lawsuit challenging the procedures by which an amendment is placed on the ballot is filed *prior* to an election, the challenge can be mooted by the election. *Pearson v. Taylor*, 32 So. 2d 826 (Fla. 1947), did not change this rule. It reaffirmed it, citing *West, Crawford* and *Landis*, reminding all that "[M]ore than once we have said in substance, ... the defect [in proposing an amendment] was cured by the election itself." *Id.* at 827.

Some of the cases note the absence of pre-election challenges. *See Sylvester v. Tindall*, 18 So. 2d 892, 895 ("once an amendment is duly proposed and is actually published and submitted to a vote of the people and by them adopted without any question having been raised prior to the election as to the method by which the amendment gets before them, the effect of a favorable vote by the people is to cure defects in the form of the submission"); *Armstrong v. Harris*, 773 So. 2d at 18-19 (quoting *Sylvester*); *Pearson v. Taylor*, 32 So. 2d 826, 827 (Fla. 1947) ("more than once we have said, in substance, that the neglect to follow such procedure was fatal if raised before the election, yet the defect was cured by the election itself"). But none of these decisions 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.

Constitutional requirements for a minimum number of valid, geographically – disbursed signatures serve to protect the state from the expense of conducting an election where there is little or no likelihood that a proposed amendment will be approved, *See Collier*, 157 So. at 41 ("the expense to be saved [is what] justifies the taxpayer in seeking an injunction"). After the election has been held, not only has the voice of the people been heard, but no expense can be saved. The compliance or non-compliance with procedures for placing the matter on the ballot no longer has any legal significance.

In the instant case, the Secretary of State had certified on July 23, 2004 that FLPF had obtained the required number of valid signatures and the required distribution of valid signatures under Article XI, section 3 of the Florida Constitution and issued a certificate of ballot position for the Initiative as Amendment 4. The initial complaint was not filed until September 28, 2004 and the amended complaint on October 14, 2004, 83 days after the Initiative had secured its place on the ballot.

The ballots had been printed and the absentee voting process already had begun pursuant to section 101.62(4)(a), Florida Statutes (2004) (requiring absentee

ballots to be mailed by September 18, 2004, 45 days prior to the general election), at the time that the suit was filed. R1-48-57. Thus, it was too late even at the time that the initial complaint was filed for the suit to avoid the expense associated with the election process.

The Plaintiffs did not seek a temporary injunction to enjoin the upcoming election as to Amendment 4. They did file a "Motion for Case Management Conference" on September 30, 2004 (R1-39-43) and a "Motion for Emergency Expedited Hearing and Permanent Injunction" on October 8, 2004 (R1-48-57), and on October 11, 2004, the trial judge conducted a hearing among the lawyers and after extended arguments, announced:

> I am going to though deny the motion for emergency expedited hearing. I mean, this is obviously a complex case with serious issues now including the issues of fraud. And seeing that to rush this case to a final hearing without giving the Defendants the opportunity to engage in meaningful discovery would be a denial of due process.
>
> I mean, an unnecessary rush to judgment wouldn't give the Court a chance to fully consider the issues, wouldn't give the attorneys sufficient opportunity to fully develop the issue, and a rush to judgment is not necessary in this case, especially in light of the request in the motion for case management conference that the plaintiffs seek declaratory injunctive relief striking the

> initiative to amend the Florida constitution, preferably hearing this matter before the general election in November of 2004, or as the motion states, in the event the November 2004 general election has already taken place to declare the election for such initiative null and void and to further order the ballot not be counted.
>
> It seems to me from the very motion itself the Plaintiffs have the knowledge that it's not absolutely essential that we have a full hearing on this matter before the election.
>
> So rather than rushing to judgment and possibly inviting error and perhaps violating the Defendants' due process rights, I am going to deny the motion for expedited hearing.

R2- 32-33. A week later, on October 19, 2004, the court entered its "Initial Case Management Order" echoing its oral pronouncement. R2-108.

Not only did the Plaintiffs wait for over two months after the Secretary of State's certification to begin their suit, they made no effort in the trial court to secure a temporary injunction; took no action to seek expedited review of the trial court's October 11 denial of their "Motion for Emergency Hearing and Permanent Injunction;" took no action to seek review of the trial court's October 19 Order, and thus acceded to the post-election process as a remedy for their claim. *Compare Collier v. Gray*, *supra*, in which the challenger acted promptly and

persistently in seeking relief in this Court:

> This is an application for a temporary restraining order pending an appeal from an order made by Hon. J.B. Johnson, judge of the circuit court for Leon county, denying an application by D.B. Collier, a citizen of Manatee county, Fla., for an injunction to restrain Hon. R.A. Gray, as secretary of state, from continuing to advertise in newspapers in various counties in the state a proposed constitutional amendment, said to have been submitted as the last general session of the Legislature.

Id., 157 So. at 41.

The Plaintiffs had three full weeks from the court's oral denial to expedite determination of the merits to obtain a pre-election determination of their claims. They could have immediately appealed under Rule 9.130(a)(3)(B), Florida Rules of Appellate Procedure, because the order denied an injunction. They could have sought an original writ, either of mandamus or a writ necessary to the complete exercise of the appellate court's jurisdiction, under Rule 9.100(a), Florida Rules of Appellate Procedure, arguing that a pre-election decision was mandated because the election-cure doctrine would moot later appellate review. They might have sought certiorari under Rule 9.100(a), Florida Rules of Appellate Procedure, arguing that the trial court deviated from the essential requirements of law by not providing a

pre-election injunction hearing where the election-cure doctrine threatened to doom their claim.

Instead, the Plaintiffs did nothing.

While the fairest reading of the Florida cases is that "the voice of the people" is the paramount principle whether or not there has been a pre-election challenge, here, the mere filing of a pre-election suit and the failure to fully pursue a pre-election remedy does not justify a deviation from that principle. Any other conclusion would permit anarchy in the constitutional amendment process – challengers filing eve of election lawsuits and claiming that the voter approval does not moot their claims. Constitutional amendments would go into effect, but the validity of those amendments would not be known for years after they became effective. Florida law does not, and should not, countenance such an approach to avoiding the *vox populi* doctrine.

2. ***Armstrong v. Harris*** **Helps, Not Hurts, Our Argument**

The *en banc* majority relied upon *Armstrong v. Harris* to support its view that an election does not cure fraud which may have occurred in the signature gathering process. The majority wrote: "It is clear that a favorable popular vote cannot cure deception. As *Armstrong* held '[a] proposed amendment cannot fly under false colors."' Appendix at 11, quoting *Armstrong*, 773 So. 2d at 16. The

majority acknowledged that *Armstrong* was addressing deception in the question presented to the voters, not the process by which the proposed amendment gained ballot access. *Id*. But the court somehow saw *Armstrong* as supporting its notion that the "false colors" metaphor could be applied to failures to comply with mandatory pre-election constitutional processes for ballot access.

First, *Armstrong* simply does not stand for the majority's proposition of law. The Court summarized the principle that was involved: "'what the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot."' 773 So. 2d at 16, quoting *Grose v. Firestone,* 422 So. 2d 303, 305 (1982) and continuing: "'Simply put the ballot must give the voter fair notice of the decision he must make."' *Id.*, quoting *Askew v. Firestone,* 421 So. 2d 151, 155 (Fla. 1982). Those rules are what led to "false colors," and we quote the whole paragraph to confirm that *Armstrong* is inapposite:

> As these cases illustrate, the gist of the constitutional accuracy requirement is simple: A ballot title and summary cannot either "fly under false colors" or "hide the ball" as to the amendment's true effect. The applicability of this requirement also is simple: it applies across the board to all constitutional amendments, including those proposed by the legislature.

Armstrong, 773 So. 2d at 16.

The Court's reliance on *Wadhams v. Board of County Commissioners*, 567 So. 2d 414 (Fla. 1990), to explain why voters' approval does not always cleanse a defect, buttresses the point that notice of the meaning of the amendment is the key. *Wadhams* stated:

> Moreover it is untenable to state that the defect was cured because a majority of the voters voted in the affirmative on a proposed amendment when the defect is that the ballot did not adequately *inform* the electorate of the purpose and effect of the measure upon which they were casting their votes. No one can say with certainty what the vote of the electorate would have been if the voting public had been given the whole truth, as mandated by the statute and had been told "the chief purpose of the measure."

Wadhams, 567 So. 2d at 417 (emphasis in original), quoted in *Armstrong*, 773 So. 2d at 20. No one can contend that the "chief purpose of the measure" was not met here. The *en banc* majority's attempt to wrest from *Armstrong* a rule that says pre-election deception of voters avoids the election-cure doctrine was flawed.

Flawed too was the attempt to use *Crawford v. Gilchrist*, *supra* as support for its view. Citing a long quote from *Crawford* (Appendix at 13-14), the majority emphasized the need for constitutional compliance with the process for proposing amendments. No one disagrees with that, but as the *en banc* dissenters pointed

out, *Crawford* does not conflict with *Landis* and *Pearson*:

> Under *Pearson* the election cured the defect in petition gathering. In *Landis*, the election cured legislative disregard of mandated procedure. In *Crawford*, the supreme court, although considering the validity of the proposed amendments, in actuality dealt directly with only the question of whether supersedeas should be granted to stay the effect of the lower court's injunction. . . . The supreme court recognized that it must resolve the matter before the election: "As the granting or denial of supersedeas will virtually dispose of the merits of the cause and the public being vitally interested, the merits will be considered on this application for supersedeas. . . ." *Crawford*, 59 So. 2d at 966.

Appendix at 28 (Kahn, J. dissenting). That approach, as Judge Kahn pointed out (*id*), appears to be a recognition by the *Crawford* court of the election-cure principle; that the merits issue would be moot upon voter approval. Thus *Crawford*, carefully read, is consistent with the principle we assert, and neither it nor *Armstrong* support stilling the voices of the people because defects – even fraud – may have occurred in the signature gathering process.

3. The Remedy for Fraud

With the caveat that signature gathering fraud has been assumed because this case was resolved on the fraud allegations of the complaint, we recognize that the

election cure doctrine does not address the *en banc* majority's concern that "If a cure operated in these circumstances [where the plaintiff claimed fraud], then there would be no recourse for citizen initiative amendments turned over to a rogue organization". . . and that a required process could with impunity be "ignored and hijacked." Appendix at 15. But that is not so. Criminal penalties against those who engage in fraudulent activities, not punishing the voters by overriding the will of the people, provides the proper recourse for rogues and hijackers.

A variety of statutes provide the necessary remedies. *See* Section 104.185(1), Florida Statutes: "A person who knowingly signs a petition or petitions for a candidate, a minor political party, or an issue more than one time commits a misdemeanor of the first degree;" Section 104.185(2): "A person who signs another person's name or a fictitious name to any petition to secure ballot position for a candidate, a minor political party, or an issue commits a misdemeanor of the first degree;" Section 104.091 creates criminal liability for aiding, abetting, advising or conspiring to commit a violation of the election code. Section 817.155 provides that a person who makes any false, fictitious, or fraudulent statement or representation concerning any matter within the jurisdiction of the Department of State is guilty of a felony of the third degree. Thus, the remedy for election fraud is prosecution of the culpable parties, not election nullification.

Allowing invalidation of an approved constitutional amendment as a potential post-election punishment for pre-election fraud dishonors the voice of the people and undermines the stability of the constitutional amendment process. It would permit opponents of constitutional amendments to make bare allegations of fraud or other irregularities immediately preceding an election and then cause chaos and doubt for months or years about fundamental rights after an election has been held and an amendment approved. This Court should adhere to the decades old election-cure doctrine and let the criminal laws punish those who may abuse the integrity of the pre-election process.

CONCLUSION

For the foregoing reasons, the certified questions should be answered this way: The second certified question –

> 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?

should be answered "NO." Unless the showing of fraud is made and finally

resolved

before the election, the fraud claim would be moot.

The other certified question –

> 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?

should also be answered "NO." Unless the challenge is made before the absentee ballots are printed and mailed, such challenges would be untimely.

Therefore, the decision below should be reversed with directions to affirm the trial court's order granting summary judgment and dismissing the Plaintiffs' Amended Complaint.

Respectfully submitted,

WILBUR BREWTON
Fla. Bar No. 110408
TANA D. STOREY
Fla. Bar No. 0514772
ROETZEL & ANDRESS, LPA
225 South Adams Street, Suite 250
Tallahassee, FL 32301
Ph: 850-222-7718
Fax: 850-222-8222

THOMAS R. JULIN
Fla. Bar No. 325376
JAMIE Z. ISANI, ESQ.
Fla. Bar No. 0728861
HUNTON & WILLIAMS
1111 Brickell Ave., Suite 2500
Miami, FL 33131
Ph: 305-810-2516
Fax: 305-810-2460

JOHN M. HOGAN
Fla. Bar No. 238082
Holland & Knight, LLP
Post Office Box 015441
Miami, FL 33101
Ph: 305-374-8500
Fax: 305-789-7799

BRUCE S. ROGOW.
Fla. Bar No. 67999
CYNTHIA E. GUNTHER
Fla. Bar No. 0554812
BRUCE S. ROGOW, P.A.
500 E. Broward Blvd., Suite 1930
Ft. Lauderdale, FL 33394
Ph: 954-767-8909
Fax: 954-764-1530

Attorneys for Floridians for a Level Playing Field

BY:

_____

BRUCE S. ROGOW

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following parties by U.S. Mail this 20th day of April, 2007:

Mark Herron, Esquire Thomas M. Findley, Esquire Robert J. Telfer, III, Esquire Messer, Caparello & Self, P.A. Post Office Box 1876 Tallahassee, Florida 32302 James A. Peters, Esquire Special Counsel Office of the Attorney General The Capitol, PL-01 Tallahassee, Florida 32399-1050 Scott D. Makar, Esquire Office of the Attorney General The Capitol, PL-01 Tallahassee, Florida 32399-1050 Ronald L. Book, Esquire Ronald L. Book, P.A. 2999 Northeast 191st Street, PH6 Aventura, Florida 33180 John H. Pelzer, Esquire Scott H. Marder, Esquire Ruden McClosky Smith, et al 200 East Broward Blvd., 15th Floor Fort Lauderdale, Florida 33302	Efrem M. Grail, Esquire Kim M. Watterson, Esquire Reed Smith, LLP 435 Sixth Avenue Pittsburgh, PA 15219 David Shahoulian, Esquire Holland & Knight, LLP Post Office Box 015441 Miami, Florida 33101 Stephen H. Grimes, Esquire Jerome W. Hoffman, Esquire Susan L. Kelsey, Esquire Holland & Knight, LLP Post Office Box 810 Tallahassee, FL 32302-0810 Jack M. Skelding, Jr., Esquire Skelding & Cox, P.A. 318 North Monroe Street Tallahassee, Florida 32301-7622 Marc W. Dunbar, Esquire Pennington Law Firm 215 South Monroe Street, Suite 200 Tallahassee, FL 32301-1852 _____ BRUCE S. ROGOW

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.

BRUCE S. ROGOW