IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2505

FLORIDIANS FOR A LEVEL PLAYING FIELD,

Petitioner,

vs.

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

Respondents.

PETITIONER'S REPLY BRIEF
(Replying to Answer Briefs of All Respondents)

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INTRODUCTION TO THE REPLY

Respondents Floridians Against Expanded Gambling, The Humane Society of the United States and Grey 2K USA have addressed the two certified questions on the merits and argue that the election cure doctrine does not apply if there has been fraud in obtaining the signatures necessary to place an initiative on the ballot. They contend that "[w]hile the individuals perpetrating the fraud should be prosecuted, the only effective remedy to the constitution is to declare the Initiative invalid." Respondents' Answer Brief on the Merits, p. 3.

The Secretary of State and Florida Department of State, designating themselves as Respondents although they did not respond to Petitioner's District Court of Appeal motions for rehearing, rehearing en banc or certification, nor oppose jurisdiction, now urge the Court to "not pass upon the certified questions and . . . dismiss this action as improvidently granted." Secretary of State Answer Brief, p. 4. The Secretary suggests that because the allegations of fraud were not tried, there should be "full factual development before an appeal to this Court." *Id.*

This Reply Brief responds to both Answer Briefs. First we show why the certified questions should be answered now, and then we demonstrate why the answer is that the election cure doctrine does apply and the expressed will of the

people must be respected.

ARGUMENT

I
THE COURT SHOULD EXERCISE ITS JURISDICTION

The Secretary says that the allegations of fraud made in Respondents' circuit court complaint "may ultimately prove to be inaccurate" and therefore the Court should stay its hand. Secretary of State Answer Brief, p. 7. The Secretary offers *State v. Schebel*, 723 So. 2d 830 (Fla. 1999) as authority for its statement that "[in] similar situations involving certified questions and speculative facts, this Court has had little hesitation to dismiss review as improvidently granted." *Id.*

A glance at *Schebel* reveals the difference between that case and this one. First, *Schebel* involved a summary denial of a Rule 3.850 motion, and a youthful offender sentencing issue. It did not involve a clearly articulated constitutional initiative that had been approved statewide by voters and, pursuant to that approval, further ratified by county voters. Nor did *Schebel* involve extraordinary legislative action in reliance upon those approvals, followed by expedited administrative rulemaking in order to follow the legislative mandate and fulfill the voters' wishes, and the expenditure of hundreds of millions of dollars by private entities pursuant to the electoral, legislative and administrative mandates

commanded by a constitutional amendment.

What made *Schebel* "speculative" is that Mr. Schebel's *pro se* submissions in the circuit court, the District Court of Appeal and this Court did not include the judgments showing the sentences he had received. This Court wrote:

> The district court found that the issue raised was more properly cognizable under Florida Rule of Criminal Procedure 3.800. The district court also noted that it was unable to determine whether Schebel was entitled to relief "because none of the sentences imposed was attached to the order or included in the record."
>
> * * *
>
> Like the district court, this court lacks the necessary facts to make a determination of the issues raised by the certified questions in this case.

Schebel, 723 So. 2d at 830.

The Secretary suggests that here a trial might prove fraud that "may be either innocuous or pernicious" and some of the allegations "may be proven to be the result of intentional, consequential fraud; others may not." Secretary of State Answer Brief, p. 9. In sum, the Secretary says "[b]ecause the facts will ultimately show varying degrees of fraud, negligence or simple mistakes" the Court should wait "[u]ntil the factual 'mix' of the types and degrees of alleged

fraud are ultimately determined" before answering the "election cure" question. *Id.* at 11.

The trouble with that submission is that however an initiative may fail the Florida Constitution's Article XI, section 3, eight percent signature gathering requirement, the ultimate question still remains: does the election cure whatever flaws may have occurred at the signature gathering stage? It would be a waste of judicial resources to accept the Secretary of State's contention that discovering a "wide and legally–meaningful continuum" of fraud is a pre-requisite to deciding application of the election cure doctrine. *Id.* at 13. Indeed, the invitation to define "egregious" or "minor" fraud (*id.* at 11) would generate uncertainty and ongoing litigation for the future. Moreover, the Respondents' counsel agreed in oral argument that 'whether it is fraud or a slipped finger on the calculator" makes no difference. "[I]t simply failed to meet the minimum requirements of the constitution for whatever reason." *See Floridians Against Expanded Gambling v. Floridians for a Level Playing Field,* 945 So. 2d 553, 564 (Fla. 1st DCA 2006) (Kahn, J., dissenting); Appendix A to Initial Brief, p. 21 (Kahn, J., dissenting).

The Secretary's footnote citing *Wadhams v. Board of County Comm'rs*, 567 So. 2d 414 (Fla. 1990); *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998) and *Boardman v. Esteva*, 323 So. 2d 259 (Fla.

1975) to support his proposition that the "type of willful misconduct" provides the "leeway[s] for legal challenges and remedies" (Secretary of State Answer Brief, p. 11, n.3) provides no help to his argument here. In *Wadhams*, election cure did not work because the *ballot* did not inform the voters: "No one can say with any certainty what the vote of the electorate would have been if the voting public . . . had been told the chief purpose of the measure . . . . '[T]he voter should not be misled and . . . [should] have an opportunity to know and be on notice as to the proposition on which he is to cast his vote.'" 567 So. 2d at 417. Here there is no question about the clarity of the ballot.

Boardman involved absentee ballots and citizens' rights to have their votes counted in the election and reaffirmed the principle we espouse: "the primary consideration in any election contest is whether the will of the people has been effected." *Boardman*, 328 So. 2d at 269. *Beckstrom* echoes *Boardman* in holding that the failure of elections officials to properly conduct *elections* allows a court "to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters." *Beckstrom*, 707 So. 2d at 725 (emphasis in original).

Beckstrom also makes our merits point about prosecuting fraud, when it wrote that there can be "sanctions for election officials who fail to faithfully

perform their duties" *Id.* And of course, fraud *in the election itself* could be a basis for voiding an election, and the precedent for that proposition lends further support to our merits argument that pre-election misconduct cannot upset the will of the voters who exercise their franchise. *See Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984), recognizing that fraud affecting "the sanctity of the *ballot*" may permit invalidation of an election. *Id.* at 566 (emphasis supplied). In sum, the Secretary's cases do not support his call for declining review and lend support to our arguments on the merits.

The Secretary of State's secondary reasons for declining to exercise jurisdiction–"because the certified questions are phrased differently from the actual questions . . . addressed" and "other prudential considerations" (Secretary of State Answer Brief, pp. 12, 14) – are also unavailing.

It is disingenuous to suggest that the decision below does not present a basis for the certified questions. To say, as the Secretary does, that the certified questions "do not directly address the ultimate question on remand" (Secretary of State Answer Brief, p. 12) is to be wilfully blind to the whole opinion. The remand was to determine if the required signatures were obtained, i.e., whether there were sufficient fraud free signatures. The District Court of Appeal rejected the Petitioner's argument that there was no need for such a proceeding because the

election cured whatever deficiency there may have been in the signature gathering and certification process. There can be no doubt that the certified questions are embedded in the decision below and the cases offered by the Secretary are not applicable to this case.

In *Pirelli Armstrong Tire Corp v. Jensen*, 777 So. 2d 973 (Fla. 2001) the District Court of Appeal certified an equal protection question to this Court, but that court had never addressed any equal protection issue in its opinion. Therefore it was appropriate for this Court to dismiss review as improvidently granted. In *State v. Sowell*, 734 So. 2d 421 (Fla. 1999), a marijuana case, review was dismissed citing Judge Allen's opinion: "I do not join in certification because there appears to be no legislative basis upon which to treat the section 893.03 (1)(d) amendment as clearly and unequivocally addressing the defense of medical necessity." 734 So. 2d 421, quoting *Sowell v. State*, 738 So. 2d 333, 334 (Allen, J., concurring). Thus it was appropriate to conclude there was no great public importance in that case. Here the District Court clearly and unequivocally addressed the election cure issue and the decisional basis is neither narrow nor unimportant.

Finally, the Secretary's invocation of "other prudential

considerations," including the speculative future possibility "of a legislative response" to "whatever facts are demonstrated at trial" (Secretary of State Answer Brief, p. 14) is without merit. Such speculation is no substitute for deciding a clearly presented issue. And the law review articles of Messrs. Sunstein and Bickel, and an untethered phrase of Justice Holmes (*id.* at 14-15), offer no principled basis for the Court to decline to address the important questions certified by the *en banc* District Court of Appeal.

II
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

Floridians Against Expanded Gambling, et al. make several arguments on the merits. The first is that an election does not moot a pre-election challenge and the second is that the election cure doctrine does not apply if an amendment was "never duly proposed." Respondents' Brief, pp. 6-13. Their other arguments are that *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000) supports the District Court decision, and that "prosecuting fraud does not protect the

Constitution." *Id.* at 16, 18.

Because *Armstrong* is the "flying under false colors" centerpiece of the decision below, we reply first to Respondents take on *Armstrong*. The Respondents write:

> 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.

Respondents' Answer Brief, p. 17. Several problems plague that argument. First is the undisputed fact that *Armstrong's* false colors phrase was addressed to whether the *ballot question* told the voter of the "true effect" decision he or she must make. 773 So. 2d at 16. Second, there is no dispute that the Slots Initiative was clear and its "true effect" plainly stated for voters to understand. The method of obtaining signatures was not relevant to the ballot question, and besides, the lawsuit's fraud allegations were widely published,[1] so the Respondents were free to use them to

[1] *See* Jackie Hallifax, *Suit: Slots Filled with Fraud*, Tallahassee Democrat, Sept. 29, 2004, at B8, *available in* http://nl.newsbank.com; *Jackie Hallifax, New*

oppose the initiative. Nothing supports the notion that the voters would have rejected the initiative had they been aware of the alleged fraud, and the statement that "it is impossible to know how the electorate would have voted" if they knew there was fraud is a non-sequitur, because if fraud had invalidated the required number of signatures, the initiative would not have been on the ballot.

The critical distinction is that "fraud" in the signature gathering process is completely different from the "fraud" in failing to tell voters what they are voting on *a la Armstrong* and *Wadhams v. Board of County Commissioners*, 567 So. 2d 414, 417 (Fla. 1990) ("No one can say with certainty what the vote of the electorate could 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*'") (emphasis supplied). The Respondents devote several pages attempting to defend their diligence (Respondents' Answer Brief, pp. 11-12) because we pointed out that absentee voting had begun, that they did not file their suit promptly and that they did not seek a temporary injunction before the election, and therefore they cannot complain about the cure doctrine's application here. Initial Brief, pp. 14-18. They respond with conjecture and excuses, opining that "an accelerated hearing

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Lawsuit Alleges Fraud in Petition Drive for Slots, The Miami Herald, Sept. 29, 2004, at 3B, *available in* http://nl.newsbank.com .

would also be denied on any motion for temporary injunction" and that the trial court's order denying their requested emergency hearing on a permanent injunction "was not appealable under Rule 9.130 because the order did not deny an injunction." *Id.* Those statements actually make our point: because they never asked for a temporary injunction they cannot speculate on what the court would have done, and if the court had denied the injunction that would have been interlocutorily reviewable. But whatever the reasons may have been for the Respondents failure to have even sought a pre-election appealable order, the legal result remains the same: the people have spoken and no post-election invalidation is available. *Compare Renck v. Superior Court of Maricopa County*, 187 P.2d 656 (Arz. 1974), where voters challenged an initiative petition prior to the election based, in part, on allegations that there were irregularities and gross fraud in the procurement of the signatures on the petition. They requested that if the election took place prior to the resolution of the challenge, the court invalidate the election. *Id.* at 658. Subsequently, the initiative petition was approved by a majority vote of the electors. In refusing to grant the relief requested by the challengers of the initiative petition, the court wrote:

> If objections had been made in the early stages of the process of submission for the reasons now assigned, the questions would have been subjects of judicial investigation

> and determination. * * * Timely appeal to the courts upon the questions now raised, if meritorious, would have settled the matter before the election was had. However, the measure was submitted to the voters * * *. They were invited to believe that the formalities of the law pertaining to the submission of the measure had been fully met. The expense of the election was incurred, and the electors, imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through hollow form, we may assume, investigated the question and went to the polls and voted thereon.

Id. at 659 (citing *Allen v. State*, 130 P. 1114, 1115). The Court continued:

> The trial court, in deciding whether to grant such order must keep in mind that the purpose of initiative petitions is partly administrative in nature, i.e. to make certain that the subject matter of the petition is of interest to a sufficiently large segment of the electorate such as would entitle the measure to a place on the ballot and justify the expense of printing and publicity required for submission of it to a vote of the people. The court must be aware always that in cases of doubt as to the strength of such preliminary showing, there is less danger to the rights of the people in incurring this expense to the state than in delaying the electorate from promptly deciding whether they do or do not want the measure. The electors, it must be remembered, should be, and are, the final arbiter in either case. In the case before us, plaintiffs failed to request the trial court to

> enjoin the placing of the measure on the ballot until complete showing was made.
>
> We are of the opinion that the superior court should have granted the motion for summary judgment as the matters under review by it came moot with the adoption of the measure by the people and its incorporation into the Constitution by the Governor's proclamations. This investigation must now yield to the election rather than the election to this investigation. We refuse to hold that the election relative to this proposed constitutional amendment was a nullity . . . .

Id. at 661. *Renck* is persuasive because it is premised on the same rationale as the Florida cases; that the will of the voters is paramount and may not be invalidated unless the defect permeated the actual election. *See also McFerrin v. Knight*, 580 S.W. 2d 463, 465 (Ark. 1979) (holding that "the sufficiency of the petition is of no importance after the question has been submitted and voted on by the people."); *State ex rel. Graham v. Board of Examiners*, 239 P. 2d 283, 289 (Mont. 1952) (holding that "after the people have voted on the measure and a great majority of the voters throughout the state have expressed their approval, the courts presume that the public interest was there and technical objections to the petition or its sufficiency are disregarded"). *State ex rel Landis v. Thompson*, 163 So. 270, 276 (Fla. 1935) was an early progenitor of that principle: "the popular voice is the

paramount act . . . ."

The Respondents question our reading of *Landis* (and some other cases too) (Respondents' Answer Brief, pp. 8-11), referring to our submissions as "mistaken [ ]," "conflate[d]," and "misread." *Id.* at 8. We recognize that there can be different views of the meaning of decisions, but the language of *Landis*, *Pearson v. Taylor*, 32 So. 2d 826 (Fla. 1947), *West v. State of Florida*, 39 So. 412 (1905) all compel the conclusion that even when a pre-election constitutional requirement has not been met, the constitutional amendment survives if the voters approve it. *Landis* explained that in *West* the complaint "was that the proposed amendment . . . was inoperative, unconstitutional, and void" because the legislature did "not enter the proposed amendment upon the journals . . . as mandatorily required by section 1 of Article 17 of the State Constitution of 1885." 163 So. at 276. Nevertheless, *Landis* tells us that despite not being duly proposed, the *West* court "definitively and conclusively aligned itself with the doctrine of a majority of American courts that . . . the popular voice is the paramount act . . . ." *Id.* *Landis* followed that lead and no Florida decision has deviated from the principle. The decision in this case must be guided by that principle.

Some final words. Respondents' contention that criminal prosecutions "will not deter future fraud" (Respondents' Answer Brief, p. 18) is

rhetoric, not realism. Deterrence is a centerpiece of sentencing in the criminal law. *Rita v. United States*, __ U.S. __ (June 21, 2007 (Slip op. at 5)). And the cases Respondents offer for the proposition that courts have "been willing to undo the election where there was a taint of fraud" (Respondents' Answer Brief, p. 18) cement our argument. *Bolden v. Potter,* 452 So. 2d 564 (Fla. 1984) involved absentee ballots *in the election*. *The Matter of Protest of Election Returns, etc.*, 707 So. 2d 1170 (Fla. 3d DCA 1998) presented the same *election* misconduct. *Armstrong v. Harris*, *supra*, did not involve "fraud," unless one views the fact that voters were not given "fair notice of the decision [they] must make" (773 So. 2d at 15) as fraud. And that takes us back to the beginning; such a "defect goes to the heart of the amendment." *Id.* at 19. The form of the ballot in this case contained no defect. Therefore there is no basis for invalidating the election.

CONCLUSION

Allowing invalidation of a clearly stated and voter approved constitutional amendment as a post-election punishment dishonors the voice of the people. The Court should adhere to the firmly established election cure doctrine and let the criminal laws punish those who may abuse the integrity of the pre-election process. The decision below should be reversed with directions to affirm the trial court's order granting summary judgment and dismissing the Plaintiffs'

Amended Complaint.

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